

Gender Recognition Reform (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Gender Recognition Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill Provisions

3. The Bill amends the Gender Recognition Act 2004 ("the 2004 Act") to reform the grounds and procedure for obtaining legal gender recognition. Under the provisions of the Bill, applications for a Gender Recognition Certificate ("GRC") will no longer be made to the Gender Recognition Panel ("GRP") but will instead be made to the Registrar General for Scotland.
4. Section 1 of the Bill defines the Gender Recognition Act 2004 in the Bill as "the 2004 Act". Sections 2-7 insert new provisions into the 2004 Act concerning the new process for applying to the Registrar General for a GRC.
5. Section 2 inserts new section 8A, which enables a person to apply to the Registrar General for a GRC if the person is aged at least 16 and is either (a) the subject of an entry in a birth or adoption record kept by the Registrar General or (b) ordinarily resident in Scotland.
6. Section 3 inserts new section 8B, which makes provision about notifications which the Registrar General must provide to the applicant in relation to the handling of the application and requires the Registrar General to provide certain information as to the effect of the issue of a GRC. It also provides that the Registrar General must not determine the application unless, after the end of a three month reflection period, the applicant formally confirms that they wish to proceed with it. This confirmation is referred to in the Bill as the 'notice of confirmation'.

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7. Section 4 inserts new section 8C, which requires the Registrar General to grant an application for a GRC if the applicant has provided a statutory declaration that the applicant is at least 16; was born or adopted in Scotland or is ordinarily resident in Scotland; has lived in their acquired gender for at least the previous three months; and intends to live permanently in their acquired gender. The applicant must also have complied with new section 8D (which requires statutory declarations to be given in relation to marriages and civil partnerships) and any requirements of regulations made under new section 8U (1) (inserted by section 11 of the Bill).

8. Sections 5, 6 and 7 insert new sections 8D to 8L into the 2004 Act, which make provision about statutory declarations to be made by the applicant dependent on whether they are married or in a civil partnership, and what type of GRC the Registrar General is to issue where the applicant is married or in a civil partnership. This can be either a full GRC or an interim GRC. A full GRC has the effect that, legally, the applicant's gender becomes the gender they were living in when they made the application. New sections 8F-8L of the 2004 Act (inserted by section 7) relate to when a full GRC may be issued in place of an interim GRC. Broadly similar existing provisions in the 2004 Act will, in consequence, be repealed by paragraph 2 of the schedule of the Bill (together with the repeal of some other provisions of the 2004 Act as they apply to Scotland, in consequence of the Bill provisions).

9. Section 8 inserts new sections 8M to 8P into the 2004 Act, which provide for recognition of GRCs issued in England and Wales or Northern Ireland, and for recognition in Scotland of gender recognition obtained overseas. This includes provision for the Registrar General to issue confirmatory GRCs to people who have obtained gender recognition overseas.

10. Sections 9-14 deal with further provisions about applications and certificates.

11. Section 9 inserts new sections 8Q to 8S into the 2004 Act, which provide that an applicant may request a review of, or appeal, gender recognition decisions made by the Registrar General. This section also makes provision about applications to the court to quash a GRC on the grounds that the wrong type of certificate was issued, the application was fraudulent, or the applicant lacked capacity.

12. Section 10 inserts new section 8T into the 2004 Act, which makes provision about the correction of administrative errors in GRCs issued by the Registrar General, such as where a name on a GRC has been spelled incorrectly. This power does not extend to cases where the wrong type of GRC was issued.

13. Section 11 inserts new section 8U into the 2004 Act, which enables the Registrar General, with the consent of the Scottish Ministers, to make regulations about: the form and manner in which an application for a GRC or a confirmatory GRC is to be made, or in which a notice of confirmation is to be given; information and evidence to be included in an application for a GRC, a confirmatory GRC or a notice of confirmation; and other matters in connection with the making of an application for a GRC or confirmatory GRC.

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14. Section 12 inserts new section 10A into the 2004 Act, which makes provisions for the Registrar General to send a copy of a GRC issued in Scotland to other Registrars General in the UK if this is necessary to update records held by other Registrars General. This enables register entries held in England and Wales or Northern Ireland to be updated after the applicant obtains gender recognition in Scotland.

15. Section 13 inserts new section 11E into the 2004 Act, which makes provision about the continuity of marriages or civil partnerships after gender recognition.

16. Section 14 inserts new section 22A into the 2004 Act, which makes it a criminal offence to make a false statutory declaration in relation to gender recognition, or a false application for a GRC, or a false notice of confirmation after the reflection period has expired.

17. Section 15 amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to require the Registrar General to report annually on the number of applications for GRCs made, and the number of certificates issued, each year.

18. Section 16 introduces the schedule which provides for further modification of the 2004 Act and modification of other enactments.

19. Sections 17 and 18 contain final provisions relating to (a) ancillary provisions and (b) commencement.

Rationale for Subordinate Legislation

20. The Scottish Government has, in deciding whether provisions should be in the Bill or in subordinate legislation, and in deciding on the appropriate level for scrutiny of subordinate legislation, given due regard to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances,
- the need to make appropriate use of valuable Parliamentary time, and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

21. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

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22. The delegated powers provided for in section 11 of the Bill in particular have been informed by the policy objective of streamlining the application process for applying for a gender recognition certificate and the new duties placed upon the Registrar General and are modelled on existing powers conferred on the Registrar General in relation to other applications.

23. The delegated powers provisions are listed below with a short explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure is considered appropriate.

Delegated Powers

Section 6 – Certificate to be issued

Power conferred on: the Scottish Ministers, after consultation with the Registrar General for Scotland

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: negative

Provision

24. Section 6 inserts new section 8E into the 2004 Act which sets out the circumstances in which the Registrar General must issue either a full GRC or an interim GRC to an applicant, in a case where the Registrar General grants an application, dependent on whether or not the applicant is married or in a civil partnership. Under new section 8E(8) and (9), Scottish Ministers may, after consulting the Registrar General, make regulations specifying the content and form of full and interim GRCs.

Reason for taking power

25. Section 4(5) of the 2004 Act provides that the Secretary of State may, after consulting the Scottish Ministers and the Department of Finance, specify the content and form of GRCs to be issued by the GRP to successful applicants. The intention of the provisions in new section 8E(8) and (9) is to similarly provide that Scottish Ministers are able to specify the content and form of a GRC, after consultation with the Registrar General.

Choice of procedure

26. By virtue of amendments made by paragraph 8(a) of the schedule of the Bill, regulations made under this section are subject to the negative procedure. The content and form of GRCs are likely to be relatively procedural and administrative matters on which the Registrar General will have a view. As such the negative procedure, after appropriate consultation with the Registrar General, is considered appropriate.

Section 8 – Gender recognition obtained outwith Scotland

Power conferred on: the Scottish Ministers, after consultation with the Registrar General for Scotland

Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: negative

Provision

27. Section 8 inserts new sections 8M, 8N, 8O and 8P into the 2004 Act, which provide for recognition of GRCs issued in England and Wales or Northern Ireland, and for recognition in Scotland of gender recognition obtained overseas. New section 8O enables a person who has obtained 'overseas gender recognition' to apply to the Registrar General for a confirmatory GRC, and sets out what the application must contain, and how the Registrar General will deal with it. Subsections (8) and (9) of new section 8O enable the Scottish Ministers, after consulting the Registrar General, to make regulations on the form and content of a confirmatory GRC.

Reason for taking power

28. Section 4(5) of the 2004 Act provides that the Secretary of State may, after consulting the Scottish Ministers and the Department of Finance, specify the content and form of GRCs to be issued by the GRP to successful applicants. The intention of the provisions in new section 8O (8) and (9) is to similarly provide that Scottish Ministers are able to specify the content and form of a confirmatory GRC, after consultation with the Registrar General.

Choice of procedure

29. By virtue of amendments made by paragraph 8(a) of the schedule of the Bill, regulations made under this section are subject to the negative procedure. The form and content of confirmatory GRCs are likely to be relatively procedural and administrative matters, on which the Registrar General will have a view. As such the negative procedure, after appropriate consultation with the Registrar General, is considered appropriate.

Section 11 – Further provision about applications

Power conferred on: the Registrar General for Scotland, with the consent of the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

30. Section 11 inserts a new section 8U into the 2004 Act. The new section enables the Registrar General, with the consent of Scottish Ministers, to make regulations about:

- the form and manner in which an application for a GRC or a confirmatory GRC is to be made;
- the form and manner in which a notice of confirmation is to be given;
- information or evidence to be included in an application for a GRC, a confirmatory GRC or a notice of confirmation; and
- other matters in connection with the making of an application for a GRC or a confirmatory GRC.

Reason for taking power

31. Under the existing terms of the 2004 Act, an applicant seeking a GRC must apply to the GRP. Section 7 of the 2004 Act provides that such an application “must be made in a form and manner specified by the Secretary of State after consulting the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland”. The Scottish Government considers that under the new procedure as laid out in the Bill, a similar provision to prescribe the form and manner of an application to the Registrar General is required.

32. The provision for a power to the Registrar General to prescribe the form and manner of (a) the application for a GRC, and (b) the notice of confirmation to be given, is consistent with the approach taken in other application or notification processes of the Registrar General, such as the power to prescribe the birth registration form under section 14(1A) and section 54 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

33. On the basis that the provisions of the Bill create a new system under which applications will be made to the Registrar General rather than the GRP, these provisions also enable the Registrar General to make regulations regarding additional information or evidence that may be included in an application and other administrative matters in connection with the making of an application. These powers are designed to ensure the smooth running of the process, and to ensure that the purpose of the Bill is not frustrated if it transpires in light of experience in future that some additional

information or evidence should be submitted with an application for a GRC, or a notice of confirmation. The power only permits additional information or evidence to be specified in regulations. It does not enable the modification or removal of the information and evidence which is required by the Bill to be submitted with an application for a GRC.

Choice of procedure

34. Regulations made under this section which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. The form and manner of making the application form and of giving the notice of confirmation are likely to be relatively procedural matters. As such the negative procedure is considered appropriate, unless the exercise of the power involves the textual amendment of an Act, when it is considered that Parliamentary scrutiny by the affirmative procedure would be appropriate.

Section 17(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

35. This section provides that the Scottish Ministers may make regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, in connection with or for giving full effect to the Bill.

Reason for taking power

36. The Bill variously amends the 2004 Act to reform the grounds and procedure for obtaining legal gender recognition under Scots law, and in consequence modifies other legislation. While the Scottish Government has given careful consideration to the provisions of the Bill, the Bill may give rise to a need for ancillary provision. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible. The Scottish Government considers that it is appropriate to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

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Choice of procedure

37. Regulations made under this section which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type and is considered to provide an appropriate level of Parliamentary scrutiny.

Section 18(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: laid, no further procedure

Provision

38. This section provides that the Scottish Ministers may make regulations to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint, with the exception of sections 17 to 19 (which will come into force on the day after the Bill obtains Royal Assent). Commencement regulations may include transitional, transitory or saving provision, or make different provision for different purposes.

Reason for taking power

39. It is usual practice for commencement provisions to be dealt with by subordinate legislation, and it is appropriate for those provisions in the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider suitable.

Choice of procedure

40. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

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