

## **Mermaids**

### **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.:**

Mermaids notes the outdated notion of 'acquired' gender within the question and only uses this term in reference to current legislation. Any future legislation should refer either simply to one's 'gender' or 'affirmed gender'.

Mermaids welcomes that the draft Gender Recognition Reform (Scotland) Bill proposes to de-medicalise and streamline the current process for applying for legal gender recognition, replacing this with a more straight-forward, administrative process, based on the principle of self-determination.

However, we believe the requirement that an individual must state on a statutory declaration that they have been living as their gender for 3 months is arbitrary, unnecessary and does not help achieve the purpose of the Act. We do not know of any evidence that this waiting time is necessary and call for this requirement to be removed. What we do have is a significant amount of evidence around the detrimental effect of waiting on the mental health and wellbeing of trans populations. Although this research is generally in reference to treatment paths, it concurs with anecdotal evidence around gender recognition. In the Trans Mental Health Study 2012 (McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.), people described waiting as 'devastating, frustrating, hoop jumping, waiting for permission to live, emotional torment, treading water, waiting for the world to catch up, in limbo' – we know how difficult it is for trans people feeling like they have to wait to live their lives. Far less research has been done specifically on waiting for a GRC, however there is research currently being conducted which will hopefully be published later this year.

Further, such a requirement would not be in line with Council of Europe Recommendations, that a system should be '...quick, transparent and accessible' [Paragraph 21 LGBT Recommendations CM/Rec 2010(5)]. One will be required to be able to afford to have a Statutory Declaration sworn (should it be done so by a notary public), as well as add an unnecessary 3 months to the process.

For completeness we want to be clear that we would not be in agreement with the Registrar General making further evidence provisions in relation to a 3 month lived experience within a GRA application. If it comes to light that such further provision could be made, we respectfully would request that we provide a further annexed response to this.

Mermaids recommends that a model of self-determination is the most appropriate, desirable and human rights conscious regime. This is supported by the notion that a

model of self-determination has already been successfully implemented in Norway, Malta, Belgium, Denmark, France, Portugal and Ireland. This is evidenced in the following report, which also shows the UK to be the only country of those reviewed without a model of self-determination <http://www.trust.org/contentAsset/raw-data/8cf56139-c7bb-447c-babf-dd5ae56cd177/file>

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.:**

Mermaids recommends that there is no period of reflection for any applicant of any age because it contravenes the principle of self-determination that we believe must be at the centre of any new Legal Gender Recognition (LGR) system. A reflection period requirement bolsters a myth that trans, non-binary and gender diverse (TNBGD) people don't understand their identities or know what's best for themselves. For a TNBGD person, a decision to apply for a gender recognition certificate (GRC) will inevitably be following a period of self-reflection. An arbitrarily imposed 'reflection period' should not be bureaucratically imposed, but instead should be self-determined by the individual.

Requiring a state-imposed period of reflection not only invalidates a TNBGD's experience, it also unnecessarily elongates the LGR process. In line with Council of Europe Recommendations, LGR should be 'quick, transparent and accessible' [Paragraph 21 LGBT Recommendations CM/Rec 2010(5)]. This requirement does not satisfy this recommendation, but instead prolongs the length of time an individual must wait before having their gender legally recognised. All this time is a delay in the individual being recognised and dealt with as their true gender (this is especially true for Children and Young People (CYP)) and prolongs the length of time that their rights, including their right to privacy, are violated – this includes CYP.)

The requirement of a reflection period is often justified with reference to the theory of 'desistence'. This ignores the experiences of TNBGD people and is not appropriate within this discussion. While we encourage the government to take into consideration all evidence, Mermaids recommends a cautionary approach to evidence around. Newhook et al (2018) offer a critique of commonly cited desistence studies, highlighting methodological, theoretical, ethical and interpretive concerns. Attention should be directed towards research which focuses on how to support TNBGD people, as the evidence base around desistence will not assist in creating better systems for our TNBGD members of society (See [Dr B Vincent, PhD, 'Transgender Health: A Practitioners Guide to Binary and Non-Binary Trans Patient Care' (2018) Jessica Kingsley Publishers pp.121-124] for full discussion around desistence in CYP).

Further, through direct consultation with our service users it was suggested that the idea of a reflection period insinuates that someone is making a decision around their gender, which is the wrong approach: "...the idea that it is a 'decision' makes me so angry ... why it is someone else's decision? People still get rejected on the basis of it

being someone else's decision and that it should not be the case. You should not have to prove yourself to anyone. Current law feels like the government are saying, "...you are not trans enough". Anonymous, 15 year old trans youth, 2018

Mermaids recommends that any procedure is made accessible enough to allow for a quick reversion if necessary in acknowledgement that one's gender identity may indeed change in time, for people of any age.

Significantly, no other process for updating records, no matter how significant a change, requires a reflection period. This level of caution suggests updating a birth certificate is likely to have a negative impact on the person's life, even though all evidence points to the opposite. Further, this level of caution suggests that the law is reserving special rules for those who are planning on updating their gender records, which could be viewed as treating someone less favourably as a result of them being TNBGD.

We call on the Scottish Government to remove this requirement.

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

No

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

Mermaids believes the minimum age should be lowered, but have no minimum age. Mermaids recommends that every trans, non-binary and gender diverse (TNBGD) CYP should have access and the option of Legal Gender Recognition.

The process of self-declaration should be available to anyone from 16 years and upwards. This is consistent with other laws in Scotland that state a person acquires their rights (eg to marry, gain employment, vote, and be held legally responsible for their actions) from the age of 16. It is also in line with the position of the World Professional Association on Transgender Health (WPATH) (2017) a non-profit interdisciplinary professional and educational organisation devoted to trans health, with goal to promote evidence based care, education, research, public policy and respect in trans health. WPATH advocates that gender recognition should be available to trans youth, including those under the age of the majority, see <https://tgeu.org/wpath-2017-identity-recognition-statement/>

We also recommend that a system of recognition should also be available to under 16s.

We say this within the context that a birth certificate is the only legally recognised form of identification for CYP under 17 without a passport, so often CYP under 17 need to use their birth certificate more than adults do, for example when changing schools. Being able to change their gender on their birth certificate is therefore particularly important to protect the privacy of children and young people under 17.

In summary Mermaids recommends that those CYP aged 16 and 17 years old should have automatic access to a self-declaration model application. The mechanism for under 16 year olds should be streamlined for those who have consent from at least one person with parental responsibility (PR), although PR consent would not be necessary should the young person have independent competence. Those without an unsupportive person with PR and lack of independent competence should have access to a safeguarded mechanism; we invite to work with the government and other stakeholders to develop a vision as to what this mechanism would look like. Any procedure must provide every CYP a life of dignity and autonomy, the right to privacy and the right to be heard and to take an active role in all administrative and judicial procedures that concern them.

Identity documents reflecting a person's gender identity are important for trans, non-binary and gender diverse (TNBGD) people's dignity, safety and access to human rights – this includes children. Nearly one-third (32%) of individuals who have shown IDs with a name or gender that did not match their presentation reported negative experiences, such as being harassed, denied services, and/or attacked; (James, S., Herman, J., Rankin, S., Keisling, M., Mottet, L. and Anafi, M. (2016) The Report of the 2015 U.S. Transgender Survey. Washington DC, National Center for Transgender Equality.)

Not providing TNBGD CYP with access to LGR creates unwanted experiences of having to come out, which often would not happen were the CYP to have a birth certificate (BC) that reflected as their true gender. TNBGD CYP people do not always have passports or driving licences; BCs can often be a CYPs only form of official personal identification. This often leads to a CYP, or their parent, having to explain why the BC has the incorrect gender marker on it which infringes on the right to privacy of that individual [Article 8, ECHR].

Through in-house consultations and statements from service users, we have listened to the life-experiences of our CYP who face problems in being recognised and respected for their gender within society without a birth certificate that reflects their true gender. We have received accounts of our service users being denied recognition in our schools, jobs and when accessing healthcare on the basis that their identity documents do not match their gender. This is unacceptable and exposes TNBGD CYP to distressing and humiliating situations that is impacting on their ability to learn, thrive and interact in full within society, which could be avoided through Gender Recognition Act (GRA) reform. Reforming the GRA to include all those below 18 years old with no age restriction can help end the discrimination that is currently taking place. Mermaids states this whilst acknowledging however that TNBGD CYP should have no extra difficulty interacting in society as their true gender without a GRC and we invite the Government to explore ways public bodies and society generally can be educated in this respect.

Not allowing a TNBGD CYP to correct their BC is also incompatible with other systems that allow TNBGD to change their gender marker. For example, trans binary CYP can change their gender marker on all other forms of ID including passports, education and NHS records without age-based restrictions. A change in law around LGR for CYP and the allowance of it would simply bring GRA law in line with how wider social systems are working. In respect of non-binary CYP, GRA reform would

ensure wider social systems recognised these individuals also. Without a set of matching documents participation in society becomes very difficult. For many TNBGD CYP, the gendered information in these documents, including name and gender marker is a constant source of discomfort, discrimination and hate incidents/hate crimes. Mermaids believes that GRA reform can help make our TNBGD CYP more comfortable, mitigate the risk of discrimination against them and mitigate the risk of hate incidents/hate crimes.

Scotland should be careful not to deny a TNBGD CYP gender recognition on the ground that they are too young. Current legislation does not give our TNBGD CYP acknowledgement that they are right holders in their true gender. The Council of Europe asks member states dealing with minors' gender recognition procedures to "ensure that the best interests of the child are a primary consideration in all decisions concerning children". Explicit or implicit age restrictions may obstruct this best-interest-principle for CYP.

Further, such restrictions may violate non-discrimination provisions in the Convention on the Rights of the Child (UNCRC) [Art 3.1; Art 8.1; Art 12.1; Art 24 and Art 6.2], the Yogyakarta Principles [YP+10, Principle 32 [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)], the European Convention on Human Rights [Art 8; Art 14] and the EU Fundamental Rights Charter [Art. 21]. The UNCRC requires states to respect the right of a child to be heard and to duly take into account their views, supported by the Council of Europe [CM/Rec (2012)2]; their evolving capacities must be taken into account also remembering that the age of a CYP does not determine the significance of their views. The UN Committee on the Rights of the Child has highlighted that the identity of the child includes characteristics such as gender identity and the right of the child to preserve his or her identity is guaranteed by the UNCRC [Article 8] and must be respected and taken into consideration in the assessment of the child's best interests.

The state talks about 'protecting' TNBGD CYP, but it needs to ensure that 'protection' is not only looked at from a cis-normative perspective. The state needs to reject a default position that not being trans (or, cisgender) as the safest position, when simply it is not for a trans person. Being TNBGD has been evidenced to subject an individual to an increased risk of depression [<https://www.sciencedirect.com/science/article/pii/S0165032717324400>] and specific research around not supporting TNBGD CYP with their gender can lead to an increase risk of isolation, distress, depression and suicide; [Olson Kristina R., Durwood L., DeMeules M., et al. (2015): Mental Health of Transgender Children Who Are Supported in Their Identities. *Pediatrics*. 2016;137(3): e20153223 accessible at: <http://tinyurl.com/jn844dx> ].

We ask the government to mitigate this risk by supporting TNBGD people with their identity through GRA reform. We have evidence that illustrates pushing an assigned gender on a young person can be extremely damaging and in some circumstances, fatal. The Stonewall School Report (2017) [<https://www.stonewall.org.uk/school-report-2017>], conducted with the University of Cambridge, found that more than four in five Trans young people (84 per cent) have self-harmed; more than two in five Trans young people (45 per cent) have attempted to take their own life; approximately nine in ten Trans young people (92 per cent) have thought about

doing it (Young Minds estimates that one in four young people have had these thoughts).

We invite the Scottish government to recognise TNBGD CYP for who they are and support them in being themselves. We believe that GRA reform is a form of social support, which has been repeatedly evidenced to have a strong positive correlation with the mental health and wellbeing of trans young people (McConnell et al, 2016; Aparicio-Garcia et al, 2018)

Making gender recognition accessible independent of age is becoming more pressing as more TNBGD CYP come out at an earlier age. The World Professional Association for Transgender Healthcare – WPATH – confirms that “increasing numbers of adolescents have already started living according to their gender identity upon entering high school” [deVries, Steensma, Doreleijers, & Cohen-Kettenis, 2010 in WPATH, Standards of Care Version 7 (2013)] and currently 8 states in Europe open gender recognition procedures for those below age of majority with no age restrictions

[[https://tgeu.org/wp-content/uploads/2018/05/SideB\\_TGEU2018\\_Print.pdf](https://tgeu.org/wp-content/uploads/2018/05/SideB_TGEU2018_Print.pdf)]. It is also worth noting that the age for gender recognition has been lowered in Norway and Belgium (<http://www.trust.org/contentAsset/raw-data/8cf56139-c7bb-447c-babf-dd5ae56cd177/file>).

Mermaids believes that it is important to pay attention to practical aspects and ensure that no barriers are in place that might render a procedure inaccessible. Accessibility needs to be ensured for all TNBGD people who seek it, independent of gender identity or a non-binary identity, the person’s medical, age or other protected characteristic status such as disability or race. If a TNBGD person cannot fulfil certain requirements for age, religious, health or other reasons, they should not be barred from having their gender identity recognised.

Through consultation with our service users there is an overwhelming support for there to be no age requirement as part of the future LGR application. We here provide you with some comments from our TNBGD CYP service users that support this assertion: “...there should not be an age limit because it takes away the agency of the children and instills the belief ‘is it just a phase’. Changing the law would also mean that there was recognition that trans young people do exist and there should be no age of credibility because this is prejudicial... changing the legislation would help get rid of the myth around young trans and non-binary people not existing and remove the barriers and make the system as simple as it is for cis gender... cis gender people do not have to prove their existence... any age limit on legal gender recognition would show an age limit to transgender people being believed to exist...” Anonymous, sister to a 16 year old trans young man, 2018

“...I find it offensive that my child has a name and gender marker that she has never identified with on her birth certificate. If my daughter is dead-named it can reduce her to tears and not being able to change her birth certificate makes it more likely that this will happen...” Anonymous, mother to 10 year old trans girl, 2018

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“...I am frustrated that I can change everything apart from my birth certificate ... I have to adapt to society rather than society adapt to me...” Anonymous, 16 year

old young trans man, 2018

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“...privacy and dignity should be afforded to people of all ages and that someone shouldn't have to out themselves through the disclosure of documents...”

Anonymous, 16 year old young trans man, 2018

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“...I don't think parental support is an unnecessary thing... trans kids who want their gender changed on their birth certificate will want it so much that they won't want to change later on... there shouldn't be an age limit on anything ...”

Anonymous, 16 year old young trans woman, 2018

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“...it would mean the state seeing me as valid and as a female which is in line with the government seeing me as a woman in all other walks of my life... it would also mean not having to out myself and I could be comfortable knowing that all pieces of ID will be consistent and uniformed. I think this would put trans young people at ease generally.” Anonymous, 16 year old young trans woman, 2018

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“...I still have a piece of paper that says I am female and the worst thing is that this isn't my fault. The law changing would mean that society would accept trans and non-binary people more – coming out as trans should not be a big deal...”

Anonymous, 16 year old young trans man, 2018

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“...I think society is scared and the legislation protects and reinforces that. Current legislation is working for the majority (i.e. cis people) and ignoring trans and non-binary people...” Anonymous, sister to young trans man, 2018

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

Yes

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

##### **1. Accessibility**

a. Firstly, we would like to stress the importance of ensuring that the gender recognition process is more straightforward and accessible. Implementing a system based around the idea of self-declaration or similar would alleviate a huge emotional, mental, and financial burden for many trans people in Scotland, including CYP. Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada' Bauer et al (2015) found that “having one or more identity documents concordant with lived gender was significantly associated with reductions in past-year ideation and attempts, with the potential to prevent 90 cases of ideation per 1000 trans persons and 230 attempts per 1000 with ideation”.

b. It would also bring the process of acquiring legal gender recognition in line with international human rights standards and European best practice. Resolution 2048 of the Parliamentary Assembly of the Council of Europe 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". We urge the Scottish Government to adhere to this resolution.

c. We call on the Scottish Government to ensure that no one is unfairly blocked from being able to apply for a Gender Recognition Certificate. For example, refugees and asylum seekers who may be blocked by the Scottish Government's proposal which limits those who can apply for a Gender Recognition Certificate to anyone with a birth or adoption certificate from Scotland, or anyone who is "ordinarily resident" in Scotland. We would ask the Scottish Government to clarify what is meant by "ordinarily resident", and to provide assurances that these criteria will not unfairly prevent anyone, particularly people without current, valid leave to remain who are in Scotland, from applying for a Gender Recognition Certificate.

## 2. Legal Recognition of Non-Binary Individuals

One key gap in this draft bill is the absence of legal gender recognition for non-binary people. This means that non-binary people have their existence invalidated every time they interact with the state, e.g. by accessing health services, applying for legal documents such as passports, or attending school or college. Under the current system, non-binary people are forced to conform to a binary gender category which is not representative of how they live and identify in their day to day lives. We herewith quote from James, S., Herman, J., Rankin, S., Keisling, M., Mottet, L. and Anafi, M. (2016) *The Report of the 2015 U.S. Transgender Survey*. Washington DC, National Center for Transgender Equality. "As a non-binary person, not being able to change my gender on any of my identification documents is really disheartening, dysphoria inducing, and kind of dehumanizing. I'm not allowed to be me."

We believe that the exclusion of non-binary people undermines the success of this Bill by denying equal rights of recognition for all gender diverse people this Act would apply to. Not having a process for non-binary people means that the process is completely and wholly inaccessible for a demographic of people. Case studies as written about by Sally Hines (*Transgender Identities - Towards a Social Analysis of Gender Diversity*, p. 103) discuss the argument for a system that recognises that not all citizens are able to, or wish to, define as male or female.

We stipulate that including a third, gender-neutral option on legal documents would be an uncomplicated proposal which would follow the precedent already set by a growing number of countries including Denmark, Malta, New Zealand, and parts of the USA, Canada, and Australia. Non-binary recognition is also advocated by WPATH (<https://tgeu.org/wpath-2017-identity-recognition-statement/>).

We urge the Scottish Government to acknowledge the existence of non-binary people in new gender recognition legislation through the inclusion of a third legal gender option.

## 3. Section 22

We have concerns about the Scottish Government's suggestion that they may introduce additional exceptions to Section 22 of the Gender Recognition Act. We do not believe that any additional exceptions are necessary. In particular, we believe that the example given of a potential additional exception – for HR staff to be able to

out trans applicants for jobs to other colleagues in their workplace – would seriously undermine trans people’s human right to privacy, enshrined in Article 8 of the European Convention on Human Rights. We therefore strongly urge the Scottish Government not to include any additional exceptions to Section 22 of the Gender Recognition Act, and to ensure that trans people’s privacy is protected by law throughout the gender recognition process.

#### 4. Separate criminal offence

We also have concerns about the Scottish Government’s proposal of creating a new criminal offence of making a false declaration in order to obtain a Gender Recognition Certificate. We believe that this new offence is unnecessary, given that the existing offence of making a false statutory declaration would fully cover any fraudulent applications for a Gender Recognition Certificate and would impose an identical penalty. This offence is particularly needless in light of the lack of evidence from any other jurisdictions that have introduced similar laws, or laws with an even lower evidential burden, of non-trans people applying to obtain legal gender recognition for fraudulent purposes, as already acknowledged by the Scottish Government throughout the consultation.

We therefore believe that creating this new offence would stigmatise the gender recognition process and by extension, trans people, by implying that the possibility of someone making a fraudulent application for a Gender Recognition Certificate is significant and concerning enough to warrant its own criminal offence.

We ask that the Scottish Government not to create this unnecessary and stigmatising criminal offence.

#### 5. A person who has an interest in a Gender Recognition Certificate

We would like the Scottish Government to provide more clarity on its proposal that “a person who has an interest in a gender recognition certificate” could apply to the sheriff to have a GRC revoked on grounds of fraudulent application. The process of applying to have an individual’s Gender Recognition Certificate revoked could potentially be open to abuse, for example by an unsupportive family member or ex-spouse. This is extremely concerning as it has the potential to cause great distress to trans people as well as undermining the purpose of the Bill, which is to provide recognition of Scottish citizens for who they genuinely are.

We would therefore ask that the Scottish Government imposes a clearly defined, sensible and limited definition of who “a person who has an interest in a gender recognition certificate” could apply to and we would welcome further conversation in this regard.

#### 6. Fees

As applicants may have to pay to make the statutory declaration, they shouldn’t be subject to further fees to make the application. Carpenter, Eppink and Gonzales (2020, Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States) found trans people to have lower employment rates, lower household

incomes and higher poverty, meaning fees could prevent people getting a GRC. Also, this can lead into a vicious cycle if people are not applying for jobs for fear of outing themselves with incongruent documentation, so remain unable to apply for a GRC, which would include all those under an age threshold should this be imposed, as well as those who identify outside of the binary.

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

Yes

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

We agree with the EQIA which finds that the proposals won't have a detrimental impact on those who share a protected characteristic, particularly the protected characteristic of sex.

Further, trans, non-binary and gender diverse people's access to single-sex spaces and facilities is already covered by the Equality Act 2010, which will not change based on this Bill. Trans people have already been accessing a number of single-sex spaces and services in Scotland, under the Equality Act 2010, with no reported difficulties as far as we are aware.

The only thing that the Bill covers is how trans people's birth certificates are changed, which impacts the level of privacy they are entitled to, such as when they are getting a job or marrying, and how they are recognised after death. The accessibility of legal gender recognition does not have an inherent impact on access to single sex spaces, or anything else that does not require a birth certificate, and therefore will have no impact on other groups.