



Gender Recognition Reform (Scotland) Bill: Consultation

12 March 2020

About Children in Scotland

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.

Children in Scotland is pleased to be able to respond to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill. We responded to the previous Scottish Government consultation on the Gender Recognition (2004) Act and outlined our support for reforms to the system for acquiring a gender recognition certificate. In that response we highlighted the views of delegates at the 2018 *An Equal Future: Next Steps for Including LGBT Children and Young People* conference. Responses to this survey were overwhelmingly in favour of reform. Please see our 2018 response for more information¹. We will also draw on that response throughout this response where relevant.

As an organisation our work is rooted in children's rights as articulated in the United Nations Convention on the Rights of the Child (UNCRC)². Our response is based on our commitment to support the rights of **all** children and young people. One of our strategic priorities is challenging inequalities, including those faced by the LGBTQI+ community.

We have consistently supported the rights of transgender young people, including through our 25 Calls campaign³. We believe that reform of the Gender Recognition

¹ https://childreninScotland.org.uk/wp-content/uploads/2018/03/Gender-Recognition_Final.pdf

² <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

³ <https://childreninScotland.org.uk/call-8-reform-the-gender-recognition-act-and-give-trans-young-people-the-chance-to-live-full-happy-lives/>

Act to make it easier for trans young people to legally be able to live in their 'acquired gender' is essential to upholding their rights.

*"The gender recognition process is very difficult due to the expectations placed on those going through it. This includes having to live as their gender for two years to prove their commitment – a humiliating and arbitrary manner of measuring the legitimacy of a person's identity – while providing extensive documentation to prove they have not wavered in their 'choice' during this time period."*⁴

Throughout the process we have engaged with partners such as LGBT Youth Scotland and young trans people involved in their youth commission to ensure that our response is reflective of their needs. Submissions to our 25 calls campaign have also allowed us to hear directly about the benefits of reform to the Gender Recognition Act⁵⁶. Our response is based on what we heard through these discussions and what trans young people have told us about the reality of their lives.

Children in Scotland also does not see this as being in opposition to the rights of any other groups.

We note the full support of other organisations that work with and represent the views of children and young people. In response to the 2018 consultation, the Children and Young People's Commissioner Scotland, Together (the Scottish Alliance for Children's Rights) and YouthLink Scotland supported reform of the Act. Reform was confirmed as Scottish Youth Parliament Policy in 2019, where MSYPs committed support to reducing the age at which you could apply for a gender recognition certificate and to recognition of non-binary identities⁷.

Children in Scotland is firmly committed to equality within all our work. We are proud to hold a LGBT Youth Scotland Silver Charter Mark⁸. We aim to make all our work inclusive for LGBTQI+ children and young people and to be fully supportive of all our staff and other adults that we work with.

General Comments

It is clear that Scotland still needs to make progress in supporting transgender young people. At present we know they experience poorer outcomes across a number of indicators. A 2017 survey by LGBT Youth Scotland highlighted that 96% of transgender young people identified that they had experienced mental health problems or associated behaviour⁹. 63% have experienced suicidal thoughts or behaviours¹⁰. 88% of trans young people still believe that transphobia is an issue in Scotland¹¹. Data gathered at UK level suggests that trans people are more likely

⁴ <https://childreninscotland.org.uk/call-8-reform-the-gender-recognition-act-and-give-trans-young-people-the-chance-to-live-full-happy-lives/>

⁵ <https://childreninscotland.org.uk/call-8-reform-the-gender-recognition-act-and-give-trans-young-people-the-chance-to-live-full-happy-lives/>

⁶ <https://childreninscotland.org.uk/25-calls-response-the-media-has-been-particularly-difficult-to-navigate-for-trans-people/>

⁷ http://policy.syp.org.uk/policy/policy_2233/

⁸ <https://www.lgbtyouth.org.uk/charter>

⁹ <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>

¹⁰ <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>

¹¹ <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>

than cisgender people to earn less than £20,000 a year¹². A smaller percentage of trans people also reported earnings in every other income bracket compared to cisgender people¹³. We cannot find comparable data at Scottish level but do not see a reason for it being any different.

Children in Scotland is strongly in favour of reform to the Gender Recognition Act. We are aware that the number of transgender young people who wish to access a gender recognition certificate is small.

“Not every trans person wishes to go through this but, for those that do, attaining a gender recognition certificate involves an arduous journey”¹⁴

Based on the evidence from the 2004 Act, we do not expect the proposed reforms to lead to a rapid increase in applications for a gender recognition certificate. However, the benefit for trans people who wish to apply is potentially life-changing. It will give them more autonomy over their lives and also provide legal recognition of their lived gender. We are aware many trans young people believe this would have a positive effect on other aspects of their life such as their wellbeing.

We know that the current system for acquiring a gender recognition certificate can be problematic for a number of reasons. The two-year timescale and the requirement to provide a range of medical assessments is invasive and prohibitively long. This process can have a detrimental effect on trans people's health and wellbeing. Children in Scotland is strongly supportive of reforms to the Gender Recognition Act to rectify these issues. We are pleased that the Scottish Government has brought forward proposals to simplify this process. The removal of medical assessments and a commitment to reducing the two-year timescale will have a positive knock-on effect for many trans young people.

At present individuals are able to self-identify their gender for documents such as passports and change their gender identity on a self-identification process. However, this system is not currently reflected in the process of applying for a gender recognition certificate.

One of the consequences of these challenges is that many trans young people's birth certificates do not match their lived gender. This can present difficulties when applying for jobs. A lack of matching documents can mean trans people have to 'out' themselves to people in situations where they may not feel comfortable doing so. Our discussions with trans young people at a roundtable hosted by LGBT Youth Scotland have highlighted that these issues can be particularly pronounced for non-binary people who do not have any legal recognition of their lived gender. We will cover this in more detail later in our response.

Moves toward a self-declaration model would give greater privacy and autonomy for trans young people over when and where they wish to come out. It would also

¹²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

¹³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

¹⁴ <https://childreninscotland.org.uk/call-8-reform-the-gender-recognition-act-and-give-trans-young-people-the-chance-to-live-full-happy-lives/>

simplify the process of applying for jobs by ensuring that trans people could have matching documentation.

Question 1. Do you have any comments on the proposal that applicants must live in their acquired gender for at least three months before applying for a GRC?

Children in Scotland is pleased that Scottish Government is proposing to reduce the time period that trans people have to live in their 'acquired' gender from two years to three months. A three-month system would be a clear improvement on the current model, however we do not believe this goes far enough.

We agree with partners such as LGBT Youth Scotland that there should not be a requirement to have lived in their acquired gender for three months before applying for a gender recognition certificate. We believe this is an arbitrary time period that does not reflect the issues that many trans young people face. It presents an unnecessary time barrier which could have negative effects on trans young people's mental health.

We would prefer a move towards a formalised self-identification model where people can legally change gender at a time chosen by them. This would bring acquisition of a gender recognition certificate in line with changing your gender on other documents such as passports. Our discussions with trans young people through LGBT Youth Scotland suggest that they do not make the decision to change gender lightly, and have spent time considering this decision before applying.

It is worth highlighting that Children in Scotland is firmly in favour of proposals to remove the requirement for trans people to provide medical certificates to support their application for a gender recognition certificate. This process can be invasive and time-consuming. It also leaves the decision about gender identity up to a group of medical professionals and not the individual themselves. We do not believe that medical certificates are required to support someone to identify their own gender.

Question 2. Do you have any comments on the proposal that applicants must go through a period of reflection for at least three months before obtaining a GRC?

As with our response to question one, Children in Scotland is pleased to see a change to the current two-year system. A total of six months to access a gender recognition certificate is clearly an improvement for trans young people. However, as previously stated, we do not believe this goes far enough.

We have concerns about the implication of a 'period of reflection'. This implies that trans people have not already considered their decision to apply for a gender recognition certificate. As mentioned above, our experience of discussing this topic with trans young people through events organised by LGBT Youth Scotland is that acquiring a gender recognition certificate is likely to be one of the final steps in a process as opposed to one of the first. As such, a period of reflection seems unnecessary as it is likely to come as the result of an ongoing and considered process.

Question 3. Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

As we articulated in our response to the 2017 Scottish Government consultation, Children in Scotland believes that the minimum age that people can apply to legally change their recognised gender should be reduced¹⁵. We know other organisations supported this move in response to the 2018 consultation. Reducing the age at which young people can apply has also been confirmed as Scottish Youth Parliament policy¹⁶.

We believe that the Scottish Government's plan to lower this to 16 is a positive first step. At an age when people are able to get married or join the army, it seems inconsistent to not be able to legally change your gender. However, we also believe that consideration should be given to lowering this further to 12. We know this position was supported in 2018 by organisations like the Children and Young People's Commissioner for Scotland¹⁷. We believe this process should also be self-declaratory and should not require parental consent.

We are aware that for many children and young people, considerations about their gender identity begins before the age of 16. Legally, they are already able to change their sex in school records, on passports and in their medical records. We believe that this should also be possible on their birth certificates. As we have articulated previously in this response, we do not believe this option would be accessed by a significant number of people under the age of 16. However, we believe the option should exist.

Having the opportunity to do this is potentially extremely beneficial for trans young people. While not everyone will access this process, it has the potential to have a positive effect on those who do. As we have referred to previously in this response, trans young people experience higher rates of mental health problems and face high levels of transphobia. We believe that having the opportunity to legally change gender would help alleviate many of these issues as it helps reduce stigma, normalise trans identities and ensure trans young people have legal protection.

Having the opportunity to apply for a gender recognition certificate from the age of 12 would also ensure that the Gender Recognition Act is aligned with the Age of Legal Capacity (Scotland) Act 1991 Children (Scotland) Act 1995. These pieces of legislation affirm that children have legal capacity from the age of 12 to form a view¹⁸. We believe a consistent approach is required across legislation in this regard – applications for a gender recognition certificate should not be viewed any differently to other areas that young people are seen to have legal capacity within. We have concerns about the precedent that setting the age of 16 for obtaining a GRC could have for future legislation around the legal capacity of children and young people to form views. We refer the Scottish Government to partners in the sector with legal expertise such as the Scottish Child Law Centre and Clan Childlaw for further discussion around the potential legal implications of setting the age at 16 vs 12.

As we have outlined throughout this response, Children in Scotland is firmly committed to children's rights, as articulated in the UNCRC. Lowering the age at

¹⁵ https://childreninscotland.org.uk/wp-content/uploads/2018/03/Gender-Recognition_Final.pdf

¹⁶ http://policy.syp.org.uk/policy/policy_2233/

¹⁷ <https://www.cypcs.org.uk/ufiles/Gender-Recognition-Consultation.pdf>

¹⁸ 1995 Act (n 1) s.11(10)

which people have the opportunity to apply for a gender recognition certificate to 12 would ensure that far more children and young people are able to undergo this process, should they wish to. This should be seen as supporting them to access their right to an identity as articulated in Article 8 of the UNCRC¹⁹.

It is important that all trans young people, and their families, are able to access support throughout the process of coming out, transitioning or applying for a gender recognition certificate. Parents provide a vital support to children and have a key role to play in this process for their children. However, we do not believe they should have a final say on whether their child can apply to have their lived gender legally recognised.

As we have articulated above, applying for a gender recognition certificate and legally changing your gender is likely to be the final stage of the process for young people. It is important that all children, young people and their families have access to support as they go through this. This may be particularly important in the context of children under 16 where there may be disagreements between children and parents. Supporting the whole family in this context may minimise conflict and ensure that the wellbeing of the child remains central to this process.

Question 4. Do you have any other comments on the provisions of the draft Bill?

Reforming the Gender Recognition Act is central to supporting trans people to experience their rights. We believe the reform will relieve stress for many as they will be able to legally change gender without intrusive and time-consuming medical reports or spending long periods of time gathering evidence. Removing barriers for those who wish to apply may have a positive knock-on effect on other aspects of their lives such as their health and wellbeing.

We also believe that the Scottish Government should bring forward measures within the reformed Act to ensure legal recognition for non-binary people. We know this position was supported by CYPCS in 2018 and is reflected in current Scottish Youth Parliament policy²⁰²¹. We are disappointed this is not included within the current proposals as it means that the whole trans community is not covered by the proposed reforms. Children in Scotland strongly encourages the Scottish Government to include the option to identify as non-binary on a gender recognition certificate when the Bill is presented to the Scottish Parliament.

It is essential that non-binary people are legally recognised members of the trans community and that non-binary people have the opportunity to legal recognition of their lived gender.

The exclusion of non-binary identities from the proposed reforms could exacerbate many of the issues that non-binary individuals face. Having to list a Mr/Miss/Mrs title in job applications means many non-binary people have to identify in a way they do not feel comfortable with. This can also mean non-binary people are misgendered in situations like job interviews or in their place of work. These experiences may put people off applying for jobs or influence how they feel within the work environment.

¹⁹ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

²⁰ http://policy.syp.org.uk/policy/policy_2233/

²¹ <https://www.cypcs.org.uk/ufiles/Gender-Recognition-Consultation.pdf>

This may exacerbate a range of issues that the community face in relation to their health and wellbeing or the lower incomes that the LGBT community experience²²²³.

A lack of legal recognition can also contribute to the stigmatisation of non-binary people. It continues a perception that their existence is in some way inferior. The reform of the Act can be used as a key way to signal that this is not the case.

Children in Scotland supports the removal of statutory declarations from the Bill. While we appreciate the desire to ensure that people have fully considered their decision we do not believe that the Statutory Declaration to live in your 'acquired' gender for life is necessary or helpful. We are concerned it places unnecessary pressure and stress on trans young people who are already making an important life decision with longer-term implications. As we have referred to throughout this response, trans young people have higher rates of mental health problems and we are concerned the pressure of a statutory declaration may contribute to this. This may act as a deterrent to applying for a gender recognition certificate.

The consultation document is not currently clear about the costs that will be associated with applying for a gender recognition certificate under the new system. The current system means that people applying for a gender recognition certificate have to pay around £140. We know that this cost is prohibitively expensive for many young people and could act as a barrier to some wishing to undergo the process of applying for a gender recognition certificate. We believe all costs incurred by the applicant should be removed from the system.

As a point of principle, Children in Scotland does not believe anyone should incur a cost for the right to legal recognition of their lived gender.

It is worth highlighting that there is still a need to tackle many of the underlying causes of prejudice and discrimination faced by the LGBTQI+ community to ensure an inclusive society for all. Children in Scotland has been involved in a working group on the development of trans inclusive guidance for schools developed by LGBT Youth Scotland. When published, we believe this guidance must be implemented across the education system to ensure schools can support all their pupils. It is also important that work to ensure an LGBT Inclusive Curriculum driven by the TIE campaign is fully embedded. This will support a development of understanding of the needs and experiences of trans young people from a young age and should contribute to tackling homophobia and transphobia.

Question 5. Do you have any comments on the draft Impact Assessments?

Children in Scotland firmly believes that the reforms should have no detrimental effect on anyone else's rights. The Bill will reform how birth certificates are legally changed and have a knock-on effect on those individuals.

It does nothing to change access to single sex spaces and as such access to toilets, changing rooms and women-only services should not be affected.

²² <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>

²³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

We note the safety concerns that have been raised about access to single sex spaces. However, there is no evidence that the proposed GRA will impact on access to single sex spaces. We acknowledge the expertise of many organisations, such as Scottish Women's Aid and Rape Crisis Scotland which have included trans women in their services for many years. These services operate under what is in effect a self-identification model and they have stated in their 2018 consultation responses that the proposed GRA provisions will not mean they have to alter their services.

In addition, it is worth highlighting that the Equality Act allows organisations to apply exemptions from their services on the grounds of 'proportionate risk' to these services. Risks that women and children's safety might be compromised, for example, could continue to be addressed using Equality Act exemption provisions, where these organisations consider it necessary. We believe this provides adequate scope to ensure that spaces are inclusive and everyone is protected from harm.

In the light of concerns expressed about the risks to safety, we recommend strongly that the expertise of women's organisations, such as SWA and others, is used to develop and lead on guidance and information dissemination on the application of GRA and Equality Act provisions in creating safe spaces for children and women, using the model of self-identification that has worked effectively for decades.

We would encourage all schools and other services that work with children and young people to follow LGBT Youth Scotland guidance on Supporting Transgender Young People: Guidance for Schools in Scotland. We understand that this guidance is being refreshed and will be published by the Scottish Government in due course. However, in the meantime, LGBT Youth Scotland's existing guidance provides an array of practical support for ensuring a safe and inclusive environment for all young people in school.