



Consultation Gender Recognition (2004)Act

February 2018

Giving all children in Scotland an equal chance to flourish is at the heart of everything we do. By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland. We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

As a children's rights organisation we aim to uphold the rights of children and young people across Scotland. As such we are very pleased to have the opportunity to respond to the consultation on the Gender Recognition Act and promote the right to identity of all LGBT children and young people.

One of Children in Scotland's strategic priorities is to challenge inequalities. We are currently working with LGBT Youth Scotland to achieve our Silver LGBT Charter of Rights accreditation. Our aim is to make our work environment fully inclusive for LGBTI+ people, both in terms of the direct work we do with children and young people but also internally for staff and our adult partners. We are also working to strengthen the children's sector externally through our partnerships and with our learning and events programme. Ultimately, we aim to raise awareness of LGBT issues in Scotland and create a mutually

supportive environment for children and young people to grow up in. This includes improving our own practice, influencing the policy sphere and also by providing our partners across the sector with the knowledge and tools to ensure all the children and young people have an equal chance to flourish.

Children in Scotland Survey

In February, we hosted a successful conference in partnership with LGBT Youth Scotland. *An Equal Future: Next Steps for Including LGBT Children and Young People* looked forward to how Scotland can become a truly inclusive environment where LGBT children and young people are meaningfully included. We took this opportunity to gather opinion from delegates in relation to Q5 & Q6 of this consultation. We received 29 responses to this survey, the responses to which will be reflected in our response to this consultation.

Question 1

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.

Do you agree or disagree with this proposal?

As a children's rights organisation we strongly support a model that places children and young people at the heart of the decisions about gender, and as such we are supportive of a self-declaration system for legal gender recognition.

Article 8 of the UNCRC gives children the right to an identity, while Article 12 gives them the right to be heard in decisions that affect them. A self-recognition approach to legal gender recognition would further children's rights in both these areas.

The current model that requires medical evidence for children and young people to receive legal gender recognition can also prove to be humiliating, expensive, time-consuming and complex¹. This is clearly in breach of article 1 on the basic human right to dignity and can be harmful to their health and wellbeing.

At present it costs £140 per application for gender recognition, and up to £80 for each medical report². This current system of a medical model of gender recognition may discourage young people from applying due to financial cost associated with it. Indeed, evidence from the Scottish Trans Health conference highlights the dissatisfaction with the financial costs associated with the medical model of gender recognition.³

Since young people will often be reliant on their parents for money to cover the financial costs, a cost neutral model is vital to promote the rights of the child and ensure they have the ability to exercise their right should they wish to do so.

This may prove to be particularly important where there is a disagreement between parents and the young person and the parents are unwilling to finance the medical procedure. **Ultimately, we see the rights of parents and children in such situations as being mutually reinforcing and feel that parents are a key part of the gender recognition process for children and young people.** However, we recognise that there may be disagreements between parents and young people and a self-recognition approach would support children and young people in these situations.

It is however essential that children, young people and parents have access to the necessary support to make informed choices about gender. Children and young people need to understand their rights from a young age and also be given information about what support is available and where to access this. It is also vital that this extends to parents, so they can support their

¹ Briefing provided by LGBTYS, Scottish Trans, Equality Network & Stonewall Scotland

² Briefing provided by LGBTYS, Scottish Trans, Equality Network & Stonewall Scotland

³<https://www.scottishtrans.org/wp-content/uploads/2013/11/Scottish-Trans-Health-Conference-Report.pdf>

child through the process and promote their best interests. We know children and young people see their parents as a key support mechanism and are likely to want to discuss their gender and any issues that go alongside it with them. This is particularly important as LGBT Youth Scotland's recent research highlights the variety of mental health issues faced by transgender young people⁴. Parents have a key role in supporting children and young people with these issues.

We believe a self-recognition system will reduce stigma around gender and create a more inclusive and supportive environment for transgender children and young people. This should help improve the outcomes for transgender children and young people longer-term. Research by LGBT Youth Scotland found that young people who felt accepted in their community were far more likely to be employed, in education and confident in reporting hate crime to the police. They were also less likely to consider themselves to have a mental health problem.⁵

The Scottish Government also must recognise that a self-recognition system will not promote inclusivity on its own. The Scottish Government should also explore how gender identity, sexual identity and recognition can be incorporated into the delivery of Personal and Social Education to develop further understanding among children and young people. There is clear evidence that LGBTI+ bullying in Scotland's schools is extremely prevalent⁶. This suggests Scotland's school environment still has some way to go to be fully inclusive for LGBT children and young people. We are concerned that at present the school environment is not supporting the health and wellbeing strand of CfE and GIRFEC. An inclusive, rights-based approach to PSE from a young age could increase understanding and tackle bullying and help rectify this in the longer-term.

⁴https://www.lgbtyouth.org.uk/files/documents/Life_in_Scotland_for_LGBT_Young_People.pdf

⁵<https://www.lgbtyouth.org.uk/policy-research>

⁶https://www.lgbtyouth.org.uk/files/documents/Life_in_Scotland_for_LGBT_Young_People.pdf

Question 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?

Children in Scotland is not convinced of the need for a declaration confirming that applicants will live in acquired gender until death. This seems particularly unnecessary given the right to self-recognition does not come with any commitment to a medical transition.

We are uncomfortable with such a strict proposal as it places a great deal of responsibility and pressure on young people and the decision they are making. As we have identified, transgender young people often experience mental health problems. Such a strict proposal appears likely to cause stress and anxiety and as such potentially exacerbate these issues. It could also act as an unnecessary deterrent to LGBT children and young people applying and they may then continue to experience mental health problems as a result of gender dysphoria.

Furthermore, a young person who is considering obtaining legal gender recognition may feel trapped and confused and so may not fully consider the full ramifications of the process. As such the proposal appears to misunderstand the issues faced by transgender young people and how to support them through this.

Ultimately, Children in Scotland sees no problem with multiple gender changes throughout life. In many cases the acquired gender will be for life, but for many the idea of gender is fluid. We also feel that the declaration could have unintended consequences for the mental health of transgender young people, seeking multiple gender changes may actually be an indication that an individual continues to need extra support and such a declaration may limit access to such support.

Question 3

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

Children in Scotland does not think there should be a limit on the number of times a person can get legal gender recognition. Although other countries, such as Colombia and Malta, do limit the number of times a person can have their gender recognised, we are unclear about the need to cap this, particularly when the Scottish Government consultation provides no evidence that it will be abused.

As we have identified, gender is an increasingly fluid concept and limiting change of legal recognition may exacerbate mental health problems. If a person changes their gender an 'excessive' number of times, this may suggest that the individual requires additional support. We believe the focus should be on ensuring the support is available rather than placing legal limits on individuals.

Question 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?

Children in Scotland believes that any self-declaration system for legal gender recognition should be open to everyone, and that not being born in Scotland should not mean that an individual is not entitled to the same rights as someone who was born here. Children and young people have rights regardless of their background. Gender dysphoria and the mental health issues that often occur alongside are also not simply issues faced by children and young people born in Scotland.

We are concerned that option A would not be in keeping with Scotland's commitment to be an inclusive and tolerant country⁷. We are unclear as to why rights to self-recognition for children and young people who have

⁷ <http://www.gov.scot/Resource/0052/00524214.pdf>

arrived here from another country would be restricted. We are particularly concerned about the impact this could have on children and young people who may already have escaped human rights abuses in other countries.

Question 5

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16.)

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?

As we have identified throughout our response, Children in Scotland is firmly committed to children's rights. Article 12 of the UNCRC identifies that children should be heard on matters that affect them, Article 8 also outlines a child's right to an identity.

As such we are strongly in favour of young people aged 16 and 17 being able to apply for and obtain legal gender recognition for their acquired gender. This view was supported by 100% of those who attended our conference and responded to our questionnaire.

"Young people should have the right to be free of barriers to their self-expression and happiness." (Respondent to Children in Scotland Survey)

As we have previously identified in this response, issues of gender identity have a real and direct impact on children and young people's lives and their emotional and social wellbeing.

Young people have the right to make a number of other important decisions from the age of 16, including to marry and to join the armed forces. We are unclear as to why children and young people who are 16 should be

able to make life altering decisions to marry or join the armed forces but not about gender. Once again attendees at An Equal Future also agreed with this view:

“At 16, young people are allowed to have a lot of legal control over their life so should have control over something which has such a big impact on their daily lives.” (Respondent to Children in Scotland Survey)

LGBT Youth Scotland’s research has shown the importance of being part of the LGBT community in supporting the positive health and wellbeing of LGBT young people. Legal recognition is in our eyes a key step in supporting them to access this community. However, legal recognition is also vital in and of itself as a right that must be fulfilled. It should also help tackle issues of stigma and bullying and supports trans young people to access many entitlements.

“It is important that young people have an opportunity for their identity to not just be socially recognised but to have the legal backing and protections they deserve.” (Respondent to Children in Scotland Survey)

However, it is also vital that the appropriate support systems for young people choosing to make this decision are put in place in order to ensure that they are able to make a decision that best meets their needs. The Scottish Government must consult with children and young people to identify how to provide this support.

We know that the process is a significant and complex experience for many transgender young people, and as such anyone going through the process should have access to free support to talk over any issues. While many who have a supportive adult will turn to them, it is important that independent support is also available. In this regard it is also important to provide support to parents throughout this process. We know this may prove a challenging

time for them and without support they may not be able to fully support their child.

Question 6

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

Please select only one answer.

Option 3 – parental application

Option 5 – applications by capable children

Children in Scotland supports a hybrid of options 3 and 5, however there were mixed opinions on this question among the small sample of respondents to our survey. See Table 1 below for the responses of those at our conference.

Table 1:

Option	No of Respondents (Total number = more than 29 as some respondents chose more than 1 option)
Option 1 –	2
Option 2 –	0
Option 3 –	5
Option 4 –	3
Option 5 –	13
None of the above	3
No response –	3

Children in Scotland recognises that children start to explore gender identities from before the age of 16, often from a very early age. We therefore support a system that puts in place provision for children and young people to have their gender recognised before the age of 16 if they wish to pursue this. This is key in fulfilling their rights and could also be key in accessing support and preventing mental health problems.

However, we know this is an extremely complex decision for children and young people and as such would support a model that takes into account the capacity of the child to make these decisions. This position was echoed by respondents from An Equal Future;

"I feel that younger people who are capable and able to share their views and voice, should have the right to self-identify." (Respondent at Children in Scotland Conference)

"Children are capable of making the decision for themselves. They will know their own mind/bodies and it is also important to recognise that not allowing children under 16 to make the decision will impact on their mental health."
(Respondent at Children in Scotland Conference)

However, we need clarity on how capacity would be assessed and recognise that there are challenges around this, for example who would conduct a capacity assessment and will young people want to undergo such a process. It may be worth exploring with children and young people how they would wish the process to take place.

The key point for Children in Scotland is what is deemed a capable child. In our view all children should start as being assumed to have capacity and the process to identify capacity should be used to ensure support, including from parents/carers. One delegate at our conference made a similar point;

"Young people are capable of making mature decisions, regardless of age. They are also experts in their own lives and should have a voice in the label of their gender." (Respondent at Children in Scotland Conference)

For Children in Scotland, having a decision about capacity in this sense is not then about constraining the rights of children and young people but instead

about access to support and information to ensure that the transition process is as easy as possible for young people.

What is also important here is that the process is not treated as a medical assessment. It should involve rights-based engagement work that places the young person at the centre of the process, to ensure they understand the process and the issues and also that they receive the necessary support throughout. The end goal here should be that all children are able to be recognised as the gender they identify as, but also ensuring they are fully supported to achieve this.

We have also noted throughout this response that parents have a key role to play in supporting children and young people through the process. Therefore, we support there being a role for parental consent to be sought as best practice.

However, we know that while many parents are very supportive of their children's decisions around gender identity, in some circumstances there may be conflict between parents and children. As a delegate at our conference noted;

"Option 3 seems logical but it doesn't take into account relationships. Tricky!"

(Respondent to Children in Scotland Survey)

"Parental applications assume there will always be parental support – need something in place for the other young people."

(Respondent to Children in Scotland Survey)

If for whatever reason a parent blocks a child from making a decision, those children may need their own process for achieving gender realignment. This is where a child's capacity to make informed decisions is crucial. Indeed, having a decision or process about the capacity of the child as identified earlier in this response could also be used to ensure parents receive support in this area.

This may also be relevant for children and young people who have a corporate parent. We would query whether in this situation a corporate parent is well placed to consent to such a decision. This relies heavily on good practice by corporate parents and their knowledge and understanding of the needs of the child or young person.

As we have previously identified in this response, we do not see parental and children's rights as being in opposition. Our position on consent is the same, we see engaged and supportive parents as being vital for children and young people to fully realise their rights in all areas including gender identity. We also feel that with the proper support, as identified throughout this response, most parents can help children and young people make the best choices in their individual circumstances.

The Scottish Government should also explore how it can take a lead on making gender identity a less rigid and more fluid concept and a less prominent part of the upbringing of children and young people. This should start with the provision of PSE and inclusive practice throughout education from the early years onwards. There are also far wider questions about how we teach children and young people about gender identity through the provision of toys and clothing and in how gender is portrayed on TV or in books that the Scottish Government should take a lead on addressing. For example, ensuring that books in schools promote an inclusive view of gender and do not adhere to a narrow and traditional gender stereotypes. We know there is good practice in this regard, however the Scottish Government should not leave this to be led on a school by school basis⁸.

Question 10

⁸ <https://www.lgbtyouth.org.uk/news/supporting-transgender-young-people-in-education>

Are any changes to section 22 (prohibition on disclosure of information) necessary?

It would be helpful for the Scottish Government to provide clarity around Section 22. At present there are questions on the impact that these changes would have on schools and other services accessed by children and young people. For example, would schools retain the right to know the gender of their pupils, or whether health professionals and social care workers would be able to access this information. Without further clarity on such issues, Children in Scotland does not feel comfortable providing a response.

Question 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?

Please see our response to Q4. Children's rights are universal and as such if an acquired gender has been assumed under the law of another jurisdiction it should be automatically recognised in Scotland. An individual's rights must be recognised in Scotland, irrespective of their background and nationality.

Question 12

Should Scotland take action to recognise non-binary people?

Children in Scotland is strongly supportive of recognition for non-binary people under the same principles that we have identified throughout this response. Gender is an increasingly fluid concept, we would recommend that the option to be legally recognised as non-binary should be explored further.

Question 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.

Option 1: Changes to administrative forms

Option 2: Book of Non-binary Identity

Option 3: Limited document changes

Option 4: Full recognition using proposed self-declaration system

Option 5: Incremental approach

Option 6: Amendment of the Equality Act 2010 None of the above options

Children in Scotland supports the views of partners with knowledge and expertise in this area. We are not well placed to respond to this question and instead rely on our partners LGBT Youth Scotland, Equality Network, Scottish Trans and Stonewall Scotland who support options 1, 3, 4, & 6.

Question 15

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

(a) the partial Business and Regulatory Impact Assessment;

(b) the partial Equality Impact Assessment;

(c) the partial Child Rights and Wellbeing Impact Assessment; or (d) the partial Privacy Impact Assessment?

Children in Scotland is pleased that the Child Rights and Wellbeing Impact Assessment (CRWIA) has been carried out. The Child's Rights and Wellbeing Impact Assessment supports many of the arguments made by Children in Scotland throughout our response, namely that both legal recognition and support are needed. The assessment rightly notes that there is evidence that gender dysphoria can have a clear impact on emotional wellbeing and therefore additional support must be provided for transgender individuals.

The CRWIA also notes the need for action, it shows that the number of Scottish children presenting at gender identity clinics for advice and support has been increasing.

The CRWIA does however highlight some troubling evidence from young people who expressed concern about the fact that they were being considered too young for hormones and surgery referrals, despite protocol. This does not demonstrate a rights-based approach being taken towards gender identity. By taking on board the recommendations throughout this response we would expect this to be tackled. However there must also be CPD for those involved in these decision-making processes to support them to

understand how to implement a rights-based approach that places children and young people at the heart of decisions that affect them.

Contributors to this response: Chris Ross, Bori Godley and Amy Woodhouse.

If you have any further questions please contact

Amy Woodhouse, awoodhouse@childreninscotland.org.uk, 0131 313 8810