

## GRA Consultation Response

**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?

Agree

Disagree

Don't know

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

Amnesty International UK supports the introduction of a self-declaratory system for legal gender recognition in Scotland.

For transgender people, official identity documents reflecting their gender identity are vitally important for the enjoyment of their human rights. They are not only crucial when travelling but also for everyday life, for example when enrolling in education, applying for jobs, accessing a public library, accessing social security, or opening a bank account. Obtaining documents reflecting your gender ensures your right to private life and means you are acknowledged by the state and equal recognition before the law.

Some countries simply do not allow for a change in legal gender status. Many others have made the change in legal gender status contingent on the fulfillment of invasive requirements such as forced sterilisation, including in countries which otherwise champion human rights. In Scotland, legal gender recognition can only currently be obtained with a psychiatric diagnosis of gender dysphoria and by evidencing having lived in an acquired gender for a period of two years. Reforming Scotland's gender recognition laws has the potential to bring Scotland in line with international best practice, and ensure that the human rights of transgender people are fully respected.

"Legal gender recognition is important as it is a validation of who I am. When you are born you get your birth certificate and when you die you get your death certificate. People take that for granted. It follows you all through life... Legal gender recognition also validates you within the rest of the population. If you are seen to be legally recognised then you have more legitimacy within the wider community." Louise, a transgender woman living in Dublin, Ireland. (Amnesty International, 2014: 'The State Decides Who I Am').

Transgender people should be able to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perceptions of gender identity. The Scottish Government should seek to ensure that transgender people

can obtain documents reflecting their gender identity without being required to satisfy criteria that in themselves violate their human rights. Evidence drawn from our global research shows that a system based on self-declaration would work towards ensuring transgender people's rights were not violated by the process itself.

#### *Medical evidence*

The current system to change the gender on birth certificates in Scotland requires a person to submit a highly detailed psychiatric report confirming they have been diagnosed with gender dysphoria, as well as detailed reports of any medical treatments they have had as part of their transition. These requirements are intrusive and humiliating, violate transgender people's right to privacy, and further stigmatise trans identities.

Legal gender recognition should not be contingent on psychiatric assessment. 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 the 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 from applying.

Most of the transgender people Amnesty spoke to for our 'The State Decides Who I Am' report expressed the view that psychological counselling would be helpful before and during the transitioning phase. However, psychiatric diagnosis is a practice that is demeaning and humiliating and can further stigmatise transgender identities. Transgender people from across Europe who spoke to Amnesty also felt the diagnosis was based on black-and-white gender stereotypes, when in reality identity issues do not manifest themselves in a uniform and consolidated pattern. "You are constantly being reviewed on the basis of how 'girly' or 'manly' you are."

"I spent over a year trying to convince other people that I am really a woman. It is a humiliating process, a breach of one's self determination. I see that as absurd. No-one else has to constantly convince others of who they are. It is derogatory and stigmatizing that the issue is treated as a psychiatric one; for instance, I had to explain to my employer that I did not have mental health issues." N, a 39 year old transgender woman from Finland (Amnesty International, 2014: 'The State Decides Who I Am').

In speaking to transgender people, Amnesty International notes psychiatric diagnosis as demeaning as well as unnecessary for the purpose of obtaining legal gender recognition. Ely, a trans man living in Belgium said: "Of course, trans people have the right to see a psychiatrist if they want too... What is wrong is the [idea that] you need a psychiatric opinion to be who you want to be." (Amnesty International, 2014: 'The State Decides').

Freedom from discrimination is stifled by the presence of any psychiatric assessment and runs counter to UN guidelines which stipulate that “people may not be discriminated against in the enjoyment of rights on the basis of (sexual orientation) or gender identity” (United Nations General Assembly, 2011: ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’). This type of discrimination can result in infringed economic, social and cultural rights including reduced access to employment, education and housing (Amnesty International, 2013: ‘Submission to the working group tasked to propose a new draft law: Gender legal recognition in Finland’.).

If the requirements for legal recognition contain mandatory criteria to be fulfilled that in effect excludes some groups of transgender people – such as psychiatric assessment - the right to private life and to recognition before the law may also be violated.

Good implementation of non-medicalised gender recognition can be found in Malta’s Gender Identity, Gender Expression and Sex Characteristics Act 2015 which states that people have a right to ‘bodily integrity and physical autonomy’ (Transgender Europe, 2017: Third Gender Markers in Europe and Beyond). In this jurisdiction, the gender recognition procedure is quick, transparent and accessible and the requirement of psychological or medical proof is forbidden. In May 2017, the Belgian Parliament introduced legislation which removed the requirement for mental health diagnosis (as well as enforced sterilisation), a move which has the potential to reduce the “pathologisation” (when health or behaviour is treated as a medical condition) of gender identities. Amnesty also notes progress in Norway, Ireland and Greece, where the respective parliaments granted legal gender recognition on the basis of self-identification ( Amnesty International, 2017: ‘The State of the World’s Human Rights 2016/17’.).

#### *Evidence of living in acquired gender*

The current process is also difficult, time consuming and expensive. In addition to providing medical evidence, applicants are also required to provide of living in their ‘acquired gender’ for at least two years. This can include original copies of a passport, driving licence, payslips or benefit documents, utility bills and other documents of an official nature must be provided. This is a significant amount of information, which is both logistically difficult, time consuming and can be traumatic.

Applicants send their application to a tribunal who they never meet, and who don’t have clear, definitive or publicly accessible decision-making criteria. It costs £140 for an application, as well as additional costs for medical reports (up to £80 per report).

Together with the requirement for a psychiatric diagnosis, the current practice of requiring evidence of having lived as your acquired gender for two years means that transgender people have to wait a long time to obtain documents that reflect their gender identity. The divergence between their gender, appearance and documents leads to the violation of their right to privacy and in some instances to discrimination.

### *Self-declaratory system*

A self-declaratory system should ensure that individuals can change their legal name and gender markers on all official state documents, along with other institutional documents such as certificates of education and employment-related documents. Further, this process should be facilitated and made fully accessible by the state, in a quick and transparent manner and should be changed in accordance with the individual's own sense of their gender identity, while preserving their right to privacy (Amnesty International, 2013: 'Submission to the working group tasked to propose a new draft law: Gender legal recognition in Finland'). A self-declaratory system would also be in line with Transgender Europe's call for the development of 'expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents (Transgender Europe, 2016: 'Human Rights and Gender Identity').

Self-declaration is strongly supported by international human rights frameworks, including the European Convention on Human Rights (ECHR) and Yogyakarta Principles. The Yogyakarta Principles were created by international human rights experts as a guide for UN member states on international legal human rights standards on sexual orientation and gender identity. Principle 31 states that everyone, regardless of their sex, gender, sexual orientation, gender identity or sex characteristics, has the right to legal recognition and access to identity documents that are true to their self. It calls on member states to ensure access to a quick, transparent and accessible mechanism to change names and gender identity. Article 8 of the European Convention of Human Rights, "Right to Respect for Private and Family Life", holds that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In order to protect individuals' right to privacy, the process of issuing documentation should be sensitive to the rights of individuals and the state should ensure that access to previous name and gender entries is limited, and no one apart from those authorised by the document holder can have access to the original birth certificate (TGEU, 2011, 18). There should be no medical requirements (e.g. sterilisation, hormone treatment, genital surgery, mental disorder diagnosis) to obtain legal recognition. Instead, gender reassignment procedures including hormone treatment, surgery and psychological support should be accessible to transgender people, subject to informed consent, along with access to assisted reproductive technology where required. This health care should reclassify these treatments in a non-stigmatising way.

**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?**

[Statutory declaration](#)

Yes

No

Don't know

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

It is reasonable to require applicants to provide a statutory declaration that they are aware of the implications of what they are doing. Any declaration statement should be simple and straightforward and fully accessible.

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

[Number of times a person can seek legal recognition](#)

Yes

No

Don't know

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

Legal gender recognition should be obtainable through a quick, transparent and accessible procedure. This should not be dependent on whether or not an applicant has previously applied for legal gender recognition.

When a person is undergoing a legal gender status change it is likely to be an extremely stressful period, and the introduction of arbitrary limits on the number of times a person can undertake the process would only add pressure and additional anxieties to the process. People who seek to change their legal gender status may already have limited resources and sources of support available. This is likely to be especially true for young people.

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

[Requirements in relation to an applicant's place of birth or residence](#)

A. only to people whose birth or adoption was registered in Scotland, or who are resident in

Scotland?

B. to everyone?

C. Don't know

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

Access to legal gender recognition should not be limited by nationality or residency, nor should this elicit delays in the process.

**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?**

[More Information](#)

[16 and 17 year olds](#)

**Agree**

Disagree

Don't know

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

[Intentionally left blank]

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

[More Information](#)

Option 1 – do nothing for children under 16

Option 2 – court process

Option 3 – parental application

Option 4 – minimum age of 12

Option 5 – applications by capable children

None of these options

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.

Legal gender recognition should be accessible to minors, taking into account the child's freely expressed views regarding their own best interests, and in light of their evolving capacities. A blanket age restriction would not be appropriate to achieve this - absolute denial of legal gender recognition to individuals under a given age is not consistent with existing standards regarding the rights of children.

We support option 3, but there should be an alternative made available for under 16s who wish to change their legal gender status and do not have parental support. A back-up mechanism should be available by which a child without parental support should be able to apply for gender recognition – ideally an administrative rather than court-based process.

The UN Convention on the Rights of the Child (CRC) requires states to respect the right of children to be heard and to duly take into account their views. A key requirement of the CRC is the “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The UN Committee on the Rights of the child has highlighted that the identity of the child includes characteristics such as sexual orientation and gender identity and the “the right of the child to preserve his or her identity is guaranteed by the Conventions (Article 8) and must be respected and taken into consideration in the assessment of the child’s best interests.”

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

[Scottish marriage](#)

Yes

No

Don't know

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

Spousal consent should not be a precondition for an individual to obtain recognition of their legal gender.

**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.**

**Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.**

[Scottish civil partnerships](#)

Yes

No

Don't know

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

Amnesty International opposes discrimination in civil partnership and marriage laws on the grounds of sex or sexual orientation. Individuals should not be forced to choose between their marital / partnership status and legal recognition of their gender.

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

## More Information

Yes

No

Don't know

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

Current grounds for divorce where the 'marriage has broken down irretrievably' are broad and sufficient. To have legal gender recognition as a standalone reason for grounds for divorce would go against the spirit of equality; furthermore it may contravene the individuals right to privacy if individuals are required to disclose their personal circumstances in relation to their gender status.

## **10. Are any changes to section 22 (prohibition on disclosure of information) necessary?**

### Privacy issues

Yes

No

Don't know

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

[Intentionally left blank]

## **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?**

### Recognition in Scotland of a person whose acquired gender has been recognised under foreign law

Yes

No

Don't know

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

An individual who has already obtained legal recognition of their gender identity in another jurisdiction should not have to make an additional application in Scotland. Consideration will have to be given to different statuses in various jurisdictions, i.e. where partial legal gender recognition is given, e.g. to passports but not other documentation.

Procedures may have to be drafted to allow new citizens to comply with the new legislation in Scotland. Again this should be designed to avoid unnecessary delays and the process should be as simple and transparent as possible.

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

### Non-binary people

Yes

No

Don't know

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.

People generally do not experience and perceive their gender identities according to one standardized pattern. 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.” (Amnesty International, 2014: ‘The State Decides Who I Am’)

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 number (only 5.9%) not wanting this change. Having driving licenses, birth certificates, passports and other official documentation that reflects this would have a significant impact on their sense of acceptance in society. Medical documentation can be of particular importance to non-binary individuals, and Amnesty International would also support Scottish Trans Alliance call to ensure that medical records are set up to provide the highest attainable standard of healthcare to all who use them.

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 providence of Ontario can have the driver’s licence and health card show ‘X’ as their gender identifier (Transgender Europe, 2017: Third Gender Markers in Europe and Beyond).

**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.**

[More Information](#)

- 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

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.

Amnesty supports Option 4 as this would do most to advance recognition of non-binary people in Scotland.

Amnesty would not support Option 2, we agree with the Scottish Government's assertion that this would not advance the recognition of non-binary individuals.

Amnesty would also not support Option 5, the Scottish Government should make the changes through this legislative change process, as putting off the decision making until an unspecified future date only leaves non-binary individuals in unnecessary limbo. The gains for non-binary people and Scottish society as a whole in bringing change now far outweighs putting off further decision making.

**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.**

**Are you aware of other impacts we have not identified?**

Yes

**No**

Don't know

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

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

[Impact Assessments](#)

**(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?**

Yes

No

If you answered Yes, add your comments or evidence.

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

Yes

No

If you answered Yes, add your comments.

Amnesty International welcome the nature of this consultation and look forward to engaging in the future on work to progress the findings of the consultation. Progressive change in Scotland in addressing these important issues would have significant impacts on the lives and mental health of transgender including non-binary people. We know from research by Amnesty and our partners such as the Scottish Trans Alliance that a person's gender recognition is of high significance.

For transgender people, official identity documents reflecting their gender identity are vitally important for the enjoyment of their human rights. Obtaining documents reflecting your gender ensures your right to private life and means you are acknowledged by the state and equal recognition before the law.

Whether at school or in the workplace, transgender people are often discriminated against because of widespread prejudices and gender-based stereotypes stemming from standardised notions of masculinity and femininity. Such discrimination occurs irrespective of whether or not transgender people bear documents that reflect their gender identity. However, the lack of such documents can further expose transgender people to discrimination whenever they have to produce a document with gender markers that do not correspond to their gender identity and expression, often forcing individuals to be involuntary 'outed'.

While the changes proposed in this consultation will not have such impact to erase all of the issues faced by transgender individuals, the process of legislative change will foster inclusion, recognition and dignity for transgender individuals in Scotland. The move to a self-declaration system would allow people to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perceptions of gender identity, as well as ensuring transgender people's rights were not violated by the process itself. These changes are essential to bring the 2004 Act up to date with international best practice.

Globally we see a crackdown of LGBTI rights and spokespeople not being given an adequate platform to discuss the needs of LGBTI people. We hope that Scotland can be a world leader in addressing transgender rights and equality, and in doing so help people globally to secure their human rights.