

<b>Title:</b> The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 <b>IA No:</b> Not available <b>RPC Reference No:</b> N/A <b>Lead department or agency:</b> Scotland Office <b>Other departments or agencies:</b> Government Equalities Office	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 17/01/2023		
	<b>Stage:</b> Development/Options		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Secondary legislation		
	<b>Contact for enquiries:</b> <a href="mailto:enquiries@ukgovscotland.gov.uk">enquiries@ukgovscotland.gov.uk</a>		
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Not Applicable

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status
N/A	N/A	N/A	Not a regulatory provision

**What is the problem under consideration? Why is government action or intervention necessary?**

This Order is made under section 35 (s.35) of the Scotland Act 1998 in respect of the Gender Recognition Reform Bill (“the Bill”) passed by the Scottish Parliament on 22/12/2022. The Bill amends the Gender Recognition Act 2004 (“the 2004 Act”), the current UK-wide regime for obtaining a Gender Recognition Certificate (“GRC”) in Scotland). The s.35 power is available to the Secretary of State, during the four week period following the conclusion of a Bill’s passage through the Scottish Parliament, subject to the provisions set out in the Scotland Act 1998.

**What are the policy objectives of the action or intervention and the intended effects?**

The policy objective of this action is to exercise the function in s.35 of the Scotland Act 1998 in respect of s.35(1)(b). The action is to make an order that has the effect of preventing the Bill being submitted for Royal Assent. Section 36 (s.36) of the Scotland Act 1998 subsequently allows for reconsideration of the Bill by the Scottish Parliament. The Secretary of State believes that Government action is necessary to prevent the Bill proceeding to Royal Assent because the Bill would make modifications to the 2004 Act as it applies to the reserved matters of equal opportunities, fiscal policy and social security. The Secretary of State believes that these modifications would have an adverse effect on the operation of the law as it applies to these reserved matters.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

The options available to the Secretary of State during the four week period are either to make the order or to not make the order within the conditions set out under s.35 of the Scotland Act. The order in itself does not create new regulation directly. The gender recognition regime under the 2004 Act will remain in place as now.

In the event the order was not brought forward (the “do nothing” option) this would mean the Bill would be submitted for Royal Assent and would give rise to the adverse effects noted above and in the sections below. The Secretary of State for Scotland has determined the order should be made, and a statement of reasons is set out in the instrument itself.

<b>Will the policy be reviewed?</b> It will not be reviewed. <b>If applicable, set review date:</b> Month/Year				
Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?		<b>Micro</b> No	<b>Medium</b> No	<b>Large</b> No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister: Alister Jack Date: 17 January 2023

# Summary: Analysis & Evidence

Policy Option 1

Description: Make section 35 Order

## FULL ECONOMIC ASSESSMENT

Price Base Year N/A	PV Base Year N/A	Time Period Years N/A	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

This action will have the effect of preventing the Bill from being submitted for Royal Assent. As such the current regime for applying for a GRC under the 2004 Act will continue to apply, including the associated costs, which would include the £5 application fee.

### Other key non-monetised costs by 'main affected groups'

Those who would hope to use the new scheme, once implemented, under the Bill to apply to change their legal sex (i.e. those with a Scottish birth registration or ordinarily resident in Scotland) will not be able to do so under the proposed Scottish gender recognition regime and may be concerned by this. The current UK-wide regime for gender recognition remains in place.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

The current regime for applying for a GRC under the 2004 Act will continue to apply.

### Other key non-monetised benefits by 'main affected groups'

There are also those who would feel they were adversely affected if the UK Government did not bring forward a s.35 order, including groups who have expressed concerns about the impact of the Bill on single sex spaces.

### Key assumptions/sensitivities/risks

Discount rate (%)

The s.35 power is available to the Secretary of State under the Scotland Act 1998 in line with which the Scottish Government is able to reconsider the Bill. Provisions under the Scotland Act 1998 provide that the Bill can be reconsidered if a s.35 order is made.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: N/A	Benefits: N/A	Net: N/A	

# Summary: Analysis & Evidence

# Policy Option 2

**Description:** Do not make section 35 Order

## FULL ECONOMIC ASSESSMENT

Price Base Year N/A	PV Base Year N/A	Time Period Years N/A	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

We anticipate that there could be HR costs for businesses operating in both Scotland, and England and/or Wales, to manage the complexities of an incoherent GRC regime. It is not possible in the timeframe to quantify these costs due to the time limit under section 35 of the Scotland Act 1998, which provides for four weeks beginning with the passing of the Bill by the Scottish Parliament for the Secretary of State to consider the making of the Statutory Instrument.

### Other key non-monetised costs by 'main affected groups'

There are those who would feel they were adversely affected if the UK Government did not bring forward a s.35 order, including groups who have expressed concerns about the potential impact of the Bill on the safety of women and children.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

The 2004 Act will continue to provide a route for applications under the current regime. However, if the Bill proceeded to Royal Assent there would be a new route for those with a Scottish birth registration or ordinarily resident in Scotland to apply for a Scottish GRC. The associated impact assessments and projected costs and benefits were published alongside the Bill by the Scottish Government.

### Other key non-monetised benefits by 'main affected groups'

Those who were planning to use the new scheme, under the Bill, to apply to change their legal sex (i.e. those with a Scottish birth registration or ordinarily resident in Scotland) are likely to be content if the Bill proceeded to Royal Assent.

### Key assumptions/sensitivities/risks

Discount rate (%)

The key assumption and risk is that there is a time limited period under s.35 of the SA 1998, which provides for four weeks beginning with the passing of the Bill by the Scottish Parliament for the Secretary of State to make an order under s.35. No order can be made following this time period, and the Bill would proceed to Royal Assent.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: N/A	Benefits: N/A	Net: N/A	

## Evidence Base

### Problem under consideration and rationale for intervention

This Order is made in response to the Gender Recognition Reform Bill (the “Bill”), which passed its final stage in the Scottish Parliament on 22 December 2022 and would amend the Gender Recognition Act 2004 in Scotland, the current UK-wide regime for obtaining a Gender Recognition Certificate (“GRC”).

The Secretary of State has determined that the Bill contains provisions which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters. These adverse effects are set out in the statement of reasons contained in the order (set out in more detail on page 8).

#### Background

1. The Bill makes amendments to the Gender Recognition Act 2004 (“the 2004 Act”) for Scotland. These amendments will significantly alter how applicants can be issued with a Gender Recognition Certificate (GRC) under Scots law. People can apply if they are the subject of a Scottish birth register entry or if they are ordinarily resident in Scotland.
2. The amendments made by the Bill to the 2004 Act will make it quicker and easier for Scottish applicants to obtain a full GRC, removing a number of measures which the UK Government regards as important safeguards, including:
  - the removal of the requirement for an applicant to have or have had a diagnosis of gender dysphoria (and, correspondingly, the removal of the requirement for an applicant to provide medical reports with their application)
  - a reduction in the minimum age for applicants from 18 to 16
  - a reduction in the period for which an applicant must have lived in their acquired gender before submitting an application, from 2 years to 3 months (or 6 months for applicants aged under 18), alongside the introduction of a mandatory 3 month reflection period
  - the removal of the requirement for an applicant to provide any evidence that they have lived in their acquired gender when submitting an application.
  - the removal of the requirement for a Panel to be satisfied that the applicant meets the criteria, with applications instead being made to the Registrar General for Scotland.
3. Taken together, these amendments remove any requirement for third party verification or evidence, compared with the process which currently applies across the UK under the 2004 Act.
4. The Secretary of State believes that the modifications to the 2004 Act as it applies to reserved matters would have three categories of adverse effect on the operation of the law as it applies to those reserved matters. These are:
  - a) the impacts of the creation of two parallel and very different regimes for issuing and interpreting GRCs within the United Kingdom;

- b) the impacts that removing safeguards could have on safety, in particular that women and girls, given the significantly increased potential for fraudulent applications to be successful;
- c) the impacts on the operation of the Equality Act 2010 that result from the change to a person's protected characteristic of sex, particularly given the expansion of the cohort of people able to obtain a GRC.

## **Rationale and evidence to justify the level of analysis used in the IA (proportionality approach)**

The level of analysis used in this Impact Assessment is proportionate to the time limit under section 35 of the Scotland Act 1998 ("the SA 1998"), which provides for four weeks beginning with the passing of the Bill by the Scottish Parliament for the Secretary of State to consider the making of the Statutory Instrument. Additionally, the nature of amendments being considered at Stage 3 meant that the final shape of the Bill was not known until 22 December.

The exercise of the s.35 power does not create new regulation. While the Scottish Gender Recognition (Scotland) Bill will not proceed to Royal Assent, the current regime under the 2004 Act will remain in place.

## **Description of options considered**

The order does not make changes to regulation and therefore the option in respect of this order was the decision whether or not to exercise the function as described on page one.

As set out above, it is the Secretary of State's position that the Bill contains provisions which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

## **Policy objective**

The policy objective of the intervention is in response to the adverse effect on the operation of the law (the 2004 Act) as it applies to reserved matters across Great Britain with regard to the Equality Act 2010. The Secretary of State believes that Government action is necessary to prevent the Bill proceeding to Royal Assent because the Bill would make modifications to the 2004 Act as it applies to the reserved matters of equal opportunities, fiscal policy and social security. The Secretary of State believes that these modifications would have an adverse effect on the operation of the law as it applies to these reserved matters. Intervention, which is to make an order under s.35, prevents the Bill from being submitted for Royal Assent and produces this effect immediately.

Section 36 of the SA 1998 allows for reconsideration of the Bill by the Scottish Parliament to ensure that the adverse effect on the operation of the law as it applies to the reserved matters identified can be addressed.

## **Summary and preferred option with description of implementation plan**

The Secretary of State considers that the Bill contains provisions which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters. Therefore, the Secretary of State has decided to exercise s.35 of the SA 1998 to prevent the Bill from progressing to Royal Assent.

The order will be made and laid in Parliament within the four week period following the passing of the Bill as stipulated in the SA 1998. This will have the immediate effect of halting the Bill's progression to Royal Assent.

### **Monetised and non-monetised costs and benefits of each option (including administrative burden)**

As outlined in previous sections the options in respect of this assessment are to make an order under s.35 of the SA 1998, or not to make an order under these same provisions. The action to make an order has the effect of preventing the Bill from being submitted for Royal Assent. This would mean the current regime for applying for a GRC under the 2004 Act will continue to apply, including the associated costs, which would include the £5 application fee.

Those who would hope to use the new scheme, once implemented, under the Bill to apply to change their legal sex (i.e. those with a Scottish birth registration or ordinarily resident in Scotland) are likely to be disappointed and concerned by this action. However, there are also those who would feel they were adversely affected if the UK Government did not bring forward a s.35 order, including groups who have expressed concerns about the impact of the Bill on single sex spaces.

By not exercising the function under s.35 the Bill would proceed to Royal Assent. The Bill could lead to costs in respect of Human Resources for businesses operating in both Scotland, and England and/or Wales, to manage the complexities of an incoherent GRC regime to manage the complexities of an incoherent GRC regime. It is not at this time possible to quantify these costs due to the time limit under s.35 of the SA 1998, which provides for four weeks beginning with the passing of the Bill by the Scottish Parliament for the Secretary of State to consider the making of the Statutory Instrument. Moreover there are those who would feel they were adversely affected if the UK Government did not bring forward a s.35 order, including groups who have expressed concerns about the potential impact of the Bill on the safety of women and children.

Those who were planning to use the new scheme, under the Bill, to apply to change their legal sex (i.e. those with a Scottish birth registration or ordinarily resident in Scotland) are likely to be content if the Bill proceeded to Royal Assent. The Scottish Government would also be expected to seek to take steps and actions to realise the costs and benefits projected in their assessments accompanying, and published alongside the Bill.

The Secretary of State believes that Government action is necessary to prevent the Bill proceeding to Royal Assent because the Bill would make modifications to the 2004 Act as it applies to the reserved matters of equal opportunities, fiscal policy and social security. The Secretary of State believes that these modifications would have an adverse effect on the operation of the law as it applies to these reserved matters.

### **Risks and assumptions**

- This order makes no changes to regulation. The current regime for applying for a GRC under the 2004 Act will continue to apply.
- There is a time limited period under s.35 of the SA 1998, which provides for four weeks beginning with the passing of the Bill by the Scottish Parliament for the Secretary of State to make an order under s.35. No order can be made following this time period
- If no order is made the Bill would proceed to Royal Assent.
- The Scottish Government is able to reconsider the Bill and can decide to do so. Provisions under the Scotland Act 1998 provide that the Bill can be reconsidered if a s.35 order is made.

