



The Gender Recognition Reform (Scotland) Bill

**Written Evidence to the Equalities, Human Rights and Civil Justice Committee
of the Scottish Parliament, May 2022**

The removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence

We strongly support the removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical diagnoses as proposed by the Gender Recognition Reform (Scotland) Bill.

Scotland must align with international legal standards and best practice in upholding human rights relating to gender recognition. The Scottish Government has set out its intention to 'create an inclusive Scotland that protects, respects, and fulfils internationally recognised human rights' for all human beings'.¹

Scotland must realign itself with the current international human rights standards with regard to gender recognition as proposed by the Bill in question.

MEDICAL DIAGNOSIS

A report by the European Commission on the restrictiveness of legal gender recognition (LGR) requirements for states within the European Union (EU), European Free Trade Association (EFTA) and the United Kingdom (UK) divided requirement into five 'legal clusters'.²

Cluster 1 encompasses the states where no legal procedures are currently in place. On the other side of the spectrum, Cluster 5 is the most inclusive of transgender individuals – where states have introduced self-identification.

¹ Scottish Government, *Policy: Human Rights* <https://www.gov.scot/policies/human-rights/>

² European Commission, *Legal Gender Recognition in the EU, 2020*: <https://tgeu.org/wp-content/uploads/2021/12/tgeu-lgr-factsheet-en-01.pdf>

The UK is currently in the second most repressive legal cluster in which LGR is currently only possible through intrusive medical requirements.

Individuals in the UK must have had a diagnosis of ‘gender dysphoria’ as well as having undergone or be undergoing treatment ‘for the purpose of modifying sexual characteristics’³ in order to obtain a Gender Recognition Certificate (GRC).

Diagnoses and mandatory treatments incorrectly assume that medical intervention is an inherent part of the gender transition process. As it currently stands, under the Gender Recognition Act 2004, Scotland takes a pathologized approach towards LGR in which medical experts are best placed to determine an individual’s gender, rather than the person themselves. States across Europe and the wider world are now moving away from this paternalistic approach.

The restrictive medicalisation of the current LGR process in Scotland has set us out of step with the progress of furthering equality and strengthening basic human rights for transgender individuals. As such, we are now lagging behind.

Further, requiring applicants to submit to a psychiatric procedure not only places unnecessary barriers in the way of obtaining legal recognition of their gender; it also forces applicants to choose between their human rights: the rights to the highest attainable standard of health and to be free from cruel, inhuman, or degrading treatment, and their rights to private life and to recognition before the law.

In a system where legal gender recognition is contingent on obtaining a specific mental health diagnosis, individuals who wish their gender identity to be reflected on official documents must submit to a notion that their transgender status is a mental disorder. The stigma attached to the psychiatric assessment can itself be a barrier that deters people from applying.

UNITED NATIONS

The principle of equality and non-discrimination is set out within Article 1 of the Universal Declaration of Human Rights and is further enshrined in multiple international conventions (CCPR, ICESCR, UNCRC).

These conventions, as outlined on the Scottish Government’s *Human Rights: Our International Obligations* policy webpage, have been ratified by the UK.⁴

³ European Commission, *Legal Gender Recognition in the EU*, 2020.

⁴ Scottish Government, *Human Rights: Our International Obligations* <https://www.gov.scot/policies/human-rights/our-international-obligations/>

Although gender expression and gender reassignment are not explicitly mentioned within these key conventions, the United Nations (UN) have moved to actively encourage member states to further protect the ability for trans individuals to enjoy their basic human rights, free from discrimination. This includes a move towards less restrictive processes for obtaining LGR.

In 2011, the UN released a report on the discriminatory laws and practices and act of violence against individuals based on their sexual orientation and gender identity⁵. Within this report, the UN General Assembly's Human Rights Committee declared that: '*The Human Rights Committee has expressed concern regarding lack of arrangements for granting legal recognition of transgender people's identities*'.⁶

More than a decade on, Scotland has so far failed to meet international expectation to reform the process for LGR. This report references the *Human Rights and Gender Identity* paper issued two years prior by the Council of Europe's Commissioner for Human Rights⁷. Recommendations are set out to encourage states to refer to *The Yogyakarta Principles on the Application of International Human Rights Law* for both guidance and implementation. These soft law principles have developed into an authoritative statement of international best practice for ensuring the accessibility of equality and non-discrimination of transgender individuals.

They also stand to remind us that, as stated in the preamble, we must acknowledge that the principles 'rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time...'.⁸

A decade on from initial publication of the principles, The Yogyakarta Principles plus 10 (YP+10) were published to reaffirm and extend existing international legal standards, urging that all states must comply with the principles set forth 'as a legal obligation and as an aspect of their commitment to universal human rights'.⁹

Particular attention must be brought to Principle 31: The Right to Legal Recognition. Although encouraging a move away from the registration of sex or gender, Principle 31(C)(iii) declares that:

'While sex or gender continues to be registered: ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis...shall be a prerequisite to change one's name, legal sex, or gender'.¹⁰

⁵ Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 2011 [A/HRC/19/41](https://www.unhcr.org/refugees/files/4/4/4/4/HRC1941.pdf)

⁶ Ibid, Pg 3.

⁷ Council of Europe, *Human Rights and Gender Identity*, 2009 <https://rm.coe.int/16806da753>

⁸ The Yogyakarta Principles, Preambular para 9, 2006 http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf

⁹ Yogyakarta Principles plus 10, Pg 5, 2017 http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

¹⁰ Ibid, Pg 9.

Although the principles are ‘non-binding’, they inarguably set out the international standard for the encompassment of rights to ensure equality and non-discriminatory practices regarding LGR.

The Scottish Government have stated that they ‘embody best practice in relation to legal gender recognition processes’¹¹ and with this we strongly agree.

Not only does this help us to understand why we must move away from the medicalisation of LGR, it also serves as an example as to how we must continually reassess our position within international human rights framework to ensure that we are taking the correct approach and meeting international standards.

COUNCIL OF EUROPE

International legal standards and best practices are moving towards the promotion of accessible procedures for LGR, enabling respectful processes for transgender people. Rulings of the European Court of Human Rights (ECHR) reflect this¹², often finding that rigid LGR processes¹³ leave individuals at risk of their rights as enshrined by the European Convention on Human Rights being violated.

The ECHR has provided sufficient case law in recent years to demonstrate how a lack of or insufficient process for LGR is in violation of a transgender individual’s rights. The standards as legislated by the ECHR have been combined in a document title ‘Gender Identity Issues’.¹⁴ This document is in no way exhaustive of the standard set by the ECHR, but it is a useful resource to remind us of the international legal standard that Scotland should adhere to.

MEMBER STATES

However, we cannot rely only on European case law, but instead must adopt the proposed bill and it’s move away from the medicalisation of LGR. Whilst European case law may protect wider trans equality rights, to assure the highest human rights standards we must follow in the footsteps of other European member states and the wider world who have gone before us to ensure the utmost respect for LGR.

We support the trademark legislation of the Gender Identity Act 2012¹⁵ adopted by Argentina and urge that, as the Gender Recognition Reform (Scotland) Bill proposes, the requirement for a medical diagnosis of gender dysphoria be removed.

¹¹ Scottish Government, *Adoption and Promotion of Yogyakarta Principles (original Plus 10)* FOI release, 2018 <https://www.gov.scot/publications/foi-18-01666/>

¹² European Court of Human Rights, *Gender Identity Issues*, 2022, https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf

¹³ S.V. v. Italy [55216/08] Para 72 <https://hudoc.echr.coe.int/eng?i=001-187111>

¹⁴ European Court of Human Rights, *Gender Identity Issues*, 2022.

¹⁵ Act No 26.743.

Argentina set the legal standard as evidenced in Article 4, stating that:

*'In no case will it be needed to prove that surgical procedure...hormonal therapies or any other psychological or medical treatment has taken place'*¹⁶, Denmark¹⁷ then followed with the newly established 'Argentinian model' for gender recognition. This was followed by Malta,¹⁸ Ireland,¹⁹ Norway,²⁰ Belgium,²¹ Portugal²² and Luxembourg²³.

We urge Scotland to follow this model.

As one of our closest neighbours, we must turn to the Irish example.

Ireland made a progressive move towards allowing self-determination with the Gender Recognition Act 2015. An Irish citizen can now correct their gender on government documents through self-determination. All that is needed is identification documents such as a Birth Certificate. There is no request for medical documentation

In accordance with Section 6 of the Irish Act, Ministers must produce an annual report, with particular focus on applications for a GRC. This is mirrored in the proposed Scottish Bill. The Annual Report for 2020²⁴ provides clear evidence that the number of individuals applying for a GRC between 2015 and 2020 did not sharply rise but has instead remained steady. Removing the medicalised element of LGR has not inflated the number of individuals applying for a GRC, but instead has allowed transgender individuals the dignity to apply for a certificate without having to be diagnosed with gender dysphoria – allowing Article 8 of the European Convention on Human Rights to remain upheld.

SUMMARY

As we have argued in previous submissions to the Scottish Government and Parliament, reforming current gender recognition legislation to de-medicalise the process and recognise trans people as experts in their own gender is vital not only to trans people's dignity, but adhering to human rights standards.

For the reasons set out above, we support the removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence as proposed by the Gender Recognition Reform (Scotland) Bill.

¹⁶ TGEU, Argentina Gender Identity Law [English Translation], 2012 <https://tgeu.org/argentina-gender-identity-law/>

¹⁷ Amendment Act L182, 2014.

¹⁸ Gender Identity, Gender Expression, and Sex Characteristics Act, 2015.

¹⁹ Gender Recognition Act 2015.

²⁰ Legal Gender Amendment 2016.

²¹ Gender Recognition Act 2017.

²² Decree (XIII 3 105) 2018.

²³ Law of August 2018.

²⁴ Department of Social Protection, *Gender Recognition Act 2015 Annual Report, 2020* <https://assets.gov.ie/213832/2caeea11-a3d9-46fb-9610-f4c55d5943cf.pdf>

Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months (rather than the current period of two years) and that they intend to live permanently in their acquired gender

We support the reduction of time that transgender people must declare that they have spent living in their ‘acquired gender’. Transgender people should be able to obtain legal gender recognition swiftly and in accordance with their own perceptions of gender identity while preserving their right to privacy. The current requirement to spend 2 years living in an ‘acquired gender’ requires that an applicant provide a huge amount of evidence to prove this. We go into more detail regarding how this requirement violates rights in our answer to the question below.

Whether applications should be made to the Registrar General for Scotland instead of the Gender Recognition Panel, a UK Tribunal

We support provisions in the Bill allowing applications to be made to the Registrar General for Scotland.

The current requirement to present evidence to the GRP places a requirement on applicants to provide evidence of living in their ‘acquired gender’ and is not in keeping with the Council of Europe Resolution 2048 which calls on all Member States to “develop quick, transparent, and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards...and other similar documents.”²⁵

The practice of requiring evidence of having lived as your gender identity for any period of time, means that transgender people have to wait longer than necessary to obtain documents that reflect their gender identity.

It is also the case that transgender people may find it difficult to demonstrate lived experience, as they are at greater risk of homelessness and unemployment and may not have access to the necessary documents to provide such evidence, for example utility bills, payslips, driving license or passport.²⁶

²⁵ Council of Europe, Resolution 2048, Discrimination against transgender people in Europe, 2015.

²⁶ LGBT Foundation, *Transforming Outcomes: a review of the needs and assets of the trans community*, 2017.

We instead support the Bill's proposal to change the process to one which recognises trans people as experts in their own genders as an approach more aligned to international legal obligations and best practice standards.

Proposals that applications are to be determined by the Registrar General after a further period of reflection of at least three months

We do not support the introduction of a 3-month period of reflection.

We consider that a period of reflection will cause unnecessary complications and delays in the process of obtaining a GRC.

Retaining a period of reflection would contribute to stigma against trans people as it would imply their ability to self-determine is not adequate. Legal gender recognition should be quick, transparent, and accessible: prolonging the length of time individuals must wait before having their gender legally recognised prolongs the length of time that their rights, including their right to privacy, are violated.

The Cabinet Secretary has stated that building in a reflection period will enshrine in law the seriousness of this process. It is our view that the statutory declaration fulfils this purpose, and a reflection period only serves to delay the process of obtaining a GRC, in addition to adding a further procedural step as after the three-month period, and within two years the applicant is required to send further written notice confirming they wish to proceed.

Whether the minimum age for applicants for obtaining a GRC should be reduced from 18 to 16

We believe it is important for young people in Scotland aged 16 and 17 to be able to access an appropriate process for having their gender legally recognised, whilst recognising that this may differ from the process for people over 18, and will require to take into account both the principle of evolving capacities of young people as set out by the Committee on the Convention on the Rights of the Child²⁷ and the corresponding appropriate protections for them.

We note that this question must be examined in the context of other rights and obligations held by 16- and 17-year-olds in Scotland. They are, for example, considered legally

²⁷ General Comment No.20, para 18.

capable of consenting to many adult decisions including voting, marriage and any medical, surgical, or dental treatment.

Further, trans young people aged 16 and 17 are already able to update their name and gender on other identity documents to reflect how they are living, including on their passports, and driving licenses. They are at a stage in life where they are often leaving home to take up employment or further studies – and are at a risk of having to “out” themselves if they require to furnish a birth certificate that does not match their lived gender.

Setting out a process whereby young people aged 16 and 17 are also able to change their birth certificates to reflect how they live their lives – whilst also taking account of their evolving capacities and the need for appropriate protections – will ensure that they have the same rights to privacy over their trans status as those over the age of 18.

If you have any comments on the provisions for interim GRCs

The Bill essentially proposes to continue the process already set out under section 4E the 2004 Act as it currently applies in Scotland for trans people obtaining gender recognition where their partner does not wish the marriage or civil partnership to continue. In these instances, the Registrar General would grant an interim GRC and within six months of the issuance of the interim certificate, the applicant would be able to apply under section 8H to a Sheriff for a full certificate. The process of applying to the Sheriff can be unnecessarily complicated, however, we do welcome that section 8H will continue to ensure that the spouse of a trans person will be unable to directly prevent them from obtaining a full GRC.

If you have any comments on the provisions for confirmatory GRCs for applicants who have overseas gender recognition

We welcome that the insertion of section 8N which will enable those who have obtained overseas gender recognition to be regarded as the ‘acquired gender’ in Scotland, without having to re-apply.

We would welcome reassurance from the Scottish Government that the inclusion of Section 8O - which sets out a process through which those with overseas gender recognition could apply to the Registrar General for a confirmatory gender recognition certificate - is only intended to provide the applicant with a confirmatory Scottish GRC if they have a particular wish to possess one and will not undermine the provisions contained in 8N.

8N (2) disapplies 8N (1) where it would be manifestly contrary to public policy to treat the person in accordance with 8N (1). The ‘manifestly contrary to public policy’ test is used currently in relation to overseas marriages and divorces but is subjective, and we have concerns about inclusion of this test, in this context. We would welcome further clarification regarding how the public policy test will apply in relation to this legislation.

If you have any comments on the offences of knowingly making a false application or including false information

We do not support the creation of an additional offence for knowingly making a statutory declaration in relation to an application for gender recognition that is false in a material particular.

We note that it is already a criminal offence under the Criminal Law (Consolidation) (Scotland) Act 1995 to knowingly make a false statutory declaration and therefore do not see any requirement for the creation of an additional offence.

If you have any comments on the removal of powers to introduce a fee

We welcome the Scottish Government’s decision to remove the provision in the draft Bill conferring power on the Registrar General to prescribe a fee.

We believe that there should be no cost to applicants, so that trans people face no additional barriers to obtaining legal gender recognition. Trans people already face additional financial costs in accessing healthcare or updating identification. We know that the current £140 fee is prohibitive to many trans people across the UK in applying for legal gender recognition.

The UK Government’s National LGBT Survey (2018) found that of the 93 per cent of trans men and trans women who were interested in getting a gender recognition certificate but had not yet applied for one, one in three (34 per cent) cited that the process was too expensive.²⁸

If the Bill’s intended policy outcomes could be delivered through other means such as using existing legislation or in another way?

²⁸ Government Equalities Office, *National LGBT Survey*, 2018.

No.

If you have any suggestions for how this Bill could be amended. If so, please provide details

While an important step forward the proposed Bill falls short of providing legal recognition for all trans people in Scotland, including children and young people, and trans non-binary people.

Individuals who identify as a gender other than male or female should be able to obtain documents that reflect their gender identity in the same manner as those who use the binary male or female. A lack of non-binary inclusion leaves a significant portion of the trans population without any legal recognition. Transgender people, whose innate sense of their own gender identities differs from the sex they were assigned at birth, also experience and express their gender identity according to a variety of patterns. According to a survey undertaken in Belgium, only 55% of those transgender people who were assigned the male sex at birth identified themselves as either fully or mainly female. Similarly, only 60% of those transgender people who were assigned the female sex perceived themselves as either fully or mainly male. The rest identified as neither male nor female, both male and female, or “other”.²⁹

Research from the Scottish Trans Alliance and Equality Network in 2015 shows that the vast majority (64%) of non-binary people want to be able to change their legal gender and have this reflected on official documentation, with a very low number (only 5.9%) not wanting this change.³⁰

Acknowledging non-binary identities on legal documentation has international precedence, for example in Australia where individuals can choose to have their gender recorded as ‘X’ instead of the binary ‘male’ or ‘female’ – on their passports and birth certificates. Widening of the gender categories is also reflected in Canada where citizens in the province of Ontario can have the driver’s license and health card show ‘X’ as their gender identifier.³¹

Any other comments on the Bill

²⁹ Amnesty International, *The State Decides Who I Am*, 2014.

³⁰ Equality Network, Scottish Trans Alliance, *The Scottish LGBT Equality Report*, 2015.

³¹ Transgender Europe, *Third Gender Markers in Europe and Beyond*, 2017.

Overall, we think that this Bill is an important step forward in improving the way that trans men and women can be legally recognised as who they are in Scotland.

The Scottish Government has been consulting on reforming the GRA to bring it into line with international standards since 2017, and the proposed bill would make vital improvements to the current legislation and remove breaches of fundamental human rights experienced by many trans people embedded within the current process.

Other sections of note we would like to highlight to the Committee include 8Q (4), which gives the registrar discretion to accept late applications for review of a decision.

This is welcome but should be underpinned by a statutory test for accepting or refusing a late application which makes clear a presumption in favour of accepting late applications unless unreasonable to do so.

In 8R (2) there seems to be no discretion for a sheriff to accept a late appeal of a review decision which we feel is unjustified and may have a discriminatory impact on many, including those in insecure housing whose address may change often and at short notice.

More clarity would also be welcome regarding 8S and who a 'person with an interest in a gender recognition certificate' able to apply to a sheriff for revocation (8S) may be.

We have concerns that as drafted this section is too general and could be abused leading to stressful litigation for the applicant. We would prefer to see the Government narrow down within the primary legislation who may apply for revocation and under what rationale.

New Section 8A(2)(b) in Section 2 of the Bill requires that a person be "ordinarily resident" in Scotland if they are not subject of a birth register entry. We are concerned that people who have chosen to make Scotland their home but are not yet "ordinarily resident" should also have access to this legal process, on the basis that precluding access based on migration status is unnecessary, potentially discriminatory and can lead to unwelcome delays in LGR for these people.

We would like to see specific provisions in the Bill to ensure that trans people seeking some form of leave to remain, including refugees and asylum seekers can apply for legal gender recognition. For example Section 8 of the Maltese Gender Identity, Gender Expression and Sex Characteristic Act 2015 states: *'A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such*

*amendment in their asylum application form and protection certificate within fifteen days.*³²

While there is still significant room for the Bill to make further improvements to the process of legal gender recognition, and Scotland will still lag behind international best practice, we support it and believe that if passed it will represent a significant step forward in combating the breaches of rights that people experience in the current process.

³² *Supra* note 18.