

## Children and Young People's Commissioner Scotland

### Questions

**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.:

Please see our response to Q3

**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.:**

Please see our response to Q3

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

Not Answered

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

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government and Parliament.

We welcome the opportunity to comment on the Scottish Government's proposed Gender Recognition Reform (Scotland) Bill.

We note that the Scottish Government's proposals include:

- removing the current requirement in the Gender Recognition Act 2004, ('the GRA'), for people to apply to the UK Gender Recognition Panel for a Gender Recognition Certificate ('certificate') . Instead, those seeking legal gender recognition could apply to the Registrar General for Scotland who has some existing functions under the GRA
- removing the current requirement for applicants to provide medical evidence of their diagnosis of gender dysphoria

- retaining the requirement that applicants must make a statutory declaration that they have been living in their acquired gender for three months and intend to do so permanently
- introducing a minimum three month period of reflection between applying for a certificate and confirming the application. This means that the applicant must have 'lived in' their acquired gender for a minimum period of six months before a certificate is granted
- retaining the position that a false statutory declaration is a criminal offence, and introducing a new offence of false application - each with a potential punishment of up to two years' imprisonment
- reducing the minimum age of an applicant from 18 to 16

## Background and context

We must firstly express our significant concerns about the polarisation and tone of the debate on this issue. This is in particular, but not limited to, social media. Children and young people have the right to take a full and active part in debates on matters of public policy and this means that the discourse must at all times be respectful, reasonable and courteous. We must all recognise that individuals who hold a range of different positions in this debate feel them deeply and personally. Language or action that seeks to demean, degrade or ascribe malicious motives in the absence of evidence is not acceptable. All those participating in this debate should be mindful of the need to keep the discussion focused on the issues and on the law rather than personalising them. Failure to ensure that these conditions exist is, in our view, highly unlikely to result in effective, rights compliant law and poses a serious risk to the rights and interests of many children and young people.

As a point of principle, all children, irrespective of their age, are entitled to receive (and the State has a legal duty to provide) universal health and education services, to meet their rights and wellbeing needs. If children require guidance or assistance, they must be able to safely access confidential, support services, without fear of harm or discrimination.

However, it is important to recognise that this consultation is limited to reforming the existing process through which an individual can change their legal sex. The consultation, and therefore our response to the questions, is limited to the proposed reforms and does not fully address wider issues of public policy. In line with our remit and mandate, we limit our responses to issues relating to children and young people.

## Response

We have previously provided evidence to the Scottish Government on this issue, including a full human rights analysis, but we set out the key rights below with reference to the United Nations Convention on the Rights of the Child (UNCRC).

The UNCRC does not directly address the issue of legal recognition of gender identity but several articles are relevant and apply to all children. Article 3 requires

that in all matters concerning a child, their best interests shall be a primary consideration. Article 6 obliges States parties to ensure to the maximum extent possible the survival and development of the child. Article 8 outlines children's right to preserve their identity. Article 12 requires States to provide children with the right to express their views and for due weight to be given to their views in accordance with their age and maturity. Article 14 covers a child's right to their own thoughts and beliefs. Article 16 provides children with a right to privacy.

The Committee on the Rights of the Child's ('CRC') General Comments 12 (on the right of the child to be heard) and 20 (on the Rights of the Child in adolescence) address the concept of evolving capacities through which children exercise their rights, and build on Article 5 UNCRC – which calls for a balance between the increasing capacity of a child to hold and express their own views, and the role of parents in decisions that affect their child.

A number of these rights are also expressed on other international human rights treaties, including in particular the right to respect for private and family life set out in Article 8 of the European Convention on Human Rights (ECHR).

Since 1996, the European Court of Human Rights has made clear that there is a requirement for the State to put in place a process for gender recognition. In 2015, the Parliamentary Assembly of the Council of Europe by Resolution 2048, called 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”.

Our view is that the current regime requires reform, which must be undertaken in line with the international human rights framework. However, we have some concerns with the proposed bill which we outline in response to the questions below.

Question 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. See Response to Q3

Question 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. See Response to Q3

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

Scots law has developed in an often ad hoc manner to set a range of different age thresholds for children. This creates a landscape that is confusing and inconsistent and the age thresholds often appear arbitrary to children themselves. For example, children can still be held criminally responsible at the age of 8 but are unable to vote until 16 (for Scottish Parliament and local government elections) or 18 for UK elections or referendums. Furthermore, the inconsistent definition

of a child in Scots law remains complex and unresolved, meaning that in some legal processes, including the criminal justice and mental health systems, children may technically reach the age of maturity, and be treated as adults, at 16 while in others, such as education and some care and protection proceedings, they are recognised as children up to the age of 18.

Some young people have told us that they consider it particularly humiliating when they have to repeatedly confirm whether they identify as male or female or explain why their identification documents are inconsistent. This most commonly occurs when children are sitting national examinations, or making applications for further education, employment, or to government agencies.

We have consistently expressed the view that age limits in some areas of Scots law are not consistent with the provisions of the UNCRC. In particular, the Convention requires that 16 and 17 year olds be treated as children in all circumstances. This does not mean however, that distinctions cannot be made based on maturity, development and evolving capacities. Indeed, the Convention requires that States balance their obligations to protect children, with a recognition of the evolving capacity of the child and rights to autonomy.

Minimum ages should, without exception, be consistent with all rights set out in the UNCRC. This means that in areas where children's protection is at risk (e.g. in the justice system), all children under the age of 18 should be afforded special protection. Where minimum ages are necessary to correct for potential abuses of power (e.g. sexual consent), their enforcement should never run counter to children's rights. In areas where age restrictions serve no protective purpose and potentially curb children's development, freedoms, and even protection (e.g. the freedom to choose or leave a religion, access to complaints mechanisms), minimum ages should be avoided. Finally, where tensions are present between children's protection and autonomy (e.g. consent to medical treatment), children's capacity should be the deciding factor and should not be judged generally, but in relation to the issue at hand and the individual child. This judgement should take into account the social and cultural norms in a given context, and the power imbalances at play in questions of consent.

There is no mechanism in the proposed reforms for setting out how an individual child's understanding of the process and its consequences would be assessed. The Scottish Government has not set out the way in which the process of statutory declaration would seek to balance these considerations for 16 and 17 year olds, or indeed, for younger children who may be assessed as having the capacity and understanding to make this decision. In other contexts, for example where a child is entering into a legal transaction, instructing a solicitor, or consenting to medical treatment there is a requirement for professional judgement to be made on a case by case basis.

We note that a 3 month "lived in" time period with a further 3 month confirmation period is significantly shorter than the current 2 year process. Children and young people often reflect that "adult" timescales can feel extremely and unnecessarily lengthy from their perspective, and we are aware of the distress reported by many trans young people about the delay in receiving full legal

recognition of their gender identity. We understand therefore, the desire to shorten the timescales.

However for children, as noted previously, this legitimate desire must be tempered with a recognition that the State is obliged to balance children's rights to autonomy with protective measures based on their evolving capacities to understand the decision, and on the significance and consequences of making it.

These kinds of protections are provided elsewhere in Scots law. For example, section 3 of the Age of Legal Capacity (Scotland) Act 1991 provides, that although a child may have had capacity to enter into a legal transaction, it can subsequently be set aside (if application is made before the young person reaches the age of 21) with no detriment or adverse consequence for the child.

For children and young people therefore, we do not agree that the Scottish Government has provided sufficient evidence to support these timeframes as being appropriate. Any legal process should be developed and drafted to provide evidence-based, appropriate safeguards and to avoid penalising or criminalising individuals for subsequently changing their minds. Timescales for children and young people should then be led by the needs of this process rather than be determined in isolation from it.

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

Yes

#### **If yes, please outline these comments.:**

Question 4. Do you have any other comments on the provisions of the draft Bill?  
We welcome in principle the Scottish Government's aim to simplify the process and mechanism for obtaining a Gender Recognition Certificate. Legal mechanisms which give effect to human rights obligations should be rights respecting themselves in how they operate, and we note the clear views expressed by trans young people about their negative experiences of the existing process. We recognise that these reforms aim to ensure compliance with human rights and equality laws and principles, in enabling trans people full recognition of their acquired gender in law.

However, we have the following concerns about these proposed provisions, as they relate to children and young people:

The Scottish Government has not proposed that the Bill will provide any guidance to define what is meant by "living in an acquired gender". Currently the Gender Recognition Panel sets out the criteria, but the proposed Bill seeks to remove the involvement of the Panel. If there is to be a process which applies to children (under 18) there is a need for these criteria to be set out in order that the professional required to supervise the process can make an assessment of a child's understanding of it. It also provides no assistance to the court on the evidence required to determine the truthfulness of a statutory declaration. This is particularly significant for individuals given the criminal consequences of making a false declaration.

The requirement for a statutory declaration of an intention to live 'permanently' in an acquired gender has particular implications for children and young people. As we note in our response to questions above, the State is obliged to take account of children's evolving capacities and provide the appropriate levels of protection. By including a criminal penalty for making a false statutory declaration there is a risk that children will be adversely affected, and unnecessarily criminalised. Further consideration is needed around the whole process for children and young people to avoid these kinds of unintended consequences.

We consider it essential that the Scottish Government addresses the issues around assessment of longer-term implications of the proposed provisions, including for children under 16 who would not be able to apply for a certificate.

In summary, there is a clear need for reform of the GRA to remove unnecessary barriers to obtaining a gender recognition certificate and ensure the process is fully respectful of human rights. However, we consider that the Scottish Government needs to do more work on this area, to address the concerns raised above, including undertaking specific assessment and evidence-based research and consultation with children and young people, before bringing a Bill to the Scottish Parliament. We note in particular that there appears to be little research into the circumstances of children who choose to de-transition, and therefore little on which to base decisions around the appropriate levels of protection and safeguards. We would also welcome further consideration by the Scottish Government of research and evidence on consent, capacity, autonomy and protection.

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

Yes

**If yes, please outline these comments.:**

Question 5. Do you have any comments on the draft Impact Assessments?  
We note that the draft Children's Rights and Wellbeing Impact Assessment (CRWIA) produced with the Bill, appears to contain different questions from the revised template published by the Scottish Government in 2019. We are unclear why a different approach has been taken to this assessment.  
We note that the impact assessment does not explicitly consider the situation for care experienced children and young people, who may be legally 'looked after' under the Children's Hearings (Scotland) Act 2011, until they are 18. These young people have legal rights to additional support and assistance from the State and their Corporate Parents up to the age of 26, in accordance with the Children and Young People (Scotland) Act 2014.

In fact, we do not believe the draft CRWIA evidences any assessment of the potential negative impacts of these proposals on different groups of children and young people, nor does it address the need to balance participation and autonomy rights with protection rights and the effect of any proposed mitigation to assessed negative impacts.