

Response ID ANON-ETBC-GFU9-S

Submitted to **Review of the Gender Recognition Act 2004**

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The Gender Recognition Act 2004

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.

Agree

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

Transgender Europe - TGEU is of the view that adapting officially held gendered information should not be based on any medical evidence, but only on the self-declaration of the person concerned.

We are pleased to note that till today seven European countries (Denmark, Malta, Norway, Ireland, France, Greece, Belgium) have moved towards de-medicalised legal gender recognition procedures.

The Parliamentary Assembly of the Council of Europe has welcomed the emergence of a right to gender identity in its Resolution 2048(2015) "Discrimination against transgender people in Europe".

It is certainly the right move for the right moment in time for Scotland to introduce gender recognition procedures based on self-declaration.

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?

Yes

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

TGEU supports recognition procedures that are quick, transparent and accessible and based on self-determination.

Introducing waiting periods or other means that might block access to legal gender recognition is contrary to European standards in this field.

Waiting periods or other additional verification methods are expressions of distrust into the capacities of trans people to make their own decisions. It also implies that being trans and seeking legal gender recognition is somewhat undesirable.

Trans people need support and empowerment to realise their full potential in a world that is still largely ignorant and hostile against them. Administrative procedures should in this regard be as easy as possible, and thus set an important example for society to trust trans people to make their own sound decisions.

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

No

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

The gender identity of a person is a highly intimate aspect of a person's private life. Similar to other private decisions such as marrying or taking up or changing faith or religious beliefs there should be no limitations to how often a person might need to seek a change to how their legal gendered information is recorded.

There is no relevant public interest that would require a limitation to the number of times a person can exercise their right to be recognised in one's gender identity.

Any administrative extra effort could be compensated through administrative fees.

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

B. to everyone?

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

Official recognition of a person's gender identity should be accessible to everyone to ensure least possible barriers to the freedom of movement of a person, as established by the EU legal framework.

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. Doyou agree or disagree?

Agree

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

Young trans people are particularly vulnerable for anti-trans discrimination, bullying and harrassment, while they have often less opportunities to secure their

rights.

Legal gender recognition for minors is key to ensure their human rights are upheld and that they can grow up with dignity and respect.

In consultation with our members we see that trans people come out at an increasingly young age. Hence, legal protection mechanisms need to be updated accordingly.

It is paramount to the principle of the best interest of the child that young people are enabled to take decisions for themselves. The UN Convention on the Rights of the Child require that minors are not discriminated against - neither on grounds of age nor on grounds of their gender identity - , and that they are heard according to their maturity and evolving capacity in all matters that concern them.

Also, professional associations support this view. The World Professional Association for Transgender Health confirms "increasing numbers of adolescents have already started living in their desired gender role upon entering high school," highlighting the large number of trans adolescents showing gender identity continuity throughout adulthood. (The Standards of Care - Version 7, 2011, p. 12)

The Council of Europe Commissioner for Human Rights has highlighted the barriers young trans people face in accessing legal gender recognition and called for accessible procedures for them. ("LGBTI children have the right to safety and equality"; 2014)

In contrast, barring young people from legal gender recognition signals that being trans and/ or seeking legal gender recognition is somewhat undesirable.

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

Option 3 – parental application

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.:

While parents should be given the chance to take the decisions that are in the best interest of their child, the current minimum age of 18 years of age for legal gender recognition is contrary to this right.

However, a child may not be barred access to legal gender recognition because of opposing view of a parent or someone holding PRR.

The proposed solution of parental application should require that only one PRR needs to agree/ support the application.

From practical experience in different European countries we know that problems occur most often if one or both parents do not support the child's gender identity. TGEU finds it thus important to clarify that the best interest of the child remains the guiding principle if those holding PRR do not agree.

Such a procedure must not be medicalised, lengthy or overtly complicated or otherwise limiting the right of a minor to be recognised in their gender identity.

Whatever the procedure chosen it should be unethical to test the minor's gender identity. Instead, the minor should in line with their maturity and capacities be heard in a decision for legal gender recognition, and have their views respected.