## **Other assessments**

- **Direct costs and benefits to business calculations**

Not applicable in relation to this Statutory Instrument.

- **Impact on small and micro businesses**

This order has no immediate impact on small and micro businesses.

- **A summary of the potential trade implications of measure**

This order has no direct impact on international trade.

## **Wider impacts (consider the impacts of your proposals)**

The s.35 function can only be exercised within the four week period set out in s.35 between the bill having been passed by the Scottish Parliament. If no order is made the bill can proceed to Royal Assent. In the event the Bill was not considered to be within the competence of the Scottish Parliament, UK Government (UKG) Law Officers may consider exercising their power under s.33 of the SA1998 to refer the bill, or specific measures, to the Supreme Court. This is within the same timeframe as s.35 (four weeks).

The UKG consulted on the GRA 2004 in 2018. This consultation invited views on how best to reform the process of changing a person's legal gender. Following that consultation the UKG concluded that the balance struck in the existing GRA legislation were correct and that there are proportionate checks and balances in the system, alongside support for people that want to change their legal sex. The Minister for Women and Equalities also stated that the UKG's position upholds the rights of transgender people and of women and protects access to single-sex spaces.

The Scotland Office is not aware of any evidence or directions which require the UKG Government, and in particular, the Government Equalities Office (GEO) to either amend, repeal or revoke provisions in the GRA 2004. Moreover the Scotland Office understands there are no live consultations issued by the UKG which set out the Government's intention to amend or otherwise the GRA 2004 (the last consultation being in 2018 to which the UKG responded on 22 September 2020). The Scotland Office confirmed this with GEO on 12 January 2022.

The Scottish Government's Bill and policy objectives were expressed in supporting documents that were published alongside the Bill at the point of introduction. In addition, an Equality Impact Assessment (EQIA) for the GRR was published by the Scottish Government on 03 March 2022. The Scottish Government also consulted on the policy and, subsequently, a draft bill which preceded the introduction of the bill in the Scottish Parliament. This assessment does not seek to re-evaluate the consideration of the Scottish Government, and is limited to the exercise of the s.35 and the effects a decision to, or not to make an order, may have.

### **Options**

Option 1 - Exercise the function to make an order which will prevent the GRR being submitted for Royal Assent by the Presiding Officer

Option 2 - Do not exercise the function to make an order which will prevent the GRR being submitted for Royal Assent by the Presiding Officer

### **Analysis of impact**

The exercise of the s.35 function has no impact on the GRA 2004 as it currently stands. The GRA 2004 would remain on the statute in its current form and as such continues to enable people to apply to change their legal sex subject to the requirements of the GRA 2004.

A decision not to exercise the function, should that decision be made, would mean the GRR passes to Royal Assent. Nonetheless the process and eligibility requirements to obtain a GRC under the GRA 2004 continue to exist as a matter of law of England and Wales. There are no residency requirements under the GRA 2004 existing scheme, therefore it remains a route that can be used to apply for legal gender recognition by people resident in Scotland.

Protected characteristic	Impact
Age	<p>Under the GRA a person aged 18 and above can apply for a GRC in the UK. The UKG has no plans to amend that minimum age. The GRR reduces the minimum age for application for a Scottish GRC to 16. The Scottish Government's policy memorandum notes that there are a number of existing areas in Scotland where people obtain rights at 16. This includes marrying/entering a civil partnership, voting in Scottish Parliament elections, consenting to lawful sexual activity, amongst other rights.</p> <p>However, the effect of exercising the power under s.35 would be to prevent the GRR from being submitted for Royal Assent. In the event a s.35 order was made it would mean that the age limit for applying for a GRC in Scotland would remain 18 years as set out in the GRA. Under the GRR, people aged 16 and 17 would be able to apply under the new scheme established by the Scottish Parliament. This decision was considered in the Equality Impact Assessment accompanying the bill and was debated during the passage of the bill in the Scottish Parliament, including in relation to safeguards.</p>
Sex	<p>A full GRC has the effect of changing the sex that a person has as a protected characteristic for the purposes, including the application of the Equality 2010 Act. The GRR introduces a new scheme with different, and lower thresholds (such as time in acquired gender) to apply to change legal sex.</p> <p>The 2010 Act provides exceptions where what might otherwise be unlawful discrimination against individuals with the protected characteristic of 'gender reassignment' is permitted. For example, someone who is transgender with a GRC cannot be excluded on the basis of their legal sex, but can be excluded on the basis of gender reassignment if there is objective justification for doing so.</p>
Gender reassignment	<p>Under the 2010 Act, a person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. This means that having a GRC, or undergoing any medical process, is not a requirement to be considered to have this protected characteristic.</p> <p>This protected characteristic is much more widely defined than the group of people currently eligible for GRCs; and everyone applying for, holding - or indeed even considering applying for - a GRC under either system, would likely have this protected characteristic. Under 18s, not currently eligible for GRCs, can also have this protected characteristic.</p> <p>The UKG consulted on reform to the Gender Recognition Act 2004 and in the consultation response and written Ministerial Statement the UKG's view was that the balance struck in this legislation 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. The UKG further noted that 'we need to improve the process and experience that transgender people have when applying for a Gender Recognition</p>



	<p>Certificate – making it kinder and more straightforward’. As such the Government put forward administrative changes to address this point.</p>
Disability	<p>The Scotland Office notes there was some debate about mental health during consideration by the Scottish Parliament of the bill. A mental health condition is considered a disability if it has a long-term effect on someone’s normal day-to-day activity. However, the Scotland Office further notes that whilst mental health was considered in debates (and care should be taken in respect of language), the GRA 2004 and GRR do not refer to disability directly. Gender dysphoria is not considered a disability, but it is noted that a consequence of gender dysphoria may lead to mental health conditions.</p> <p>The GRR Bill removes the need for a gender dysphoria diagnosis to apply for a Scottish GRC. In its 2020 response to the 2018 GRA consultation, the UK Government confirmed that it would maintain the GRA 2004 requirement for a diagnosis of gender dysphoria for transgender people to change their legal sex. The UK Government considers this to be a necessary measure, as one of the appropriate checks and balances in the GRA 2004.</p>
Marriage and Civil Partnership	<p>The Equality Act 2010 considers this protected characteristic in an employment context only. A person's marriage or civil-partnership status does not directly apply to the exercise of this function in respect of employment. Nonetheless, the Scotland Office notes the analysis conducted by the Scottish Government on in the EQIA published on 03 March but does not consider this applies here.</p>
Pregnancy and maternity	<p>Some transgender men give birth and may be protected under this characteristic. By relaxing the requirements for legal gender recognition, option 2 provisions may mean there is a slight increase in transgender men who are eligible for a Scottish GRC and give birth when being legally male.</p>
Race, ethnicity and nationality	<p>The decision on a s.35 order is not expected to impact on the need to eliminate unlawful discrimination and other prohibited conduct on grounds of race.</p> <p>The decision not to exercise the function would create an inequality of opportunity between people born in Scotland (with a Scottish birth entry) as compared with the rest of the UK, by giving people access to a system for acquiring a GRC that does not have the same protections and safeguards as the current UK system. However, by recognising GRC equivalents of all countries for the purposes of Scots law this could advance equality of opportunity on grounds of nationality in a different way.</p>
Religion or belief	<p>In the context of GRA reform, religion and belief is most likely to be relevant to transgender people with religion and belief, in a context where some religious and faith communities may be unaccepting of transgender people, with rules on sex segregation in certain contexts that rely on biological sex. It may also arise in the context of a religious spouse or civil partner of a GRC applicant, who has religious reasons for not wishing for their spouse to change legal sex.</p> <p>The belief that biological sex is immutable and cannot be changed (‘gender critical’ beliefs) has also been held to be a protected philosophical belief, and this is relevant to any decision in this area, in balance with the beliefs of those advancing transgender rights, and self-identification within that.</p> <p>Some religious bodies may be opposed to the concept of legal gender recognition. There are protections in the Equality Act 2010 outlined for the interests of religious bodies.</p>

Sexual orientation	Scotland Office notes that GEO does not consider there are reliable figures as to how many transgender people in the UK have a minority sexual orientation. Nonetheless the UKG's 2018 consultation on the GRA 2004 invited respondents who had or wanted to undergo legal gender transition, to explain how their protected characteristics may have affected their views of the GRC process and GRA reform options. The consultation responses included feedback in respect of this protected characteristic.
--------------------	---

## **Monitoring and Evaluation**

The order will be reviewed in light of any relevant policy developments, including if the Bill is reconsidered in the Scottish Parliament.