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-declaratory system for legal gender recognition instead.

Agree

If you want, you can give reasons for your answer, or make comments.

As acknowledged in the Scottish Government’s additional information to this question, it is now international best practice to provide a legal gender recognition system based on self-declaration.

We welcome the Scottish Government’s reference to Council of Europe Resolution 2048 which calls for ‘quick, transparent and accessible’ legal gender recognition processes[1]. The current process in Scotland does not fulfil any of these criteria. Applicants are required to have been living in their ‘acquired gender’ for at least two years. Because you have to be able to prove this, people who are unaware of the requirements may have to wait even longer to ensure they have collected the necessary evidence. Applicants send their application to a tribunal who they never meet, and who don’t have clear, definitive or publicly accessible decision-making criteria. The application process is difficult, time-consuming and expensive. Scottish Trans Alliance often has to help trans people with their applications, as it is very easy to miss something crucial due to how complicated the process is. You also have to have a psychiatric diagnosis of gender dysphoria – which some people may be unwilling or unable to obtain.

The Yogyakarta Principles referenced in the Scottish Government’s additional information to this question state that governments should “Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity.”[2] It is acknowledged in international human rights that gender identity is a deeply personal characteristic, and that only individuals are able to know their gender identity. The current process requires the corroboration of medical practitioners, taking away trans people’s rights to determine and define their own realities.

One of the reasons that Scotland lost its place at the top of the ILGA Rainbow Index in 2016[3] and 2017[4] was the improved laws around gender recognition in other countries in Europe – such as Malta and Norway. If the Scottish Government remains committed to being a leading country internationally for LGBTI people, bringing forward legislation to introduce a self-declaratory system for legal gender recognition in line with international best practice and international human rights ideals is a vital step.

Problems with the current process

When using mental health services, 29% of trans people have had their gender identity treated as a symptom of a mental health issue, rather than their genuine identity. [5] Historically, trans identities have been conflated with mental illness, and continue in the present to be misunderstood in this way, not just by the general public but also in parts of the medical profession. Requiring trans people to have a diagnosis of gender dysphoria in order to have their gender legally recognised reinforces this outdated assumption that being trans is a mental health problem.

The current evidence requirements are intrusive and humiliating, violate trans people’s right to privacy, and further stigmatise trans identities. For transgender people who do not want to access medical transition treatments, there may be no reason for them to seek a psychiatric diagnosis of gender dysphoria, effectively excluding them from the current process. Reforming the legislation is about recognising that the need for a psychiatric diagnosis pathologises trans people, and requiring medical evidence rather than simply the testimony of the individual suggests that trans people themselves are not the best placed to make decisions about their gender and lives.

We have been contacted by trans people who feel deeply upset and angry that, not only is a psychiatric diagnosis report required, but also the gender recognition panel rejected their diagnosis reports as inadequate unless they included information about their childhood gender expression, including what toys they played with as a child. This is a grossly offensive reinforcing of gender stereotypes and does not even relate to the current ICD-10 diagnostic criteria used for trans adults. Similarly, we have had trans people tell us that the panel expected details of their sexual orientation and current relationships to be included in the psychiatric diagnosis report, which again is completely unacceptable and irrelevant to whether or not someone has experienced gender dysphoria.

We have been contacted by trans people who had their psychiatric diagnosis report rejected by the gender recognition panel simply because the report did not specify the exact number and dates of the gender identity clinic appointments the person attended prior to the diagnosis being made.

A trans man, who has been living permanently as a man for several years and has undergone hormone treatment, has informed us that his application for gender recognition was rejected by the panel because he had given birth to a child while living as a man. This could be viewed as the panel punishing trans people simply for utilising their reproductive rights.

We have also been contacted by a trans person who had their application for gender recognition rejected, despite them having transitioned to live permanently as a woman, because their psychiatric diagnosis report mentioned that they had discussed a non-binary aspect of their gender identity.

Many trans people encounter problems with fulfilling the evidence requirements for the current process. This is often because the Gender Recognition Panel (GRP) require medical reports to be worded very particularly, meaning trans people often have to return to medical practitioners several times to ensure their
Evidence is deemed satisfactory. This is due to a precedent set soon after the formation of the GRP around the level of detail needed for medical reports. Despite the fact that no medical treatments are required for a person to obtain a GRC, the panel still insists on knowing full details of any treatment you have had, or similarly, that you provide a medical report explaining why you haven't had any particular treatment.[6] This is an intensely intrusive and humiliating requirement, and it is unacceptable that transgender people are required to provide detailed information about their bodies and medical history, even when these are not conditions to obtaining legal gender recognition.

We have been contacted by trans people who have had their medical evidence report rejected by the gender recognition panel simply because it does not give the exact dosage of their current hormone treatment, even though the report would have been accepted if they had never had any hormone treatment. Likewise, we have been contacted by trans people who have had their medical report rejected simply for using less specific terminology such as ‘genital reconstruction surgery’ or ‘vaginoplasty’ rather than ‘penile inversion vaginoplasty’, or such as ‘chest reconstruction surgery’ rather than ‘masculinising chest reconstruction surgery involving bilateral mastectomy with nipple grafts’.

The current gender recognition process, by virtue of requiring medical evidence, causes confusion about whether trans people who decide against surgery will be treated fairly by the gender recognition panel. In a particularly disturbing case, we were contacted by an extremely distressed young trans person in their early 20s who had been informed by the gender recognition panel that they would not grant her legal gender recognition until she decided for certain whether or not to undergo genital surgery. She had been transitioned for several years but had not yet had any sexual relationship and did not wish to make a decision about genital surgery until she was older and had the chance to explore her sexuality. She was being expected to dangerously rush her decision about irreversible major surgery purely to overcome the bureaucratic pedantry of a faceless tribunal panel.

The vast majority of trans people we engage with express significant confusion and anxiety about how much evidence they need to provide to prove they have been living in their acquired gender for over two years. We have been informed by some trans people that they have been verbally chassedity by the administrators who assist the gender recognition panel for submitting ‘too much evidence’. We are aware of a trans person who had their application rejected but then when they resubmitted it immediately afterwards with the only change being that they included less evidence, it was accepted. The panel appears to be very inconsistent and unclear in terms of the degree to which it requires evidence to be spread across the entire two year time period.

Furthermore, the complexity of the different kinds of evidence required causes many trans people to struggle to complete their application. When they make errors with their evidence, the tribunal panel’s requests for further information are often very difficult to follow. We are aware of a Scottish Trans Alliance staff who have struggled to understand. We are in contact with trans people who have abandoned their gender recognition applications due to frustration at not being able to understand the panel’s requests for further information.

We have also been contacted by trans people who have been unable to apply for legal gender recognition despite having transitioned many years ago, because they have lost paperwork due to homelessness, fleeing domestic violence, or fire or flood damage to their home.

We feel strongly that these overly onerous requirements around evidence are a direct product of the current system, which pathologises trans identities and allows a panel to scrutinise individuals before granting them legal gender recognition. Built into the current process is the notion that trans people’s identities are up for debate, and that their privacy and dignity is secondary to the knowledge and expertise of other professionals. This is why a move to self-declaration is so crucial, because it removes the idea that there is any external ‘expert’ required to verify trans people’s identities, and acknowledges that trans people themselves are in fact the only experts on who they are. We feel any retention of the GRP would be entirely unacceptable, as it would serve to perpetuate the idea that trans people must somehow prove themselves to others before being recognised as who they are.

Due to the complexity, cost and indignity of the current Gender Recognition Act process, most eligible trans people have not applied for a Gender Recognition Certificate to change their birth certificate. This leaves them in a risky legal limbo, with all their day-to-day identity documents updated through self-declaration to reflect their gender identity, but their birth certificate and technical legal gender still in contradiction to how they live and identify. This can result in trans people unwittingly experiencing serious harmful errors, inconsistencies and difficulties described below.

Marriage and civil partnership:
Since civil partnership remains restricted to legally same-sex couples only, trans people can find their civil partnerships invalidated due to not having changed their birth certificates. We were contacted by a couple who identify as a lesbian couple and had arranged a civil partnership in Scotland. A few days before their ceremony, the celebrant realised that as the trans woman did not have a gender recognition certificate (despite being many years transitioned), the civil partnership could not take place. The couple could not change their scheduled ceremony to a marriage because there was not sufficient notice period left. They were forced to cancel their ceremony, and lost all of the substantial money paid for venue and catering. They were left with no option but to come out as trans to all their guests in order to explain why the civil partnership ceremony had been cancelled and why it was being switched to a marriage ceremony several weeks later. This caused the couple huge distress.

Confusion as to their legal gender can also mean a trans person may mistakenly believe they have a mixed-sex marriage when in actual fact they have a same-sex marriage or vice-versa, which can negatively affect survivor pension entitlements and international recognition of the marriage validity.

Pension entitlement and start date:
For trans people born before 6th April 1955, the gender on their birth certificate affects the age at which they can receive a state pension. We have been contacted by a number of trans people who have experienced financial hardship and distress due to miscalculating their pension entitlement and start date many years after their transition, because they do not have a gender recognition certificate. People implement plans to retire and only find out at the last minute that their pensions will not start when they thought they would. Due to the complexity of the evidence needed for the current Gender Recognition Act process, it can take many months of financial hardship before trans people affected by such pension issues can get their legal gender corrected. Public domain example: https://www.dailyrecord.co.uk/news/real-life/sex-change-squaddie-sandra-macdougall-6703602

Validity of insurance policies (especially car or travel insurance):
Insurance companies are required to treat trans people as the legal sex on their birth certificates but most trans people do not realise this and therefore give the gender on their day-to-day identity documents such as passport (for travel insurance) and driving licence (for car insurance). This technically invalidates the insurance, exposing trans people to serious financial and legal risks.
Human right to privacy about their gender reassignment history:
Trans people often have to show their birth certificate to prove their right to work in the UK when starting new job, or in order to join their workplace pension scheme. If they have not received legal gender recognition, then this violates their privacy by outing their previous name and gender reassignment history to their employer. Young trans people are often required to show their birth certificate when changing to a new school and when starting college or university. We have been contacted by trans young people who have left education rather than out themselves as trans in this way, and we have been contacted by trans people who have failed to join pension schemes or even to take up an employment offer due to fear of outing themselves by showing an uncorrected birth certificate.

Exposure to discrimination and harassment:
Although changing the gender on their birth certificate is not required for a trans person to access employment and services in their gender identity, having an anomaly between their birth certificate gender and the gender on their other identity documents (in which they are living) increases the risk of trans people being subjected to transphobic discrimination and harassment. It is common for employers and financial service providers to mistakenly believe that a person must show a gender recognition certificate in order to change their gender at work or on their bank accounts. This is of course not only wrong in law but also impossible for the trans person concerned, given the requirement to prove that they have lived and worked in line with their gender identity for at least two years before applying for a gender recognition certificate. Interestingly, this demonstrates that generally people anticipate that legal gender recognition should be in line with the point at which trans people start living permanently in their gender identity (not two years later).

Access to women-only spaces
Many services in Scotland already operate on a self-declaratory system for deciding who to include in their service provision[7]. In particular, large organisations in the gender based violence/women’s sector have been including trans women in women-only services for many years, including those trans women who may still be labelled as male on their birth certificates. This is because the sector has long recognised that only trans people themselves are experts on their own identities, and that it would be unfair to require people to have obtained legal gender recognition given the difficult and onerous nature of the current process. In Scotland, no women’s service requires seeing a service user’s birth certificate in order to grant her access to a service. People are already able to update the gender on their driving licences and change their names by self-declaration – and we have never heard of any man doing either of these things in an attempt to access a women’s service, in over ten years of working closely with many gender-based violence services in Scotland. The proposed changes will have no impact on who is able to use women’s services in Scotland. Instead, it will simply ensure that transgender people are recognised legally as who they are without having to submit intrusive medical reports, a psychiatric diagnosis, and two years worth of evidence that they have been living in accordance with their gender identity. This is exactly the approach to inclusion that the women’s sector, along with many others, are already taking in Scotland.

Women accessing Violence Against Women services, such as Rape Crisis and Women’s Aid, have a reasonable expectation that these services will provide them with a safe space in which they can cope with the trauma in their lives. To this end, these services have developed robust risk-management and safeguarding policies and practice to ensure that, before any potential service user is accepted, their needs and risk factors are individually assessed. This results in various potential service users being refused inclusion in group work and/or shared refuge accommodation, due to risk factors such as antisocial behaviour, convictions for violent or sexual offences, or drug addiction. This individualised service provision decision-making can be safely carried out regardless of whether or not the person is trans. It is our understanding that possession of a gender recognition certificate does not circumvent in any way these existing risk management procedures. Furthermore, the proposed reform to the Gender Recognition Act 2004 will not alter the current single-sex exemptions in the Equality Act 2010 that permit single-sex service providers to treat a trans person differently from other service users if that is a proportionate means to achieve a legitimate aim.

We greatly appreciate the long positive partnership relationships and constructive dialogue we have with Scotland’s women’s sector which ensures trans rights and women’s rights progress together and are not in contradiction or competition with each other.

We appreciate the additional complexities involved when a person transitions in custody and, for over 10 years, we have been working intensively with the criminal justice sector in Scotland to uphold safety and dignity for all. Existing practice in the Scottish Prison Service is that trans people are allowed to self-declare their gender identity, but all placement issues are subject to a comprehensive case-conference risk-assessment process. This process takes into account the prisoner’s offence and behavioural history, and ultimately placement decisions are based on the best interest of safety for both the trans prisoner and the people with whom they will be housed. In addition to which estate a person is placed in, risk-assessments carefully inform detailed decision-making regarding single-cell accommodation, privacy measures when showering, and any required restrictions on circulation with other prisoners.

A concern that has been raised by some people is the possibility that sex offenders in prison may pretend to be transgender in order to try to gain access to women as potential victims. We believe that the proposed reforms will not weaken existing robust protections against this possibility. Provision exists for any prisoner, whether trans or not and even if legally female, to be kept within the male estate if necessary to manage the specific risks relating to that individual.

Similarly, people are able to use public toilet facilities without having to produce a birth certificate to show they are allowed to do so. There is no law that dictates who uses which bathroom in Scotland – it is simply custom. Furthermore, it is already established in case law that transgender people have the right to access the bathroom facilities that correspond with their gender identity[8]. We share people’s concerns that safety and privacy are upheld in public toilet facilities, and our research shows that transgender people often avoid using public toilets, out of fear that they will face discrimination or harassment when doing so[9].

Adopting the Scottish Government’s proposal of a self-declaratory system for legal gender recognition will have no impact on privacy and safety in public toilet facilities; it will not change who has access to single-sex public toilet facilities. Any criminal behaviour will continue to be prosecutable, as now, regardless of the gender of the perpetrator.

Footnotes:
3 https://www.ilga-europe.org/resources/rainbow-europe/2016
2 Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Yes

If you want, you can give reasons for your answer or make comments.: 
We think that a statutory declaration is a fair way to ensure that applicants know that they are making a serious and important decision. Whilst we think that there should be no evidence required for a person to receive legal recognition of their gender, it is still important that an applicant knows that their declaration carries real-life consequences, and that they feel comfortable making the application in the context of it being a solemn and true declaration of their intentions. Because it would be a declaration of your intentions, we think it is appropriate that the statutory declaration includes that you intend to live in your gender until death. As you will see below, we do not think that there should be any limits to the number of times a person can apply for legal gender recognition. Making a second declaration would not mean that you would automatically be considered to have made a false declaration previously, but that circumstances change, and you should be able to apply to have your gender legally recognised again if this is the case. It may be useful to make it clear to applicants that they are making a declaration of their current situation and future intentions, and not necessarily of unalterable permanence, so that people are not unduly concerned that they may be criminalised if they need to apply to have their gender legally recognised again in the future. Requiring a statutory declaration will also mean that the process for changing your gender legally will reflect the process used in Scotland for other changes, such as a change of name.

We don't think that there is a need to introduce any period of reflection after the statutory declaration is made, as is the case in Denmark and Belgium. It is not common practice for statutory declarations to require a period of reflection and reaffirmation before they are considered valid in Scotland. We feel that to make an exception with regards to a statutory declaration to have your gender legally recognised will reinforce some of the assumptions that underpin the current process, namely that trans people are not individually able to take the decision to be recognised as who they are without some kind of checks and balances process. We feel that requiring a period of reflection could undermine the message of a move to a self-declaratory system, and perpetuate the feeling in the trans community that trans people are not trusted to make decisions about our own lives and identities.

As mentioned by the Scottish Government in their additional information to this question, requiring applicants to sign a statutory declaration would also prevent fraudulent or frivolous applications, as intentionally making a false statutory declaration is a crime. We think this is a sensible way of safeguarding the process. A factsheet from TGEU produced in October 2017 showed that in five countries that have a self-declaratory system (Argentina, Denmark, Ireland, Malta and Norway) there has only been one recorded incident of a fraudulent application out of over eleven thousand applications, which was a case in Denmark[10]. The person who made the fraudulent application had no criminal intent in doing so, but simply wanted to show how easy it would be. This kind of application could be prosecuted in Scotland if a statutory declaration was used, as anyone who chose to use the process simply to announce publically afterwards that they had done so just to show they could would be admitting to making a false declaration.

Footnotes:

10 TGEU: Implementation of Legal Gender Recognition Procedures based on self-determination in Malta, Norway, Denmark, Ireland, Argentina with a focus on fraudulent intent and repeated applications?

3 Should there be a limit on the number of times a person can get legal gender recognition?

No

If you want, you can give reasons for your answer or make comments.: 
As mentioned by the Scottish Government in their additional information to this question, there are no current limits to the number of times a person can get legal gender recognition under the 2004 Act, and we don’t feel that there is a need to introduce them to a new system. A factsheet from TGEU produced in October 2017 showed that in five countries that have a self-declaratory system (Argentina, Denmark, Ireland, Malta and Norway) there have only been two recorded incidents of repeat applications out of over eleven thousand[11]. Neither of the cases were fraudulent or frivolous; both involved trans people who experienced discrimination and difficulties with their transition and whose circumstances changed. We think that the wording of the statutory declaration, and the nature of it being criminal to deliberately make a false one, will be a suitable way of ensuring that people don’t make repeated frivolous applications.

We think that an application to have your gender recognised legally should be considered similar to a marriage. Although you would make the application with the intent of the decision being permanent, the law would allow for the possibility that circumstances change. If somebody’s decision did change, they should be able to apply in the same way again to have their legal gender changed again.

Footnotes:

11 TGEU: Implementation of Legal Gender Recognition Procedures based on self-determination in Malta, Norway, Denmark, Ireland, Argentina with a focus on fraudulent intent and repeated applications?

4 If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

B. to everyone?
If you want, you can give reasons for your answer or add comments.: 
We think that everyone should be able to apply for a Scottish Gender Recognition Certificate. The Scottish Government, in their additional information, give the example that someone may apply from overseas if they intend to move to Scotland. We think there are three other reasons that it is crucial to have the process open to everyone.

Asylum Seekers and Refugees

Asylum seekers are not considered to be legally resident in Scotland when awaiting a decision on their application for refugee status or for some other form of leave to remain. Many trans asylum seekers have left a country of origin where they were unable to access any legal gender recognition process[12] and indeed may have suffered persecution on account of their gender identity. Trans asylum seekers may be housed in asylum support accommodation or detention centres that don't match their gender identity, due to arriving in Scotland with identity documents from their country of origin that reflect their assigned sex at birth[13]. They may have been unable to change their documents due to a process not existing, or because they would have faced discrimination and harassment for doing so. It is therefore vital that asylum seekers in Scotland are able to access the legal gender recognition process, as this may assist them in being housed correctly and in obtaining documents in Scotland that reflect their identity and not the information on their documents from their country of origin.

As many trans asylum seekers will be in Scotland as a result of experiencing transphobia, or even persecution, in their country of origin, it is crucial that these experiences are not exacerbated by being unable to access the process of legal gender recognition on arrival. Staff working with asylum seekers should be provided with information on the new process in order to be able to support trans asylum seekers to make an application where appropriate.

Of course, it should never be a requirement that a trans asylum seeker has legal gender recognition to be housed in a facility that corresponds with their gender identity. Many trans asylum seekers will arrive without legal gender recognition from their country of origin, and it may take weeks for them to access a legal gender recognition process, during which time they may face discrimination and violence in asylum support accommodation or detention centres[14]. However, the policy on the housing of trans asylum seekers is outside of the scope of this consultation. Despite the fact that we would strongly oppose legal gender recognition being a requirement for trans asylum seekers arriving in Scotland, we think it is important that a new self-declaratory system is open to everyone to ensure that this option is available to them.

International Students

Many international students from outside the EEA are in Scotland on tier 4 visas, which means they are not considered to be ordinarily resident here. Despite this, they may spend the significant portion of the year living and studying in Scotland. Some of them may come from countries without fair or accessible gender recognition processes, and may wish to get a GRC from Scotland even though it will not update their birth certificate, to ensure they are legally treated as their gender throughout their studies. This may be particularly useful as they may be unable to get some other identity documents issued in the gender they live in as easily as other trans people who are ordinarily resident.

We also know that many trans people are not aware of their rights in the law, and this may be further exacerbated for international students. They may not realise that they can apply for studies, update their medical records, and apply for identity documents in the gender they live in, even if this is not their legal gender. We already know from the experience of Scottish trans young people that applications for, and experiences at, higher education can be negatively impacted by not having access to legal gender recognition. Allowing international students access to the legal gender recognition process would ensure clarity for trans international students that their gender will be recognised in Scotland. International students are another group that we believe demonstrate the need for the new self-declaration process to be open to everyone.

Scotland as a welcoming and inclusive place for trans people

Many trans people around the world will live in countries with no legal gender recognition process, or with processes that require forced sterilisation, medical treatments, or court orders[15]. We think that there is no reason to not allow trans people from anywhere in the world to apply to have their gender legally recognised by the Scottish Government. This could be the only process open to someone to have their deeply felt identity recognised. We feel that having the process open to anyone would reaffirm Scotland’s commitment to being an outward-looking country, and a welcoming place, to all transgender people.

For further details on the human rights argument for why the process should be open to everyone, please see the JustRight Scotland submission, which we support in full.

Footnotes:

14 Ibid.

5 The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Do you agree or disagree?

Agree

If you want, you can give reasons for your answer or add comments.: 
We strongly agree with the Scottish Government’s proposal, for all of the reasons set out in the additional information to the question. In Scotland, young people are deemed to have full legal capacity at 16 years old. They are able to vote in elections, get married, and consent to any medical, surgical or dental treatment, as well as a host of other rights. This should also extend to having their gender legally recognised. Changing the law in this way will reflect the general consensus in Scottish politics that 16 and 17 year olds are able to make decisions for themselves.
Furthermore, many trans young people aged 16 and 17 will be at a stage of their life where they are making new starts. This may be getting a job, starting college or going to university. Because they aren’t able to have their gender legally recognised, they often have to out themselves ( disclose that they are trans) when starting these new opportunities. This can often mean that events that are supposed to be exciting and positive can be much more stressful for trans young people.

“I’m currently 17 and am going away to college next year. I would much prefer to have myself as male on the official records, but they need to have my ‘real’ details on the system.” Young trans person

LGBT Youth Scotland will provide greater detail on the importance of extending the ability to apply for legal gender recognition to 16 and 17 year olds, and we are supportive of their comments.

6 Which of the identified options for children under 16 do you most favour?

Option 3 – parental application

If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views:

Children and Young People’s Rights

We think it is vital that people under 16 have access to the legal gender recognition process. An Amnesty International report into legal gender recognition processes across Europe states that “Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children.”

6  Which of the identified options for children under 16 do you most favour?

The current absolute exclusion from legal gender recognition processes of under 16s is unacceptable, and the Scottish Government must ensure that there is some process by which children and young people can have their gender legally recognised.

Importance to trans young people

A small but increasing number of trans young people in Scotland are able to be open about their gender identity and live happy, healthy lives with the support of their parents, families and peers. At the moment, even those young people who have been living for many years as themselves, who are accepted by their families, and who go along to school expressing themselves in the way that they feel most comfortable, are unable to have their gender identity legally recognised on their birth certificate. With their parent’s consent they can already change their gender on their medical records and passport but their birth certificate remains stuck in their old gender which causes them significant distress and inequality. They are left in an unacceptable legal limbo for years with their birth certificate conflicting with their gender identity, their other identity documents and the reality of their daily life.

All children have a gender identity. Many children will talk from an early age about how they are a boy or a girl and this is considered perfectly normal if this happens to match up with what society expects of them, based on the sex they were assigned at birth. There is no reason to think that trans young people aren’t equally sure of who they are. Extending the right to access the legal gender recognition process to young people under 16 will not ‘encourage’ anyone to be trans – it will simply allow those young people who are sure of themselves to be able to change the gender on their birth certificate to reflect who they really are.

Allowing trans young people under the age of 16 to have their legally recognised is not about access to medical treatments. Decisions about the medical treatment of young trans people would continue to be made by medical professionals, and would not be affected. It’s about enabling consistency in people’s legal documentation, to allow them the same recognition of their identity as everyone else. It’s about making sure they don’t face discrimination or encounter people who don’t believe their gender identity is “real”.

Why do we think parental consent is the best approach?

We think that requiring applicants under 16 to have parental consent will bring the process of legal gender recognition in line with many of the other administrative changes that trans young people can make at that age, such as changing their passport, medical records, and name. This would mean that the process for under 16s would mirror the process for adults if the Scottish Government’s proposals for moving to a self-declaratory system are adopted: that legal gender recognition becomes a decision subject to the same processes as those for updating your other identity documents. In the case of trans adults this would mean being able to do so simply by self-declaration, and in the case of trans young people this would mean being able to do so with parental consent.

If a trans person under 16 did not have a parent with parental rights and responsibilities, then somebody else with parental rights and responsibilities should be able to make the application. If the trans young person under 16 had nobody with parental rights and responsibilities for them, then perhaps another interested party could make the application on their behalf – such as a social worker or other designated person in the young person’s life.

We also think that this approach would ensure that a medical assessment or evidence would not become an aspect of obtaining legal gender recognition for under 16s. For all of the reasons we argue in our answer to question 1, we feel strongly that there should be no need for ‘experts’ or scrutiny from others for
people to have access to legal recognition of who they are. We would not want the process for under 16s to end up similar to the current process for adults.

We think that a parental application should require the person making the application to sign a statutory declaration which includes that they have a solemn and true belief that the young person has an intention to live in their gender identity. We would want the application to be made with the best interests and wishes of the child having been taken into account, and the wording of the statutory declaration should make this clear.

Parental consent will also mean that some very young trans people, who do have the capacity to know their identity and express their gender but who definitely wouldn’t be deemed ‘capable’ of knowing the outcomes of signing a statutory declaration would be able to apply. They may be living in their gender and be fully supported by their families. The parental consent approach means that the legal gender recognition approach will be open to a greater number of young people.

What about parents who will not provide consent for an application?

However, we do think that there must be a process in place for those young people who do not have parental consent, to ensure that they are able to have their gender legally recognised if this is in their best interests. It is our understanding that at the moment, if a young person under 16 did not have parental consent for their application, they could apply to the Sheriff Court for the need for parental consent to be dispensed with, in line with Section 11 of the Children (Scotland) Act 1995[18].

If the process were to be court-based, decisions made in the court should be based on the criteria suggested in Malta’s Gender Identity, Gender Expression and Sex Characteristics Act 2015 in section 7(2)(a) and (b), which say that:

"(a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and
(b) give due weight to the views of the minor having regard to the minor’s age and maturity.[19]"

and in Argentina’s Gender Identity Law Article 5, which similarly states that children should have the right to gender identity and the Conventions on the Rights of the Child and the young person’s views should be taken into consideration in instances where consent of all people with parental responsibility cannot be obtained.[20]

This is in line with current practice in Scotland. The Children (Scotland) Act 1995 Section 11 (7) which details how young people should be included in Sheriff Court decisions around parental responsibility states:

"(7)Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
(b) taking account of the child’s age and maturity, shall so far as practicable—
(i) give him an opportunity to indicate whether he wishes to express his views; and
(ii) if he does so wish, give him an opportunity to express them; and
(ii) have regard to such views as he may express."[21]

However, we think that a court process for trans young people who lacked parental consent for an application for legal gender recognition would not be ideal. Court processes are necessarily adversarial, and we think that it would be unlikely that many young people would feel able to access this process. Instead, we think that there should be provisions made that capable children can make an application to have their gender legally recognised when they lack parental consent. As mentioned above, we are concerned that a capacity assessment for trans young people could reintroduce pathologisation or ‘experts’ to the legal gender recognition process. As such, we think it would be more favourable for a designated person in a young person’s life to be able to confirm their capacity to make the decision.

We have selected option 3 as the best option for the process for under 16s, but we feel strongly that this must include an effective provision for any trans young person under 16 who does not have parental consent but who would be deemed to be capable. We would encourage the Scottish Government to work with ourselves and other experts across the LGBTI sector and children’s rights sector to ensure that this is achieved.

Footnotes:


Marriage and Civil Partnership

7 Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes

If you want, you can give reasons for your answer or add comments.

As noted by the Scottish Government in their additional information, it is currently possible in Scotland to obtain legal gender recognition without the need for
spousal consent. If the new process required the consent of a spouse, this would be a serious reduction in the rights of trans people to obtain legal gender recognition. It is international best practice to not require spousal consent for a trans person to obtain legal gender recognition.

It is completely unacceptable that a spouse could prevent a trans person from being legally recognised as who they are. Obtaining legal gender recognition is simply an administrative process to bring in line all of a person’s documents and records with their gender identity. Trans people can transition in all other social, legal and medical ways without the consent of their spouse. This includes coming out to friends and family as trans, accessing medical transition treatments such as hormones and surgeries, and living completely in their gender. Allowing a spouse to veto a trans person’s application for legal gender recognition does not prevent that spouse from being married to a trans person, it simply allows that spouse to prevent that trans person from accessing their legal rights.

Requiring spousal consent for obtaining legal gender recognition reinforces negative societal attitudes towards trans people. It would enshrine in legislation the notion that being married to a trans person would be so unsatisfactory that the spouse having the right for this not to be the case is more important than the trans person having the right to be legally recognised as who they are. Introducing a requirement for spousal consent would see the Scottish Government seem to validate these negative societal attitudes.

It is entirely unbalanced to allow a spouse to prevent their trans spouse from obtaining legal gender recognition, when it has such disparate impacts on their relative rights and lives. As such, we are strongly opposed to any introduction of a requirement for spousal consent.

As a result of the above arguments, we also agree with the Scottish Government proposals in Annex H that a spouse or civil partner is no longer able to make an application to quash a GRC.

8 Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Yes

If you want, you can give reasons for your answer or add comments.: The Scottish Trans Alliance, as part of the Equality Network, has always campaigned for the introduction of mixed-sex civil partnerships. One of the four calls of our successful campaign for Equal Marriage was that they be introduced, and the call for mixed-sex civil partnerships is the only one that remains to be met following the introduction of the Marriage and Civil Partnerships (Scotland) Act 2014[22]. For more information about why we feel civil partnerships should be opened up to include mixed-sex couples, please see our consultation response to the Scottish Government Review of Civil Partnership[23].

Because it is our position that all couples should be able to access civil partnerships, we are of the view that a couple in a civil partnership should not have to dissolve this or convert it to a marriage simply because one of them wishes to obtain a full Gender Recognition Certificate. Although one spouse in a civil partnership obtaining legal gender recognition makes that civil partnership legally one between a mixed-sex couple, in fact many trans people will have already taken a number of steps to live in accordance with their gender identity before applying. This means that there may already be mixed-sex couples in civil partnerships in Scotland, but simply where one spouse is trans and has not obtained legal gender recognition – so they will be legally seen as same-sex. We think this is another reason for allowing people to remain in their civil partnerships after one spouse obtains legal gender recognition, as there has only been a legal change in the person’s recognised gender.

As a result of the above arguments, we also agree with the Scottish Government proposals in Annex H that a civil partner is no longer able to make an application to quash a GRC.