Sweden debates the introduction of an automatic notification to Social Services for the possibility of parental neglect if a minor applies without the (full) support of their parents. In this case, it would be checked that the minor is properly supported and protected in their gender identity, even if their parents are not supportive.

Marriage and Civil Partnership

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

Yes

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

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.

Yes

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

Requesting a change to the legal institution affects not only the person seeking legal gender recognition but also their spouse. Hence, any legal requirements that might jeopardize acquired rights of the spouse or other family members need to be carefully assessed for their necessity and legal validity. Otherwise, the applicant's spouse might be affected to adverse treatment because of the gender identity of the applicant, which could amount to discrimination.

Given the relatively small number of people for whom such a option would be important it seems fair to enable this exception.

Also, with introducing gender recognition for non-binary persons the binary concept of marriage and civil partnership also needs to be reworked and opened up.

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

Yes

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

Other aspects of the 2004 Act

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

Yes

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

While we are not familiar enough with the relevant legal framework as to comment on all aspects raised, the exemption relating to the application for a religious post seem inappropriate. The gender identity (history) of a person is their private matter and should not be disclosed by public officials to any future employer, whether they are faith-based or not. The handling of such information should entirely be in the hands of the person concerned and they should feel confident that their information is securely held with the authorities.

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?

Yes

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

Automatic mutual recognition would be a logic consequence of the principle of self-determination and be particularly important to remove any barriers to the right to freedom of movement and residents of EU citizens.

Non-binary people

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

Yes

If you answered No, and if you want, you can give reasons for your answer.:

Non-binary trans people face higher levels of discrimination and social exclusion, as shown by TGEU's health report "Overdiagnosed but Underserved". Binary recognition is not sufficient to reflect the human rights of a growing part in the trans community of those not identifying as one or another gender. Introducing legal gender recognition for non-binary people is an important step to counteract structural discrimination on grounds of gender identity.

Resolution 2048 (2015) of the Council of Europe's Parliamentary Assembly welcomed "the emergence of a right to gender identity [...] which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to it" and asked member States to "consider including a third gender option in identity documents for those who seek it".

The German Constitutional Court found in November 2017 that the legislator is under the obligation to introduce a positive gender marker option for those not identifying as male or female. (See <https://tgeu.org/joint-statement-civil-society-welcomes-ground-breaking-german-constitutional-court-demand-for-a-new-regulation-of-sex-registration/>)

WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose. (WPATH Identity Recognition Statement 2017)

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.

Option 1: Changes to administrative forms, Option 3: Limited document changes, Option 4: Full recognition using proposed self-declaration system, Option 6: Amendment of the Equality Act 2010

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.:

Recognition of non-binary identities requires further changes in the legal framework to ensure that the rights of non-binary persons are adequately protected and that it is not on the individual to deal with "lose ends". It cannot be left at a level of symbolic recognition. Comprehensive analysis and reform is necessary to ensure the legal framework is fit all people, including those with a non-binary identity.

For a comprehensive analysis of the German legal framework for necessary changes in case of non-binary recognition including concrete suggestions see "Geschlechtervielfalt im Recht - Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt - Begleitmaterial zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität - Band 8" by the German Institute for Human Rights, accessible at: <https://www.bmfsfj.de/blob/jump/114066/geschlechtervielfalt-im-recht---band-8-data.pdf>

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.

Don't know

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

Conclusion

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

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?

No

If you answered Yes, add your comments.:

About You

What is your name?

Name:

Richard Koehler

What is your email address?

Email:

richard@tgeu.org

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

Transgender Europe - TGEU

If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.

If you are responding to this consultation as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, please do that here.:

Transgender Europe envisions a Europe free from discrimination, where each person can live according to their gender identity and gender expression without interference and where trans people and their families are respected and valued.

TGEU works for the equality of all trans people in Europe.

We give trans people a voice in Europe

We advocate for trans people's human rights

We raise awareness on issues trans people are facing

We support a strong trans movement

We conduct and encourage research for the benefit of trans people

We are an active part of the international trans movement

TGEU has currently 110 member organisations in 44 countries.

TGEU has been supporting more than 30 processes for improved legal gender recognition procedures in Europe in recent years.

Where are you resident?

Rest of the World

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Very satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Very satisfied

Please enter comments here.: