

Amnesty International UK

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.:

Transgender people should be able to obtain legal gender recognition swiftly and in accordance with their own perceptions of gender identity while preserving their right to privacy. The Scottish Government should seek to ensure that transgender people can obtain documents reflecting their gender identity without being required to satisfy criteria that in themselves violate their human rights.

Amnesty considers that placing a requirement on applicants to provide evidence of living in their acquired gender is not in keeping with the Council of Europe Resolution 2048 which 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.”

The practice of requiring evidence of having lived as your gender identity for any period of time, means that transgender people have to wait longer than necessary to obtain documents that reflect their gender identity. It is also the case that transgender people may find it difficult to demonstrate lived experience, as they are at greater risk of homelessness and unemployment (LGBT Foundation, 2017: ‘Transforming Outcomes: a review of the needs and assets of the trans community) and may not have access to the necessary documents to provide such evidence, for example utility bills, payslips, driving license or passport.

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.:

Amnesty considers that a period of reflection will cause unnecessary complications and delays in the process of obtaining a GRC. Retaining a period of reflection would contribute to stigma against trans people as it would imply their ability to self-determine is not adequate. Legal gender recognition should be quick, transparent and accessible: prolonging the length of time individuals must wait before having their gender legally recognised prolongs the length of time that their rights, including their right to privacy, are violated.

The Scottish Government’s initial consultation document published in 2018 stated the view of the Government to be that applicants for legal gender recognition

should no longer need to produce evidence that they have lived in their acquired gender for a defined period. The current proposal for a reflection period of three months – if included in legislation - will require explicit justification. The Cabinet Secretary has stated that building in a reflection period will enshrine in law the seriousness of this process. It is Amnesty's view that the statutory declaration fulfils this purpose, and a reflection period only serves to delay the process of obtaining a GRC, without a clear rationale.

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.:

Yes.

Amnesty recommends that the self-identification process is open to those aged 16 and above and strongly agreed with the Scottish Government's original proposals to extend self ID to 16 and 17 year olds.

Many 16 and 17 year olds are in the process of moving away from home, starting higher education and new jobs, and it is vital that they are able to legally self-identify to avoid continually having to disclose their trans status.

16 year olds in Scotland are considered legally capable of consenting to many adult decisions including voting, marriage and joining the army. Ensuring a legal right to self-declaration of gender identity would simply be consistent with these other rights in Scotland. Legal gender recognition should be accessible to minors, taking into account the child's freely expressed views regarding their own best interests, and in light of their evolving capacities. Amnesty supports the option of parental application for children under the age of 16 but there should be an alternative made available for under 16s who wish to change their legal gender status and do not have parental support. A back-up mechanism should be available by which a child without parental support should be able to apply for gender recognition – ideally an administrative rather than court-based process. The UN Convention on the Rights of the Child (CRC) requires states to respect the right of children to be heard and to duly take into account their views. A key requirement of the CRC is that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The UN Committee on the Rights of the child has highlighted that the identity of the child includes characteristics such as sexual orientation and gender identity and "the right of the child to preserve his or her identity is guaranteed by the Conventions (Article 8) and must be respected and taken into consideration in the assessment of the child's best interests."

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

Yes

If yes, please outline these comments.:

Amnesty welcomes the Scottish Government's commitment to legislating to reform the GRA. As stated in our response to the first consultation, official identity documents reflecting gender identity are vitally important for the enjoyment of transgender people's human rights. The current system violates the human rights of trans people's rights to privacy and further stigmatises trans identities.

Non-Binary

The draft Bill states that the Scottish Government: "Does not intend at this stage to provide legal gender recognition to nonbinary people and would establish a working group to consider possible changes to procedures and practice in relation to non-binary people and what we can learn from best practice internationally, in Scotland and from the rest of the UK."

Individuals who identify as a gender other than male or female should be able to obtain documents that reflect their gender identity in the same manner as those who use the binary male or female. A lack of non-binary inclusion leaves a significant portion of the trans population without any legal recognition. Transgender people, whose innate sense of their own gender identities differs from the sex they were assigned at birth, also experience and express their gender identity according to a variety of patterns. According to a survey undertaken in Belgium, only 55% of those transgender people who were assigned the male sex at birth identified themselves as either fully or mainly female. Similarly only 60% of those transgender people who were assigned the female sex perceived themselves as either fully or mainly male. The rest identified as neither male nor female, both male and female, or "other." (Amnesty International, 2014: 'The State Decides Who I Am') Research from the Scottish Trans Alliance and Equality Network in 2015 shows that the vast majority (64%) of non-binary people want to be able to change their legal gender and have this reflected on official documentation, with a very low number (only 5.9%) not wanting this change.

Medical documentation can be of particular importance to nonbinary individuals, and Amnesty International would also support Scottish Trans Alliance calls to ensure that medical records are set up to provide the highest attainable standard of healthcare to all who use them. Acknowledging non-binary identities on legal documentation has international precedence, for example in Australia where individuals can choose to have their gender recorded as 'X' instead of the binary 'male' or 'female' – on their passports and birth certificates. Widening of the gender categories is also reflected in Canada where citizens in the province of Ontario can have the driver's licence and health card show 'X' as their gender identifier (Transgender Europe, 2017: Third Gender Markers in Europe and Beyond).

Conclusion

Amnesty International look forward to engaging in future work to progress GRA reform. Progressive change in Scotland in addressing these important issues

would have significant impacts on the lives, safety and mental wellbeing of transgender and non-binary people. We know from research by Amnesty and the Scottish Trans Alliance that a person's gender recognition is of high significance. For transgender people, official identity documents reflecting their gender identity are vitally important for the enjoyment of their human rights. Obtaining documents reflecting your gender ensures your right to private life and means you are acknowledged by the state and equal recognition before the law. Whether at school or in the workplace, transgender people are often discriminated against because of widespread prejudices and gender-based stereotypes stemming from standardised notions of masculinity and femininity. Such discrimination occurs irrespective of whether or not transgender people bear documents that reflect their gender identity. However, the lack of such documents can further expose transgender people to discrimination whenever they have to produce a document with gender markers that do not correspond to their gender identity and expression, often forcing individuals to be involuntary 'outed'. While the changes proposed by the Scottish Government will not have such impact to erase all of the issues faced by transgender individuals, the process of legislative change will foster inclusion, recognition and dignity for transgender individuals in Scotland.

The move to a self-declaration system would allow people to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perceptions of gender identity, as well as ensuring transgender people's rights were not violated by the process itself. These changes are essential to bring the 2004 Act up to date with international best practice.

Globally we see a crackdown of LGBTI rights and spokespeople not being given an adequate platform to discuss the needs of LGBTI people. We hope that Scotland can be a world leader in addressing transgender rights and equality, and in doing so help people globally to secure their human rights.

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

Yes

If yes, please outline these comments.:

Amnesty Welcomes the Scottish Government's draft Impact Assessments, particularly with regards to sex as a protected characteristic under the Equality Act.

According to the EHRC, the regulatory body for the Equality Act, the proposed changes to the GRA will not affect the operation of the Equality Act 2010, which contains exceptions permitting single sex and separate sex services to be provided in limited circumstances. In relation to single sex services, the EA already permits the exclusion of trans people when it can be objectively justified and is proportionate. This does not depend on the existence of a GRC. The exceptions will continue to operate as they do now and have done for almost ten years, whether there is or isn't reform to the GRA. When implementing these exceptions, service providers must always take the least discriminatory approach when considering an exception and must strike a fair balance in the particular

circumstances of each case between the needs of trans people and other service users.