

NUS Scotland

1 Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Yes

If yes, please outline these comments.:

While we welcome the overall bill we do not support the inclusion of this backdating requirement. There is no evidence to support that this arbitrary time period is necessary and believe that it sets an additional hurdle for individuals applying for gender recognition. No other statutory declarations require evidence of backdating and this is likewise not a requirement in other gender recognition systems around the world, which only require a declaration to be made in the present. There is no reason to require this additional wait to change a person's birth certificate when it is not required for any other documents.

Furthermore, living in any particular way does not necessarily indicate or reflect a person's gender identity; there is no universal way of 'proving' a person's gender upon observing the way they choose to live. In order to 'prove' something requires some universal metrics by which a thing can be verified, however we believe that there are no universal experiences of living as any gender and that any attempt to quantify this risks further entrenching harmful gender roles in society.

If the requirement be that a trans person provides some form of official documentation, this again may present a barrier to many trans people legally changing their gender. Trans people are more likely to be estranged without a fixed address, be unemployed or struggle to access employment because of transphobia on the part of employers. This makes official records difficult to obtain and similarly, changing documentation might have associated costs which can present a significant barrier. For most trans people, transitioning looks like changing the way that you live your life, potentially changing your gender presentation, changing pronouns and how others refer to you informally. This is the reality of transition for most trans people. The process by which trans people can legally change their gender must reflect the reality that transition is largely a private process, not one that is administrative or can be measure without violating trans people's privacy.

It is important to remember that transitioning can be difficult and sometimes dangerous for trans people; the burden of requiring evidence to prove their gender would be overly invasive and would add yet another burden to an already sometimes difficult process.

NUS Scotland and NUS UK already work with our members on the basis of self-declaration. During registration for our events we ask delegates how they self-define and let people run for reserved democratic positions for trans representatives on this basis. Furthermore, our member student associations also use self-declaration in relation to their liberation bodies such as LGBT+ societies, in democratic elections and in access to toilets.

2 Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

Yes

If yes, please outline these comments.:

We are opposed to this proposal on the basis that it is paternalistic, assuming that significant reflection has not already happened. Similarly to question 1 we are

not aware of a reflection period being common practice in Scottish law for statutory declarations and requiring it here suggests trans people are somehow less competent to make these decisions. It is also not common practice in other countries with similar systems - Denmark and Belgium are the only other countries who have a reflection period. There is again no evidence to support this proposed arbitrary time period and we call on the Scottish Government to remove it.

People coming out as trans do not do so lightly; the social costs for doing so can be heavy and so those who decide to legally change their gender will do so after a long period of having thought about it. Any time taken up until this point will not be included in this gender recognition process so requiring a period of reflection will place further barriers and unnecessary waits in the process. Not being able to legally change their gender when they are ready to do so denies trans people dignity and respect and may have implications for an individual's mental health and wellbeing. Furthermore, a lack of legal recognition can put trans people in unsafe situations if they are forced to out themselves when needing to show their birth certificate which does not match their gender identity.

We urge the government to commit to the principle that no individual has a better understanding of their gendered experiences than they themselves. This would eliminate the need to introduce this or any measure which presupposes that a trans person may necessarily be unsure of their gender, or would regret or have any choice in if they did feel differently about their gender identity in the future.

As abovementioned, NUS Scotland and NUS UK already work with our members on the basis of self-declaration, which does not require any reflection period.

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

Yes

If you wish, please give reasons for your view.:

NUS Scotland represents a large number of students in further education under the age of 18, and University students who are 17 at the start of their course.

Research conducted by NUS LGBT+ in 2014 shows that trans students face specific difficulties related to the lack of recognition of their identity, and that they stand out within LGBT community as being particularly vulnerable and unconsidered by HEIs. This is supported by more recent research conducted in Scottish universities and colleges in 2019 by Dr Matson Lawrence and Dr Stephanie Mckendry (<https://strathprints.strath.ac.uk/66730/>).

We strongly believe that legal recognition would make it easier for trans students in further and higher education and that they would benefit from being able to legally change their gender without parental consent. This would ease the application process, during which students often feel obligated to disclose their gender at birth. As a consequence of this continued restriction, 16 and 17-year-old trans students starting in further education, and some starting higher education, will be required to register with their provider under the wrong gender if they are unable to access legal documentation reflecting their correct gender. This creates an additional barrier for students who later wish to change their records and is likely to impact a student's experience of and success in education. At the other end of the education journey, this may cause significant difficulties for a graduate if their qualification is in a different name to the one they're using as it can be difficult to have the qualification recognised without a gender recognition certificate.

Furthermore, growing communities of young trans and gender non-conforming people (such as those established by LGBT Youth Scotland) reflect growing societal awareness of trans identities and, as a consequence, an increase in the number of people who feel able to come out under the age of 18. As such, we believe that legislation should be amended to reflect this and better support the growing needs of young trans people.

Sixteen years old is already widely recognised in other areas of legislation as the age at which individuals can vote, get married or join the army. Reducing the minimum age for gender recognition would help to ensure gender recognition legislation is in line with these. Forcing individuals to wait an additional two years is likely to have significant detriment to their wellbeing.

NUS Scotland does not represent under-16s. However, like other stakeholders (including Stonewall, the Scottish Trans Alliance and LGBT Youth Scotland), we oppose the decision to remove under-16s from consideration from the ongoing process to reform the Gender Recognition Act.

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

Yes

If yes, please outline these comments.:

We are disappointed that the Scottish Government has chosen not to progress with their initial intentions of non-binary recognition. We would question why, if the intention behind this reform is to allow trans people to be recognised as who they are, this is any different for non-binary people and would urge the Scottish Government to reconsider recognition for this group.

Legal recognition for non-binary people would be a huge step towards a more progressive and accepting society. It would not only formally recognise non-binary identities as real, but would also end the current necessity for non-binary individuals to legally identify as either male or female. This legal recognition should follow the same process as the recommended process for legal recognition for trans men and trans women does.

As stated in our response to the 2018 consultation, we believe that additional changes to a number of systems are required to truly recognise non-binary identities and to separate gender from sex in the public discourse. This must include working with the UK Government to address laws which use only binary terms. We would encourage the Scottish Government to explore how non-binary legal recognition can be achieved in Scotland.

NUS Scotland and NUS UK recognise non-binary individuals through self-declaration, using the same procedures as we do for our trans members. We would expect the Scottish Government to do similarly.

We also have significant concerns about the proposed additional offence specific to gender recognition and are opposed to this. It is already an offence to knowingly make a false statutory declaration under the Criminal Law (Consolidation) (Scotland) Act 1995 and we do not believe that an additional offence is needed beyond this. We fear that adding one could act as a significant deterrent, particularly to young people, for people who wish to legally change their gender. It is unclear how it can be proven that someone has abused the process and equally who is harmed in the event that someone wishes to reverse their gender recognition.

We have concerns that having an additional offence may also facilitate harassment of trans people, with significant risk here of trans people being accused

maliciously by anti-trans individuals or groups. Furthermore, given that convictions for breaking a statutory declaration in gender recognition cases are almost unheard of both the UK and other jurisdictions with similar or more relaxed laws, it seems unlikely such mechanisms are needed.

Issues for non-binary people and how they use gender-recognition are also raised. Some non-binary people may wish to seek gender recognition within the current binary system if they feel closer to one gender than the other but this could be misconstrued as a false declaration under a binary system. Gender recognition for non-binary people is needed if we are to protect this group.

We believe that there are already a number of in-built deterrents against false declarations, including the difficulties involved with reversing the process, namely having to go through the process again. Additionally, we do not believe that there is any incentive for an individual to maliciously and falsely apply for gender recognition. The scenarios offered by those opposed to these reforms, including using gender recognition to access women's bathrooms to commit sexual assault, relate to actions which are already crimes with legal consequences which are independent of the individual's gender status. We find it absurd to suggest that someone would go through the extra hurdles, and cost, of falsely applying for what is essentially paperwork to commit what is already a crime. We also feel it is important to acknowledge that legal gender recognition would not give a person any additional rights in accessing single-sex services and spaces.

Finally, in section 2 of the draft Bill, 'Persons who may apply', we note that there does not appear to be provision for asylum seekers and would urge the Scottish Government to consider this group in the legislation that they bring forward.

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

Yes

If yes, please outline these comments.:

We welcome the inclusion of the Equality Impact Assessment in the consultation and its rightful conclusion that this Bill will not have a detrimental impact on the rights of any other protected group. Specifically, we welcome the acknowledgement that this bill will have no adverse impact on women and that the protections afforded under the Equality Act 2010 will not be altered by this legislation.

The only additional area we would like to be given more consideration is the impact on the pregnancy and maternity characteristics. The Cross-Party Group on Sexual Health and Blood Borne Viruses recently held a number of evidence sessions on the issues of trans healthcare and reproductive health which NUS Scotland contributed to. During the session NUS Scotland participated in, numerous issues related to access to reproductive healthcare were identified. We would urge the Scottish Government to consult with the CPG on Sexual Health and Blood Borne Viruses and undertake any necessary follow-up actions relating to the impact on pregnancy and maternity.