Footnotes:


9 Should legal gender recognition stop being a ground of divorce or dissolution?

Yes

If you want, you can give reasons for your answer or add comments.: We feel that the conversation has moved on considerably since the Equal Marriage discussions in 2014 around the rights of trans people, their spouses, and what this means for marriage and divorce. Although the issuing of an interim GRC being a ground for divorce or dissolution was retained in 2014, we feel that understanding of trans human rights have changed enough that it is now inappropriate for obtaining legal gender recognition to be considered an action of significant severity to warrant being a specific ground for divorce or dissolution.

Similarly to our arguments to question 7 around whether spousal consent should be required in order to apply for and obtain legal gender recognition, we feel that keeping gender recognition as a ground for divorce or dissolution reinforces negative social attitudes around trans people. Again as mentioned above, legal gender recognition is also much less likely to materially impact on a spouse than many other steps a trans person may take in their transition that are not grounds for divorce. These steps could include coming out to friends and family as trans, accessing medical transition treatments such as hormones and surgeries, and living completely in their gender. We completely support all spouses’ rights to separate from their trans partner for any reason at any time, but making obtaining legal gender recognition a ground for divorce, when many other types of genuinely unacceptable behaviour are not, would seem to explicitly stigmatise trans people.

Other aspects of the 2004 Act
10 Are any changes to section 22 (prohibition on disclosure of information) necessary?

No

If you answered Yes, describe the changes you consider are needed.:

We think that there are already a significant number of exemptions contained within section 22 of the Gender Recognition Act 2004 and The Gender Recognition (Disclosure of Information) (Scotland) Order 2005. We cannot think of any other exemptions that would reasonably need to be added to the requirement to not disclose protected information that has been obtained in an official capacity.

One of the fundamental principles of the Gender Recognition Act 2004 is to protect trans people’s privacy. The ruling of the European Court of Human Rights which led to the introduction of the 2004 Act was based on the fact that not having access to a birth certificate which reflected your gender was a breach of the European Convention on Human Rights Article 8 right to a private life[24]. Having your gender legally recognised is primarily about ensuring that your deeply held personal identity is reflected in law, and that you are able to live in accordance with your identity without people having access to information about your gender history. We think that any additions to section 22 would undermine this foundational principle of creating legal gender recognition processes.

However, we do think that there is widespread misunderstanding of how section 22 operates, and we would support the development of guidance on this, to ensure that it is implemented as intended in the 2004 Act. Two particular areas where this would be of use are around trans people in the courts and data collection. We think that training for the judiciary and greater use of reporting restrictions would ensure that fewer trans people were outed in court proceedings, and this would improve their access to and satisfaction with the criminal justice process. We also know that a number of public bodies don’t think that they can collect data about trans people because of section 22, despite the fact that as long as the person isn’t identifiable this is clearly permitted. We think that these sorts of issues are around implementation and understanding of this section though, rather than any fault with the legislation itself.

Footnotes:

24 European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at http://hudoc.echr.coe.int/eng#{"fulltext":{"CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM":"","documentcollectionid":{"GRANDCHAMBER","CHAMBER"},"itemid":{"001-60596"}}

11 Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes

If you want, you can give reasons for your answer or add comments.:

It is our understanding that the current overseas track for having your legal gender recognition from another jurisdiction recognised in Scotland was created to ensure that only applicants from countries with laws with similar requirements and restrictions as the current GRA were able to do so. As the Scottish Government is proposing moving to a self-declaratory system, in line with international best practice, we see no reason why they would need to keep this track. We would also hope that the Scottish Government will legislate to fully legally recognise non-binary people, and that therefore legal recognition from all jurisdictions, including of non-binary people, could be automatically recognised without the need of an overseas track.

The current overseas track can often cause problems for people, who may be expected to provide expensive translations of their medical reports, or in some cases have to access NHS Gender Identity Clinic services to be re-diagnosed with gender dysphoria despite having no need for medical treatment. It often means that people who may have had to go through an intrusive process to be legally recognised in another country are made to do this again once reaching Scotland. Furthermore, the existence of both an overseas track and a standard track has caused considerable confusion for trans people who have overseas birth certificates but have not received legal gender recognition in any overseas country, as they can mistakenly think they should use the overseas track. We would hope that the overseas track could be entirely removed once a self-declaratory system was implemented, and that legal recognition from all jurisdictions would be recognised automatically.

A public policy exemption would be a satisfactory solution to dealing with exceptional circumstances where gender recognition from another jurisdiction ought not to be automatically recognised. We think it would be appropriate that the Scottish Ministers could decide on a public policy exemption. This would keep the power over recognising legal recognition from another jurisdiction in line with the power to apply for a decision on a GRC to be quashed under the new self-declaratory model, as outlined in Annex H. We think this would ensure equitable treatment of those who had obtained legal gender recognition in other jurisdictions with those who had obtained legal gender recognition in Scotland.

Non-binary people

12 Should Scotland take action to recognise non-binary people?

Yes

If you answered No, and if you want, you can give reasons for your answer.:

We will give all additional information on why we think steps should be taken to recognise non-binary people in answer to question 13.

13 If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.


If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.:

On March 31st 2016, we ran an LGBTI Hustings event jointly with Stonewall Scotland and LGBT Youth Scotland, for the leaders of all of the political parties
during that year’s Scottish Parliament election campaign. During the event, one audience member asked:

“When do you plan on recognising non-binary gender identities in law?”

In response, First Minister Nicola Sturgeon said:

“I think we should, and I think we should do it in the next Parliament, and that’s one of the specific things I think we should look to take forward in terms of reviewing the gender recognition law. I think it is no longer, in this day and age, appropriate for people not to have their perfectly legitimate identity recognised legally, because from that lack of legal recognition comes many of the other problems that we’re talking about; a lack of general recognition in the population, a lack of understanding of the issues and the barriers that people face. I don’t believe, and not just in this issue, I don’t believe generally, that change in the law, very often, in and of itself, solves the problem. Often, most problems take much more to solve than simply changing what’s on the statute book, but very often, you cannot solve the other problems until you take that step of recognising something very clearly in law. So just as we went into the last Parliament, I think many of us hoping, that there would be Equal Marriage by the end of that Parliament, I hope that this is one of the achievements that the next Parliament, by the time we’re sitting here in five years, can boast about as well.”[25]

The First Minister’s response shows a clear commitment to recognising non-binary people legally within this Parliament.

We support Option 4 – full recognition using proposed self-declaration system. We also think that Option 1 and Option 3 would need to be pursued alongside this.

We also think that Option 6 – seeking amendments to the Equality Act 2010 – would be valuable. However, we feel that amendments to the Equality Act would have benefits for a whole range of people, not simply non-binary people. As such, we don’t think that it would be suitable for the Scottish Government to only pursue this option.

We do not think Option 2 is worthwhile as it is merely a symbolic move with no real impact.

We do not support Option 5 as we think that full recognition using the proposed self-declaration system should be part of the current updates to the GRA, and not delayed further.

Option 4 – full recognition using proposed self-declaration system

Human Rights Principles and International Best Practice

Unlike for trans men and women, there is currently no process for non-binary people to apply to have their gender legally recognised. This means that non-binary people are unable to get their birth certificates changed to reflect their gender identities. It also means that in the eyes of the law they are either a man or a woman – despite them knowing that this is not an accurate reflection of the way they feel about their own identity.

The process to obtain legal gender recognition currently available to trans men and women was introduced in the UK as a consequence of a ruling by the European Court of Human Rights. This ruling stated that not being able to have your gender legally recognised is a breach of your Article 8 right to a private life[26]. In making that decision, part of the court’s ruling was:

“The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance… No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”[27]

In the fourteen years since that ruling was made, huge progress has been made in Scottish politics’ approach and commitment to trans equality. However, a continued lack of recognition of non-binary people leaves them in the exact position that trans men and women were in before this ruling and the subsequent introduction of the Gender Recognition Act 2004, with no way to be legally recognised as who they are. Although extending legal gender recognition to non-binary people will undoubtedly have consequences for other areas of legislation, this reflects the situation when the case of Goodwin vs UK was taken to the European Court of Human Rights. We feel that similarly to the ECHR decision in that case, the right to be recognised and ‘live in dignity and worth’ outweighs these other considerations.

The Yogyakarta Principles, as outlined by the Scottish Government in their additional information to this question, also assert how crucial a right to gender identity is for all individuals:

“Everyone has the right to recognition everywhere as a person before the law…Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”[28] – Yogyakarta Principles (emphasis added)

Furthermore, the World Professional Association for Transgender Health recently updated its statement on legal gender recognition, where it called for numerous best practice approaches to be taken, including recognising non-binary people:

“WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose.” – World Professional Association for Transgender Health Identity Statement[29]

By only allowing people to be recognised as a man or a woman, current legislation implies that other gender identities – non-binary identities – are less valid and less valued than these. It also means that non-binary people do not have the same access to their right to be recognised as who they are as all other Scottish citizens, and in keeping with human rights principles.
Malta[30], New South Wales[31] (Australia), Northwest Territories[32] (Canada), and California[33] and Oregon[34] (USA) all allow non-binary people to be recognised legally on their birth certificates. The Constitutional Court in Germany also recently made a ruling that non-binary people have a right to legal recognition of their gender[35]. There has clearly been a shift in recent years to acknowledging that only legally recording people as men or women denies some people their right to recognition and privacy. The Scottish Government is committed to gender recognition legislation “in line with international best practice”[36]. This now clearly includes legal gender recognition for non-binary people.

The Scottish Government has indicated in its additional information to this question, and by consulting on the topic at all, that it believes non-binary people’s identities are legitimate and real. The Scottish Government has also indicated it has reached a position where it is firmly behind the rights of trans men and trans women to have their gender identity recognised legally by a self-declaratory system, underpinned by its understanding of human rights principles and international best practice. We feel that in using these principles, it follows that the government should equally support this right for non-binary people, as all of the human rights arguments apply equally. By pursuing any solution to recognising non-binary people that is less than complete parity with the system proposed for trans women and trans men, the Scottish Government will be making a statement that non-binary people are not equal to trans men and trans women, and will be extending rights to some transgender people while continuing to withhold them from others. This is why we think anything less than full recognition using the proposed self-declaration system is unacceptable.

Consequential Changes

We will outline all of our thoughts on consequential changes in our answer to question 14.

Option 1 – changes to administrative forms

Alongside full legal recognition of non-binary people, we think that option 1 would be valuable, as so few public bodies currently monitor gender or design forms in a way that is inclusive of non-binary people.

In our survey of non-binary people’s experiences in 2015, 58% of respondents said that forms ‘never’ used language that allowed them to accurately describe their gender, compared to only 1% who said they ‘always’ did[37]. This was across almost all public services, with 77% saying it had happened at their GP, 76% in education, 74% in general NHS services, 64% in other public services, 58% in mental health services, 41% in sexual health services and 27% with the police[38]. Often, the first thing you will be given when trying to access a service or apply for a job is a form requesting information about you – and normally, the first question on this form will ask you your gender. The lack of forms designed with an option for non-binary people means that many people’s first experience with a service is one of exclusion. Along with Stonewall Scotland, we have published monitoring guidance which outlines how to ask questions about gender that include non-binary people[39]. We would fully support the Scottish Government in showing leadership around inclusive forms and monitoring.

We think that often, collecting and monitoring data on gender is valuable and important, particularly where this is done to measure whether progress is being made on sexism experienced by women. We are fully supportive of collecting and reporting on gender disaggregated data whenever this is for a useful purpose, as long as this is done in a way that includes non-binary people. At the moment, data around gendered difference is less accurate, as non-binary people are forced to select an answer that doesn’t reflect their identity. Ensuring that administrative forms and gender equality monitoring are designed in ways that include non-binary people will improve rather than reduce the quality of the data produced.

We don’t think it would be acceptable for the Scottish Government to only pursue option 1, however. As we outlined above in the section on human rights principles and international best practice, we feel that non-binary people have an equal right to access legal recognition of their identity as trans men and trans women, and want to see this enacted by the Scottish Government.

Option 3 – updates to identity documents

“I would feel far more comfortable if my passport, driver’s licence, etc., said my actual gender rather than the one I was assigned at birth. The gender on them currently feels wrong, and I feel like having my real gender on those items would be a big step in making myself and others feel more comfortable with our identities, and in making sure people in general know about and acknowledge non-binary people.” – respondent to our non-binary survey[40]

Alongside full legal recognition of non-binary people, we think that the Scottish Government would need to ensure that identity documents could record people as non-binary. At the moment, receiving a GRC does not automatically update other identity documents – the process of being legally recognised is not linked to the various other administrative process for issuing ID. It would be important therefore that the Scottish Government seeks to ensure, as far as possible, that as well as full legal recognition, there were provisions in place to ensure passports, driving licences etc. could also record people as non-binary. Otherwise, non-binary people may end up legally recognised as who they are, with that gender recorded on their birth certificate, but with other identity documents that were unable to match this.

On paragraph 7.22 around CHI numbers, it is important to note that there may already be some problems with NHS Scotland systems that rely on the gender associated with a CHI number to issue screening letters, allow bookings for certain types of appointments and treatments etc. This is because many transgender men or transgender women may have a CHI number that reflects their gender identity, but need to access medical treatment that reflects their physical sex characteristics. It would appear that greater flexibility around NHS systems would be valuable, reducing the number of screening information, treatments etc. that can only be accessed or generated by or for patients with CHI numbers that are considered to ‘match’ those interventions. This does not seem to be a non-binary specific issue, rather one of the systems being designed around an assumption that all patients can have their sex characteristics assumed from their gender identity.

We do not feel that it would be acceptable for the Scottish Government to only pursue option 3, however. Passports and driving licences are issued on a UK-wide basis, and are not within devolved competence of the Scottish Government. Consequently, we don’t feel that this option alone would significantly advance the rights and recognition of non-binary people. Also, as we outlined above in the section on human rights principles and international best practice, we feel that non-binary people have an equal right to access legal recognition of their identity as trans men and trans women, and want to see this enacted by the Scottish Government.
We agree with the position of the Equality and Human Rights Commission, cited by the Scottish Government in their additional information to this question, that the gender reassignment protected characteristic should be broadened out to include all people who face ill treatment as a result of their gender identity. We gave similar evidence around the need to amend the protected characteristic in our own evidence to the Women and Equalities Select Committee[41].

We think it is important that protection is on the basis of an inclusive definition of ‘gender identity’ which includes someone’s gender expression. Gender identity is defined in the Yogyakarta Principles as:

“each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

The term gender identity has been adopted by the United Nations[42], European Union[43] and the Council of Europe[44]. We recommend the Scottish Parliament and all Scottish government departments use the Yogyakarta Principles definition of gender identity in all equality legislation, reports and policy development.

At the moment, the protected characteristic of gender reassignment does not provide adequate coverage for everybody, because it relies on there being a ‘process’ or part of a ‘process’ for someone to be covered. Somebody who came out as non-binary at work, but who did not plan to change their name or pronouns, and who continued to express their gender as they had done previously, may not be considered to have the protected characteristic of gender reassignment as there is no ‘process’ which they are planning to undergo, are undergoing, or have undergone. If colleagues were to then call that person names because of their gender identity, to verbally abuse them, or to exclude them from workplace events, they may have no protection from that discrimination. In our non-binary survey, 42% of respondents had faced harassment at work, so improving the protected characteristic to ensure they have adequate protections is crucial[45].

Similarly, a person who was discriminated against because they occasionally cross-dress may not be protected under the current wording. For example, a man who sometimes went to work wearing “feminine clothing” and make up, but who did not have any intention to transition, and who experienced discrimination and harassment at the workplace because of this, may not be covered. Although people can be covered if they are discriminated against because they are perceived to have a protected characteristic, in this instance discrimination would very clearly be not on the basis that he was thought to have the protected characteristic of ‘gender reassignment’ but entirely because he occasionally cross-dressed.

Thus, amending the protected characteristic will ensure adequate protection for a broad range of people who experience discrimination on the basis of their gender identity or gender expression, rather than just those who are proposing to undergo, undergoing or have undergone a process for reassigning their sex. This would clearly ensure better protections for all transgender people, including non-binary people, and also cross-dressing people.

However, it is our understanding that many non-binary people are already covered by the protected characteristic of gender reassignment. The protected characteristic does not specify that people must identify as men or women, or that reassigning sex refers specifically to the other binary sex. Many non-binary people clearly propose to, are undergoing or have undergone any part of a process for reassigning their sex. For example, they may ask colleagues to use a new name and pronouns for them. They may access gender identity services to have medical transition treatments – 31% of respondents to our non-binary survey were currently using or had ever used gender identity services[46].

The protected characteristic of ‘gender reassignment’ is broadly intended to protect transgender people from discrimination. Non-binary people are trans[47], so they do receive protection from discrimination rooted in transphobia (within the limitations set out above around the current wording). In sections 7.37 – 7.41, the Scottish Government states that amending the protected characteristic from gender reassignment to gender identity may have an impact on the provision of services. In fact, it is unclear if it will have this impact, because the Equality Act currently does not require the provision of services specifically for people with the protected characteristic of ‘gender reassignment’ and would not for an amended protected characteristic of ‘gender identity’. As noted above, some non-binary people are already covered by the ‘gender reassignment’ protected characteristic, and this has not meant that specific service provision has been necessary.

We would want non-binary people to have equal protection from discrimination as men and women, but think that this is probably achieved by amendments to different parts of the Equality Act, and is outside the scope of this consultation, and reforms to the Gender Recognition Act.

We strongly oppose the building of a non-binary prison, as we oppose any expansion of the current prison system or number of people in custody in Scotland. We do not think that this is a fair representation of the costs of introducing recognition of non-binary people.

The points discussed in 7.4.1 about reasonability in particular circumstances seems fair, and we would welcome discussing with the Scottish Government how guidance could ensure that the right balance was reached. Non-binary people are already using services despite a lack of legal recognition, and these services are finding ways to adapt and include people that is suitable and works for both the service and the non-binary people using it.

To summarise, we are in favour of the protected characteristic of gender reassignment being amended to gender identity, as it will improve the protections of all transgender people, including non-binary people, and also cross-dressing people. However, we think that this is probably outside of the scope of the work on reforming gender recognition law. The Equality Act is also a reserved piece of legislation, so it is unclear that any changes could be achieved. Furthermore, we are concerned that the Scottish Government has not understood that some non-binary people are already covered by the gender reassignment protected characteristic, and that amending this would not necessarily have the impacts outlined in their additional information.

Footnotes:

25 LGBTI Hustings: https://www.youtube.com/watch?v=FFykvwKg1lo
28 The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity

30 http://www.wpath.org/ 


38 Ibid.


44 ‘Recommendation CM/Rec(2010)5 of the Council of Europe Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity': https://wcd.coe.int/ViewDoc.jsp?id=1606669


46 Ibid.

47 Our definition of transgender is ‘An inclusive umbrella term for anyone whose gender identity or gender expression does not fully correspond with the sex they were assigned at birth’

14 At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Yes

If you answered Yes, describe the impacts you have identified:

Foo

We think that there will be a number of places throughout legislation that make references specifically to ‘women and men’, ‘both sexes’, ‘opposite sexes’ and so on where it intends for this language to include everyone. We think it could be worthwhile considering amendment to the Interpretation Act of 1978. The Interpretation Act was intended, among other things, to resolve historic sexism in the writing of legislation:

‘In any Act, unless the contrary intention appears,—
(a)words importing the masculine gender include the feminine;
(b)words importing the feminine gender include the masculine;’[48]

This could be amended— to neatly include non-binary people in legislation that is written using gendered language but which doesn’t intend to treat people differently.

Family Law

Whilst we agree that legally recognising non-binary people would have consequences for family law, there are already many areas of family law that do not work as a result of the Gender Recognition Act 2004. For example:

• A transgender man who has received a gender recognition certificate and gives birth to a child is both legally a man and legally a mother
• The Human Fertilisation and Embryology Act uses language that assumes that all people who carry babies and give birth are women, and all people who can provide sperm are men. This is not the case, including in terms of legal sex, in the UK as a result of the existing GRA

It is our view that law around parentage, the relationships between parents and children, and the rights and responsibilities of parents could remain the same after legal recognition of non-binary people, in so far that this could continue to correspond directly to the role an individual played in conceiving a child (where this role was related to their sex characteristics or reproductive capabilities). However, language within these laws may need to be updated to be clear that it is the role the person has played, and not the gender of the person, that determines this. Assisted reproductive technologies are rapidly changing, and we think that it is likely that lots of legislation in this area will need to be reviewed as a result of this – we think these broader exercises could be used to look at how all trans including non-binary people could be included in these. As noted above, as these issues already exist as a result of the Gender Recognition Act 2004 within family law, we think it would be unacceptable to decide not to legally recognise non-binary people on this ground.

Marriage Law

We agree with the Scottish Government’s observations about Marriage Law. We would be happy for provisions to be made for those religious bodies and celebrants who did not wish to marry non-binary people. However, there is already a provision for religious bodies to not marry anyone who is a transsexual (as defined by the Equality Act 2010) and this would certainly include any non-binary person who had had their gender legally recognised (as they would have
undergone any part of a process for reassigning their sex), if additional provisions were also felt necessary that would be fine.

Crime – Gender-specific offences

We agree with the Scottish Government’s observations about gender-specific offences, and support that legislation such as the Criminal Law (Consolidation) (Scotland) Act 1995 is reviewed to ensure that obtaining legal gender recognition would never mean a person was unable to be held accountable for a crime, as was done with provisions in the original Gender Recognition Act 2004. This may not require any amendments to the law because of the existing section 20 in the GRA on gender-specific offences.

Victims of crime

We think that the current exceptions for complying to requests to specify the gender of an interviewer in the Victims and Witnesses (Scotland) Act 2014 would mean that where there were no non-binary police officers, it would be clear that it was not reasonably practicable to provide a non-binary officer (if this had been requested). However, we would be happy to work with the Scottish Government if they felt these exceptions require strengthening.

We appreciate that there may be a number of laws or policies that exist that have given people the right to choose that a person who provides a service to them is of the same gender they are (for example, being searched at airport security). We think that often, this is just because these laws or policies are formulated on the assumption that everyone is a man or a woman, so this language was considered appropriate. We don’t think that non-binary people will expect to be entitled, in these sorts of scenarios, to be able to specify that the person who provides a service to them is non-binary. As the Scottish Government noted, current estimates have 0.4% of the UK population identifying as non-binary, so there would necessarily be times where it wasn’t practicable for a non-binary person to provide a service[49]. However, they should be able to specify if they would prefer a man or a woman, and this should be simply based on their decision, not any other criteria (such as their sex characteristics or gender assigned at birth). We would be very happy to work with the Scottish Government to identify these sorts of situations, and update language appropriately so they refer to a ‘choice’ rather than a ‘match’ for non-binary people.

Similarly, we are keen that full legal recognition of non-binary people does not have any impact on legislation which is designed to improve the rights of women or correct sexism. We have not been able to identify any legislation where this would be the case, but are keen to work in cooperation with women’s organisations to ensure that implementation of full legal recognition for non-binary people did not have any unintended consequences.

Footnotes:


Conclusion

15 Do you have any comments about, or evidence relevant to:

Not Answered

If you answered Yes, add your comments or evidence.:

a) We recognise that the government has acknowledged that it is difficult to be certain of the costs of implementing non-binary recognition, both because the option that will be chosen and subsequent consequences are hard to know with certainty.

One area of particular focus is around the costs of updating I.T. systems. We are increasingly finding that organisations in both the private and public sector are already updating their I.T. systems to include non-binary people, both in terms of options for recording gender and also for titles available, despite non-binary people not being legally recognised. Whilst legal recognition would mean this process may need to be accelerated, this could likely be rolled into scheduled updates, particularly for many large organisations. We would not be seeking immediate update requirements following legal recognition of non-binary people, but would want these to be implemented within a reasonable time period.

We would like to reiterate that we strongly oppose the building of a non-binary prison, as we oppose any expansion of the current prison system or number of people in custody in Scotland. We do not think that this is a fair representation of the costs of introducing recognition of non-binary people.

Non-binary people are already using services despite a lack of legal recognition, and these services are finding ways to adapt and include people that is suitable and works for both the service and the non-binary people using it. We do not believe there would be a demand for the widespread provision of non-binary sex-specific services.

b) We broadly agree with the Government’s partial EQIs on sexual orientation and gender reassignment that the proposed changes will have a positive impact for people with these protected characteristics. We appreciate that they are currently ‘partial’ and would like for these to be developed and done in greater depth going forward, and would welcome the opportunity to be included in this work.

Scottish Trans Alliance is part of the Equality Network, an organisation that works for lesbian, gay, bisexual transgender and intersex equality and human rights in Scotland. Whilst reforms to the Gender Recognition Act 2004 are mostly of benefit to trans people, we feel strongly that the proposed changes will benefit all LGBTI people. Many proposals included in this consultation, and the hopeful outcome that this leads to the Scottish Government introducing legislation in line with international best practice, will contribute to creating a society which celebrates, includes and legislates for people who may be outside of typical norms and assumptions around identity, attraction and bodies. Whilst the new legislation in many ways will only have an impact on a particular group of people with regards to a change in identity documents, we see this as a small piece of our broader purpose to create a Scotland that is welcoming and inclusive of all LGBTI people.

Throughout this submission, we have given detailed evidence about why the proposed changes would have a positive impact on people with the protected
characteristic of ‘gender reassignment’ and the transgender community more broadly.

Under “Marriage and Civil Partnership”, stage 1 of the EQIA considers the impact of dropping “the requirement for a married applicant to obtain spousal consent when obtaining legal gender recognition”. This is a misunderstanding of the current law – there is no such requirement currently in Scotland; see section 4E of the GRA. Therefore there will be no impact, except a small potential positive impact on a small number of married trans people in simplifying the process for obtaining gender recognition without spousal consent.

We are not in a position to be able to comment in great detail on the other partial EQIAs, but we note that the women’s sector response felt that they had not been adequately consulted on the EQIA on sex. We would encourage the government to engage with these organisations to make sure this is improved going forwards.

c) We fully support Together’s comments on the partial Child Rights and Wellbeing Impact Assessment

16 Do you have any further comments about the review of the Gender Recognition Act 2004?

Yes

If you answered Yes, add your comments.: The Scottish Government’s consultation has sparked a wider discussion about transgender people, rights and equality in society, not all of which has been positive about the proposed changes to the Gender Recognition Act. We know that there will likely be many responses to this consultation that deal with complex issues and topics that fall greatly outside of its scope. Whilst we would love to be able to anticipate and rebut them all, one particular area we would like to address is the emerging public conversations around where trans equality and women’s equality overlap and how they interact.

Conversations around the distinctions between sex and gender, where exactly trans rights fit within feminism, and other similar topics that this consultation has prompted discussion of, are undoubtedly of interest. However it is important to acknowledge that transgender people exist, and that our day-to-day lives and our need to be able to live with privacy, dignity and free from discrimination can feel very far removed from such discussions. This consultation seeks to improve the way trans people are able to update the gender on our birth certificates, and to extend the number of trans people who are able to do so. Whilst we think that there is undoubtedly much more to unpack and discuss around what a trans inclusive world really looks like, it is important that we do not lose sight of the fact that this consultation is mostly about improving access to an existing legal process for a marginalised group of people.

We think it is very important to reiterate that this consultation asks only how to improve a process of legal gender recognition that already exists in Scotland. Since 2004, some trans men and women have been able to have their birth certificates changed to reflect their personal identity and how they live their lives. This includes transgender people who have not had any medical transition treatments, such as hormones and surgeries. Much of the negative coverage of the changes has opposed realities that have in fact existed for well over a decade in Scotland, and that have not had a negative impact on the rights of others. It is unacceptable that some people are arguing for a reduction of rights for transgender people.

Similarly, the Equality Act 2010 does not exclude transgender people from sex discrimination protection that corresponds with their gender. Gender reassignment protections were initially won as a form of sex discrimination, and continue to be such within EU law. For many years in the UK, gender reassignment protections were part of the Sex Discrimination Act. We are not proposing changes to how sex discrimination protections work, but think it is worthwhile to note that some people are opposing what is in fact the status quo, and has been for many years, rather than something that would be a consequence of these reforms.

We would like to state strongly our support for and solidarity with feminist movements all across Scotland, and our commitment to working for transgender equality that is underpinned by feminist principles.

The consultation has also prompted widespread discussions about transgender young people. Much of this has focused on transgender young people’s use of gender identity clinics and access to medical interventions, something that the Scottish Government notes is not connected to legal gender recognition.

However, another common misconception has been that gender non-conforming young people are being encouraged to transition by trans organisations. This is simply not the case. We do not believe that a person who is gender non-conforming must be trans. Our position has always been that young people should be supported to express and explore their gender without any pressure or external expectations. Similarly, it does a disservice to the trans community to imply that we uphold gender stereotypes more than others, or that we reinforce gender stereotypes by transitioning. Many trans people do indeed adhere to gender stereotypes once they have transitioned to live as they feel comfortable – but many non-trans people adhere to gender stereotypes too. Many trans people are also gender non-conforming after they have transitioned to live as they feel comfortable. As a trans equality organisation, we believe strongly that gender stereotypes harm everybody – and strive to work for a world in which they are dismantled. This does not run counter to also recognising and respecting trans people’s identities, but in fact goes hand in hand with it. If you believe that breaking down gender stereotypes is key to building a better society, then we agree, but we think this includes the gender stereotype that the body you were born with should define the way you experience and express your gender.

A study that is often quoted by those who argue that young people should not be supported or affirmed when identifying as trans is that 80% of trans young people desist by puberty. A closer reading of the methods used in this study shows this simply isn’t the case. The study did not differentiate between young people who had consistent, persistent and persistent gender dysphoria, and those who were simply considered to be too masculine or feminine for their gender. The study actually showed that where children were consistent, persistent and persistent this was a very good predictor of continued trans identity in puberty. Many of the other children who were included in this study were simply gender non-conforming, and therefore they never ‘desisted’ from a trans identity, as they had never had one. Many of the young people in the study were also actively discouraged from displaying any gender non-conformity. It seems clear that many of these young people were enrolled in the study specifically because their parents were seeking reparative therapy for their child’s gender non-conformity or their apparent non-heterosexual sexual orientation. It is frustrating that this study is then used to argue against supporting trans young people when it makes use of the very conflation that those who cite it seem to disrupt.

There is a huge difference between a young boy who likes wearing princess dresses, trying on his mum’s make up and whose favourite colour is pink, and a young trans girl who feels intensely distressed that people see her and treat her as a boy. We do not think that a person’s interests, likes and dislikes are a predictor for their gender identity, and we do not think that gender non-conforming children need to transition. We do however think that all young people,
including transgender young people, should be supported, respected and affirmed, no matter how they experience or express their gender.

Fees

There is currently a £140 fee to apply for a gender recognition certificate, which we think is prohibitively expensive. We think it should be free to apply for a GRC, to ensure that there is fair and equal access for everyone. Legal recognition of your gender identity is a human right. We do not think that anyone should incur a fee for accessing their human rights.

Intersex people

We welcome the fact that the Scottish Government will be consulting with intersex organisations and people on a broad range of equality issues, including how any updated gender recognition process may work for them. We have not commented on intersex people’s use of or needs for access to gender recognition in this consultation, as we will do so in greater depth then.

About You

What is your name?

Name:
Vic Valentine

What is your email address?

Email: 

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:
Equality Network and Scottish Trans Alliance

If you are responding as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, you can do so here.

If you are responding to this consultation as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, please do that here:
This response is made jointly by the Equality Network and Scottish Trans Alliance.

Equality Network & Scottish Trans Alliance, 30 Bernard Street, Edinburgh, EH6 6PR
www.equality-network.org www.scottishtrans.org

The Equality Network is a national charity working for lesbian, gay, bisexual, trans and intersex (LGBTI) equality in Scotland. Scottish Trans Alliance is the Equality Network project to improve gender identity and gender reassignment equality, rights and inclusion in Scotland.

Our response has been informed by online, telephone and face-to-face discussions with trans people in Scotland, including facilitating several discussion events specifically to hear trans people’s views about the consultation paper. These discussion events were held in Aberdeen, Edinburgh, Galashiels, Glasgow, Inverness and Perth during the consultation period (Nov 2017 to Feb 2018 inclusive).

Where are you resident?

Scotland

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name