

ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)

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.:

Recently, several European countries have removed “real life experience” requirements completely (e.g. Ireland, Denmark, Belgium). It would be in opposition to

the trend in terms of interpretation of international human rights frameworks for Scotland to create a new legal gender recognition procedure which includes such a requirement.

“Real life experience” metrics are notoriously difficult to manage, with little to no clarity on how a trans woman, for example, might “prove” that she has lived as a woman for a set period of time. Rather, these requirements reinforce and rely upon gender stereotypes which do not adequately represent the lives of the vast majority of the population, hold trans people to false standards of what it is to be men or women, and often encourage trans people to modify their gender expressions to fit the expectations of those providing access to legal gender recognition. [See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 656]

Furthermore, the global landscape with respect to “real life experience” requirements varies dramatically in length of required period, from no test to 2 years. This reveals the arbitrary nature of any required period.

Finally, during the “real life experience” period, trans people are forced to live with unmatched legal documents, meaning that it would thus be difficult or impossible to socially transition, as increasingly day-to-day interactions require use of identity documents. There is a significant safety risk created by inconsistent documents, as well as by documents that do not match one’s gender presentation. These tests thus violate the right to privacy of trans people by requiring them to disclose their trans status (and potentially face discrimination) during the “experience” period.

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.:

Denmark, the only State in Europe with a self-determination-based model including a reflection period, put this law in place in 2014. As of 31 August 2019, 948 LGR applications had been approved. Over the same period, 22 individuals changed their minds during the reflection period, according to civil society communications with the Danish government.

With this in mind, it appears overly punitive to create a mechanism which prevents a “mistake” by a very small minority at the dire and potentially life-threatening expense of 97% of applicants, rather than creating simple, accessible procedures to change legal gender again for those who find the change incorrect, inappropriate, or too difficult.

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.:

Inherently, age requirements violate the principle of non-discrimination on the basis of age enshrined in the Convention on the Rights of the Child, to which the United Kingdom of Great Britain and Northern Ireland is a party. [See Article 2.1 of the Convention on the Rights of the Child; also Article 13 of the European Convention on Human rights, Article 1 of Protocol No. 12 of ECHR, and Recommendation (C) under Principle 24 of the Yogyakarta Principles] Furthermore, gender identity is arguably within the scope of Article 8.1 of the CRC the right of the child to have their identity recognised by law without unlawful interference. Recent research indicates that young trans individuals are equally as capable of recognising their own consistent gender identity as their cisgender peers. [See for example Olson, Key, and Eaton. (2015) Gender cognition in transgender children. *Psychological Science*, 26(4), p. 467] As such, failure to grant access to legal gender recognition to minors violates the right of children to be heard and have their views taken duly into account [Article 12.1 of the CRC], as well as fails to uphold the principle of the best interest of the child [Article 3.1 of the CRC]. We do support the lowering of the age limit. However, we recommend, instead, that there be no set age limits for access to legal gender recognition, as is the case in Argentina, Luxembourg, and Malta.

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

Yes

If yes, please outline these comments.:

We are concerned about the omission of access to adequate legal gender recognition for non-binary people. There are an increasing number of jurisdictions in Europe taking measures to grant legal gender recognition to non-binary people, and recent Supreme Court decisions in Austria, Germany, and Belgium have mandated that the government create these categories to alleviate discrimination against this population. In regards to Section 22, we are concerned by the discussion of additional exceptions to the right to privacy of trans people. The existing provisions allow for all necessary privacy infringements, and additional exceptions would only be discriminatory in the application of the right to privacy when it comes to trans people. Another concern is in terms of access for non-citizens, including refugees, migrants, and asylum seekers. For many trans people, their country of origin, citizenship, or residency will not allow self-determination-based legal gender recognition - in fact, this is a key component of why many trans refugees and asylum seekers flee their homes. It is vital that, as part of integration processes, trans refugees, asylum seekers, and other migrants are able to change their identity documents as quickly as possible. The concern that is often presented by governments in this regard is that the local (in this case, Scottish) identity documents would not match the birth certificate, passport, or national identity card from the country of origin. However, that problem is of much lower significance in day to day life for trans people than the issue of not being able to participate in public life safely and with dignity and privacy. Local (Scottish) documents that reflect the correct name and legal gender would allow migrants, refugees, and asylum seekers to better integrate and engage with their communities, to live with less fear,

and to experience their full human rights. Also of note on this issue is that, in some cases, where the process for legal gender recognition in one's country of origin requires interventions or attestations that violate human rights standards, having a local (Scottish) residency document with one's correct details can assist in accessing the process without having to meet the restrictive and abusive requirements in the first place. As such, allowing this access could allow for a pathway

for documents that are both consistent and in line with the individual's gender identity based on international principles even in cases where the country of origin does not meet the standards in practice.

Finally, the concept regarding revocation described in the new section 8S of the draft bill, specifically the text stating that "A person who has an interest in a gender recognition certificate may apply to the sheriff for the revocation of the certificate". This creates an opportunity, after the fact, for a third party to intervene in the right to recognition before the law. As research indicates, trans people are subject to abusive treatment by friends, family, current and former partners, and others on the basis of their gender identity. An option for a "person who has an interest" to challenge the legal gender recognition of an individual creates much too large a risk for trans people to be subjected to bias- or hate-based accusations via this mechanism. Another more closed system, open only to the Registrar with a requirement of significant documentation, would be more acceptable.

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

No

If yes, please outline these comments.: