



# **Response to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill**

**March 2020**

## **1.0 INTRODUCTION**

Close the Gap is Scotland's policy advocacy organisation working on women's labour market equality. We have been working with policymakers, employers and employees since 2001 to influence and enable action that will address the causes of women's inequality in the workplace.

Close the Gap worked with other national strategic women's organisations to develop a joint response to the consultation on the review of the Gender Recognition Act 2004<sup>1</sup>. The women's sector also submitted a joint paper to the Scottish Parliament Culture, Tourism, Europe and External Affairs Committee in respect of the Census (Amendment) (Scotland) Bill<sup>2</sup>. In these previous responses, we set out our support for the broad principles of reform of the Gender Recognition Act.

Close the Gap continues to support the aim of the Gender Recognition Reform (Scotland) Bill to introduce a self-declaration system for legal gender recognition. The complexity, restrictions and expense of the current gender recognition process particularly discriminates against trans people who are disabled, migrant, minority ethnic, unemployed, homeless, experiencing domestic abuse, young or non-binary.

Our consultation response is based on almost two decades' experience of engaging with labour market policymaking and legislation, and on working

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<sup>1</sup> Scottish Women's Sector Response to the Review of the Gender Recognition Act 2004 (2018)  
<https://www.closesthegap.org.uk/content/resources/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf>

<sup>2</sup> Scottish Women's Sector Note on the Census (Amendment) (Scotland) Bill (2018)  
<https://www.closesthegap.org.uk/content/resources/Scottish-womens-sector-submission-to-the-Culture-Tourism-Europe-and-External-Affairs-Committee-on-the-census-v2.pdf>

closely with employers to influence and enable action to address the gender pay gap.

Our response does not respond in detail to specific consultation questions on the content of the bill as this is outwith our expertise and organisational focus of women's labour market equality. Instead, and as set out in the joint women's sector response, we focus on the consequential of the bill, specifically around gathering, analysis and use of data, and on measuring the gender pay gap. We welcome this opportunity to provide clarity, evidence and insight into importance of data in advancing women's equality and rights in the workplace.

## **2.0 ANSWERS TO QUESTIONS**

Q4. Do you have any other comments on the provisions of the draft Bill? (other title?)

### **2.1 Definitions**

In the public discourse around gender recognition reform, there has been significant focus on, and dispute around, the terminology used. Close the Gap supports the definitions used by Engender, Scotland's feminist policy advocacy organisation, which are set out in its submission<sup>3</sup> to the Chief Statistician's sex and gender in data working group. The terminology relevant to this submission is below.

- *Sex*: Whether a person is a man or a woman<sup>4</sup>
- *Gender*: A social constructed set of norms, roles and relationships that is constituted in our social mores, laws, processes and policies. It is time and culture-specific and functions as a hierarchy.
- *Gender identity*: Whether an individual's internal sense of themselves aligns with their sex as assigned or observed at birth.
- *Gender-sensitive data*: Statistics and other information that adequately reflect gendered differences and inequalities in the situation of women and men in all areas of life.
- *Sex-disaggregated data*: Data that is broken down by sex so that it is possible to compare and contrast differences between men and women.

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<sup>3</sup> Engender (2020) *Submission to the Chief Statistician on Sex/gender: Gathering and using data to advance women's equality and rights in Scotland*

<sup>4</sup> For equalities monitoring, this would include an "other" option in which individuals may describe themselves, for example, as non-binary.

- *Gender-disaggregated data*: Widely used, if literally inaccurate, synonym for data that is both gender-sensitive and sex-disaggregated.

In this response, we discuss the importance of gathering and using gender-sensitive sex-disaggregated data.

## **2.2 Data gathering**

Gender sensitive sex-disaggregated data is essential to understanding the different experiences that women and men have in entering and progressing in employment, and to track indicators of women's labour market equality over time. It is core to Close the Gap's work in expanding the evidence base around women's equality and rights in the workplace, and in delivering policy advocacy work to address the inter-related causes of the gender pay gap.

The public sector equality duty requires public bodies to gather, analyse and use employee data, disaggregated by protected characteristic. However, assessment work on compliance with the duty has found that performance of the duty has largely regressed since reporting was introduced in 2013.

Close the Gap has undertaken three biennial assessments of public body compliance with the gender and employment aspects of the duty, namely the requirements to report a gender pay gap; publish an equal pay statement, including horizontal and vertical occupational segregation information; gather and use gender-disaggregated employee data; publish and report on progress on meeting a set of equality outcomes; publish a mainstreaming report; and do equality impact assessment. Public bodies are required to gather and use employee data in relation to the composition of the workforce and on recruitment, development and retention. A listed public body's mainstreaming report must include an annual breakdown of this data, as well as a description of progress in gathering and using the information to better perform the general equality duty<sup>5</sup>.

Each Close the Gap assessment has identified significant issues with the quality and format of the data published. In 2017<sup>6</sup>, just under a quarter (23%) of public bodies assessed had either published no employee data, or the data that has been published was not disaggregated by sex. Of those that had published sex-disaggregated employee data few had published meaningful employment data

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<sup>5</sup> The general equality duty has three elements: addressing discrimination, advancing equality and fostering good relations.

<sup>6</sup> Close the Gap (2017) *Assessment of 2017 reporting of the public sector* [unpublished]

beyond workforce composition. 87% of public bodies were assessed as having made poor or no use of employee data.

The Equality and Human Rights Commission (EHRC) describes the collection and use of employee data as an “area of weakness” for public bodies<sup>7</sup>. Work by the Coalition for Racial Equality and Rights for the EHRC describes “substantial gaps, irregularities and inconsistencies in the data available in the publications by public bodies”<sup>8</sup>.

Close the Gap participates in a range of equality advisory groups which are convened to advise on the work of national agencies, delivery bodies and other public sector employers. We also participate in, and engage with, a variety of other national advisory groups, working groups and committees that are germane to women’s experiences of the labour market. This experience, along with our experience of influencing policymakers over the past two decades, highlights that gender sensitive sex-disaggregated data is rarely used to inform policymaking.

In the past year, we have become aware that some public bodies have incorrectly interpreted the introduction of the EU General Data Protection Regulation (GDPR) as prohibiting them from asking service users their sex. In recent years, Close the Gap has also engaged with public bodies that have interpreted their new understanding of non-binary identities as precluding asking staff members or service users about their sex on the grounds that it would be “offensive”. This is not only incorrect, but also harmful to women’s equality and rights. Sex-disaggregated data provides the building blocks for gender-sensitive data and gender competency<sup>9</sup>. If public bodies stop gathering data on employees’ and service users’ sex because of misunderstanding the law, or a concern about a risk to their organisation, there will be fewer gender-sensitive statistics with which to support policy, legislative, and service delivery change that benefits women and women’s rights<sup>10</sup>.

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<sup>7</sup> Equality and Human Rights Commission (2017) *Measuring Up? Report 7: Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017*

<sup>8</sup> Equality and Human Rights Commission (2018) *Effectiveness of the PSED Specific Duties in Scotland*, available at: <https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf>

<sup>9</sup> Gender competence refers to the skills, knowledge and analytical capability to develop policy that is well-gendered; that takes account of the socially constructed difference between men’s and women’s lives and experiences.

<sup>10</sup> Engender (2020) *Sex/gender: Gathering and using data to enhance women’s equality and rights in Scotland*

Our concern underlines the importance of taking an intersectional approach to women's equality and rights. This is because trans women will have different experiences of the labour market in the way that BME women, disabled women, lesbian and bisexual, and Muslim women will also experience the labour market differently. Women are not a homogenous group, and solutions to the structural inequalities that are faced in the workplace will vary according to women's multiple identities.

## 2.3 The gender pay gap

In response to the proposed GRA reform, it has been suggested by a small group of those who are opposed to reform, that enabling trans people to self-declare will artificially narrow the gender pay gap because some men will self-identify as trans women. Although there is very little detail around this notion, it is likely to be because men, on average, earn more per hour than women, and therefore pay data of a male employee will then be recorded as pay data for a female employee once they have identified as a transwoman, which in turn will have the effect of narrowing an overall gender pay gap, meaning employers will take no further action. **It is Close the Gap's view that self-declaration will not adversely affect efforts to address the causes of the gender pay gap.** In this section, we set out why this is by providing contextual information and evidence on the gender pay gap and employer responses to the tackling the pay gap.

### 2.3.1 Gender pay gap reporting

The gender pay gap is the key indicator of women's different experiences in employment, education and skills acquisition, and in the division of unpaid care and other types of domestic labour<sup>11</sup>. The pay gap is the percentage difference in pay between men's and women's average hourly pay. Some employers are legally required to publish their gender pay gap including:

- Listed public bodies in Scotland, who are required to publish a gender pay gap figure under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012; and

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<sup>11</sup> Close the Gap (2018) *The Gender Penalty: Exploring the causes and solutions to Scotland's gender pay gap*

- Large private and third sector organisations (with 250 or more employees)<sup>12</sup>, who are required to publish a range of gender pay gap information under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

### 2.3.2 Administrative data on the gender pay gap: The impact of employees changing sex

The lead data source for calculating the national gender pay gap is the Annual Survey of Hours and Earnings (ASHE) which is published by the Office for National Statistics<sup>13</sup>. ASHE data in employee earnings is drawn from payslip information and reported each year. The sample size is 1% of the employee workforce on PAYE schemes, typically covering 180,000 jobs<sup>14</sup>.

There is no robust data on the number of trans people living in Scotland or the UK. The UK Government tentatively estimates that there are between 200,000 and 500,000 trans people living in the UK, equivalent to between 0.3% and 0.8% of the population<sup>15</sup>. For comparison, a US meta-analysis estimates that approximately 0.6% of the US adult population is trans<sup>16</sup>. Given the very small estimated number of trans people living in the UK, whether people identify as trans has no meaningful impact on the calculation of the national gender pay gap. This is because the presence of small populations in administrative datasets does not undermine the production of sex-disaggregated or gender-sensitive statistics.

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<sup>12</sup> A very small number of Scottish public bodies who are not covered by the Scottish Specific Duties are also required to report their gender pay gap under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

<sup>13</sup> Close the Gap (2020) *Gender Pay Gap Statistics*

<sup>14</sup> Office for National Statistics (2017) *An overview of and comparison between Annual Survey of Hours and Earnings and Average Weekly Earnings: 2017*, available at: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ano-viewofandcomparisonbetweenannualsurveyofhoursandearningsasheandaverageweeklyearningsawe/2017-09-14>

<sup>15</sup> Government Equalities Office (2018) *Trans People in the UK*, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721642/GEO-LGBT-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf)

<sup>16</sup> Flores, Andrew R, Jody L Herman, Gary J Gates, and Taylor N T Brown (2016) *How Many Adults Identify as Transgender in the United States?* The Williams Institute

### 2.3.3 The impact on organisational gender pay gaps when employees change sex

To examine the effect of a sample of employees changing their sex, Close the Gap has developed three example scenarios to model this impact on workforce composition and gender pay gap.

Notes on the methodology used are below:

- Given the estimate of the trans population being between 0.3% and 0.8%, it was assumed that the proportion of trans employees in each organisation was equivalent to the mid-point of 0.55%.
- There is no reliable data on the composition of the trans population by sex, and therefore a 50/50 split between trans women and trans men, based on the breakdown of the general population, has been assumed for modelling purposes.
- Reflecting the notion that men becoming trans women will affect the gender pay gap, examples include only male employees becoming trans women employees. The data does not include female employees becoming trans men.
- Anonymous employer pay data has been used to synthesise realistic examples which provide an understanding of the impact on an organisation's gender pay gap when an employee changes sex.
- The mean gender pay gap is the calculation used<sup>17</sup>.

*Example A: Large male-dominated, private sector employer with 823 employees with an existing gender pay gap of 26%*

Based on the assumptions set out, this company has three trans women. In an organisation of nine salary bands, employees whose sex was changed from male to female were from the lower, middle and highest grades of the organisation. **This resulted in no change to the employer's gender pay gap, which remained at 26%.**

*Example B: Large public sector employer with 10,000 employees with an existing gender pay gap of 9%*

Based on the assumptions, Example B has 28 trans women employees. Employees whose sex was changed from male to female were selected across

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<sup>17</sup> More information on the different measures of the gender pay gap can be found in Close the Gap (2020) *Gender Pay Gap Statistics*

all eight grades. This also included changing the most senior man to a woman. **This resulted in no change to the employer's gender pay gap, which remained at 9%.**

*Example C: Medium-sized, female-dominated private sector employer with 280 employees with a gender pay gap of 21%*

Based on the assumptions, the company has one trans woman employee. The sex was changed from male to female for a senior employee working in the second highest grade which includes nine roles, most of which are held by women. **This resulted in a 2% reduction on the employer's gender pay gap to 19%.**

The examples show that having employees among the workforce changing their sex does not have a meaningful impact on an organisation's gender pay gap. In two of the examples, there was no change at all to the headline figure. Example C resulted in a slight reduction in the pay gap although **this does not mean that having trans women among a workforce artificially reduces an organisation's pay gap.** Organisational gender pay gaps fluctuate according to employee turnover, and the gender pay gap is particularly sensitive to turnover in senior grades, in which there are fewer roles, and where either women or men are under-represented. The estimated average annual staff turnover rate is 16%<sup>18</sup>.

Close the Gap has extensive experience of working with a range of employers to support work to report on the gender pay gap, and take action on the causes of organisational pay gaps. The gender pay gap is complex, and we therefore urge employers to look beneath the headline figures which can mask other structural inequalities such as occupational segregation, a culture of inflexible working, women's concentration in lower-grade roles, biased recruitment and progression practice, pay discrimination, the undervaluation of jobs predominantly done by women, and a lack of development opportunities and pathways for women who want to progress. Employers that are committed to closing their gender pay gap analyse their pay data to identify the specific challenges female employees face.

All of the examples assume that a man in a senior role maintains their job in their acquired sex. Evidence on trans people's experiences of employment

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<sup>18</sup> HR Magazine *Turnover rate reaches new high*, 24 October 2017, available at: <https://www.hrmagazine.co.uk/article-details/turnover-rate-reaches-new-high>



suggests that this may be an optimistic assumption. Trans people face a range of structural barriers to equality in the workplace, and these barriers will be amplified for trans people who are Black or minority ethnic, disabled, have experienced domestic abuse, or have refugee status. A UK Government survey of trans people found that two-thirds of respondents (66%) identified gaining and retaining employment as the most important challenge.<sup>19</sup> Half of respondents (50%) said they had been harassed or discriminated against because of their gender identity in their previous or current job.<sup>20</sup>

A US study<sup>21</sup> on the earnings and workplace experiences of trans people before and after they had transitioned found that although they have the same human capital, their workplace experiences changed radically. This study found that average earnings for female-to-male transgender employees increase slightly after transition, while average earnings for male-to-female trans employees fell by nearly one-third. It also found that for many trans women employees, becoming a woman often brings a loss of authority, harassment, and termination, but that for many trans men employees, becoming a man often brings an increase in respect and authority.

Q5. Do you have any comments on the draft Impact Assessments?

## **2.4 Equality impact assessment**

The Scottish specific duties require public bodies, including the Scottish Government, to do equality impact assessment (EqIA). EqIA is a mainstreaming tool which requires public bodies to apply a gendered lens to the policy development with the aim of identifying differential impacts on men and women. Where differential impact is identified, unintended impact is required to be mitigated, or the policy should be redesigned.

In the joint women's sector response, national women's organisations highlighted the poor quality of the "partial" EqIA, and noted that its cursory list

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<sup>19</sup> UK Government (2012) *Headline findings from our transgender e-surveys*, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85499/transgender-survey.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85499/transgender-survey.pdf)

<sup>20</sup> Ibid.

<sup>21</sup> Schilt, Kirsten and Matthew Wiswall (2008) "Before and After: Gender transitions, human capital and workplace experiences", *The B.E. Journal of Economic Analysis and Policy*, Vol.8, Issue 1, 2008, Article 39

of domains of women's equality that may be affected does not engage with issues that were highlighted as important in the our response<sup>22</sup>.

Close the Gap is disappointed that the EqIA of the Gender Recognition Reform Bill is also poor. While there is a focus on the important issue of preserving women-only spaces, it does not mention any of the potential consequential around public body gathering of gender-sensitive sex-disaggregated data. This is indicative of a wider problem across the public sector where EqIA is done sporadically, and frequently not all, and often do not identify the differential impacts on policies on women.

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<sup>22</sup> Scottish Women's Sector Response to the Review of the Gender Recognition Act 2004 (2018)  
<https://www.closesthegap.org.uk/content/resources/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf>