

Gendered Intelligence

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.:

1. There is no evidence to suggest that insisting on applicants living in their 'acquired gender' for 3 months or more before applying for a GRC is useful or necessary. We are therefore asking that this be removed from the draft Bill.
2. Whilst requiring an applicant prove that they have lived in their 'acquired gender' for at least 3 months may seem initially like an easy task, in reality it may prove not to be. This demand also runs counter to the ethos of a less restrictive system of legal recognition which the Scottish Government is ostensibly keen to bring into place.
3. Legal systems of self-determination of gender are already in place in several countries worldwide, including in our European neighbours Ireland, Denmark, Norway and Portugal.
4. As per our original response to the wider consultation, we would raise issue with the terminology "acquired gender". The language we use in discussing these matters is important and whilst "acquired gender" has been hitherto used by the Scottish Government, it reads as though a gender is frivolously taken on and installed, rather than reflecting the reality of the situation.
5. Governmental recognition around determination of self is around affirmation of a pre-extant and already-defined gender identity, not to do with any act of 'acquisition'. We would therefore suggest 'affirmed gender', 'declared gender' or simply 'gender' as alternatives which mirror more closely the seriousness with which trans people view their identities as aligned with their lived experiences.
6. Similarly, the concept of "living in" a gender is an odd one, framed as it can be by the centring of the binary understandings of 'man' and 'woman' as discrete identities which people must readily adopt in order to achieve legal recognition.
7. The act of having to prove in any way that you are who you know yourself to be by documenting your adherence to gendered assumptions is one which is asked only of trans people and is not a just process. However, through wanting to avoid any further social ostracization, trans people are often acutely aware of the need to be seen as conforming in their gender identity. Whilst we understand the Scottish Government is not seeking to require documented proof of an applicant having "live[d] in their acquired gender], the language used serves only to hedge applicants into discrete, government-mandated routes towards legal recognition.
8. Terminology aside, Gendered Intelligence is widely welcoming of the proposed reforms to the Gender Recognition Act and of the provisions laid out in the Gender Recognition Reform (Scotland) Bill. Any of the proposed changes to the Act will only improve the framework through which the Scottish Government legally recognises trans men and women.
9. Notwithstanding our assured mutual understanding, it is worth highlighting the Act will serve solely to allow trans men and women to update their birth certificates with less onerousness than at the current time. Social transition – the process through which any trans person can take steps to be socially recognised in their declared gender – and legal ability to access relevant single-sex services through the Equality Act 2010, will continue unimpeded and unaffected by any

updates to the Gender Recognition Act.

10. Of a graver concern of Gendered Intelligence is that non-binary people will continue to be excluded from legal gender recognition through the binary nature of this consultation and the law to which it pertains. As a matter of urgency, the Scottish Government must ensure that non-binary people are able to access legal gender recognition, including access to fitting Gender Recognition Certificates.

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?

Not Answered

If yes, please outline these comments.:

11. There is no evidence to suggest the proposed 3 month 'waiting period' will be of any benefit. If the Scottish Government is minded to retain this archaic, gatekeeping relic, it must produce evidence as to why. The onus of proof must remain on the Scottish Government to sustain its assertion that this is a necessary addition to a system it is ostensibly aiming to make less difficult for its prospective applicants.

12. Apart from adding another layer of bureaucracy for the Scottish Government itself, the instituting of such a period offers nothing of worth. In Gendered Intelligence's response to the undertaken, wider consultation on the GRA, we stated "our opposition to a 'reflection period' as required in Belgium. The Scottish Government's own research into countries using [a] self-declaration system (including Ireland, the population of which is similar in size to that of Scotland) has shown no evidence of false statements being made by applicants, so forcing people to delay the process to reflect appears to be both a red herring and an arbitrary hindrance. It should be noted that several countries which are leading the way by having successfully introduced a system of self-determination with regards to gender identity, including Ireland and Malta, have no such 'reflection period'."

13. As a charity the work of which is centred on trans youth – and from several of our staff and volunteers' experience of having been trans young people themselves – we would be remiss if we did not highlight the callousness of such a stipulation being embedded into an improved GRA process. Trans people know who they are and need affirmation in their identities from their government, not stonewalling.

14. The Scottish Government - having inadvertently positioned itself at the coalface of a wider 'debate' about trans rights by being the first of the UK's countries to launch a consultation on the GRA - would be remiss to prostrate itself in response to any odious pressures at this stage with regards to this waiting period.

15. Trans and non-binary people need legal gender recognition now, not an eventual rolling-out of piecemeal concessions when any trans-antagonistic pressure wanes. It is pertinent on us to highlight that this is a consultation around a matter of human rights, not one of politics.

16. There is no reason to suggest that such a waiting period offers anything but negatives for applicants, and it appears that this is simply an exercise in optics. If the Scottish Government is minded to reform the GRA for the better, it would be best to not try to appease or placate those who are hostile to the Act's very existence by instigating such rigid, archaic and unnecessary processes.

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.:

17. Gendered Intelligence has believed since its inception that the Gender Recognition Act's exclusion of younger people is unfair and not fit for purpose.
18. Making the GRA available to people 16 years of age and older would be in keeping with the Scottish legal system and citizenship norms in general, including the right to vote. Retaining a lower age limit of 18 would be not just an illogical choice for the Scottish government but would run counter to its wider aims of more robust societal engagement for under-18s. We believe therefore that 16 and 17 years olds should have full access to any GRA provision without caveat.
19. The Scottish Government references the United Nations Convention on the Rights of the Child in its consultation, including the CRWIA it undertook. The UNCRC does not differentiate between ages, deeming every person under the age of 18 to legally sit under the umbrella of 'child' and thus as needing protection under the auspices of its contained Articles.
20. Why the Scottish Government is proposing that the reformed GRA is lowered to apply to 16- and 17-year olds becomes a question of political expediency, rather than one of jurisprudence. There must be a process through which those under 16 are able to access right and fighting legal gender recognition, lest the Scottish Government fail to adhere to Articles 2, 3, 8 and 16 of the UNCRC.
21. We therefore believe that there should be put into place a system whereby those under 16 years of age are able to easily apply for an update to their legally recognised gender where parental consent is also granted. We are not minded to provide the Scottish Government with a proposed minimum age for any process for under-16s, but it should take full consideration of the seriousness and proposed permanence of any applicant's position.
22. Those people under 16 years of age without parental consent have particular access needs to the GRA which the Scottish Government must be cognisant of.
23. Notwithstanding the possible reasons for why a young person may not have parental consent for legal gender recognition, the Scottish Government must ensure that there are processes in place. These need not be overly legalistic, as court processes for what amounts to a simple bureaucratic change would necessarily prove prohibitively expensive for under-16s.
24. Furthermore, a process through the courts would simply be shifting the onus of recognition via pathology from the current system of the Gender Recognition Panel to Sheriffs and solicitors.
25. There is no reason to suggest that potential applicants under the age of 16 should not have the ability to change their legal gender. This should be a less difficult process than the current system for over-18s whilst taking into consideration the safeguarding, legal and child rights ramifications.

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

Not Answered

If yes, please outline these comments.:

26. Gendered Intelligence welcomes the proposals to bring the GRA up to date, as well as the opportunity to help ensure the process is as transparent and as meaningful as possible. We believe that the steps being proposed in the draft Bill are in the spirit of wider inclusion and recognition of all gender identities.

However, we believe that the Scottish Government must be cognisant of the following if it is to allow for complete recognition of all people in the country:

Non-binary people

27. As the UK Government's LGBT Report shows, over half (52%) of trans people are non-binary, compared to trans women (26%) and trans men (22%). It would seem apposite then that any reform to the GRA would be centred on the largest population who may need access to legal gender recognition and change. There needs to be a process which is fit and proper for non-binary people to have their identities legally recognised across all arenas where it is recorded, including birth certificates.

28. The Yogyakarta Principles, devised after international human rights groups met and regarded as some of the best guidance around how states can recognise gender and sexual orientation minorities, hold several principles relevant to the Scottish Government in deciding how to continue its work on the GRA.

29. Principle 3 (B, C) of the Yogyakarta Principles asks that states should "take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity" as well as taking all necessary measures to ensure "birth certificates [...] reflect the person's profound self-defined gender identity". This should be assumed to apply to non-binary people and their gender identities, and as such the Scottish Government must take steps in closing the gap on a lack of legal recognition for this substantial population.

Asylum seekers and refugees

30. Principle 23 (G) of the Yogyakarta Principles asks that states "accept the self-identification of a person seeking asylum on the basis of sexual orientation, gender identity, gender expression or sex characteristics". Principles 23 (J) further adds that states must "ensure respect for the dignity and privacy of persons seeking asylum at all times, including by recording information about a person's sexual orientation, gender identity, gender expression and sex characteristics where it is lawful, reasonable, necessary and proportionate to do so". "ordinarily resident" and potential exclusion of asylum seekers??

Cost

31. We believe that the current cost of applying for a Gender Recognition Certificate is too high, especially when factoring in the societal stigma and prejudice which all too often means trans people are excluded from employment. The cost should be entirely waived and the process made free to access. Despite the wider population of trans people who will seek a GRC in Scotland being small, this cost may be deemed to be impossible to waive by the Scottish Government. In this case, we recommend a tiered system whereby those on lower or no incomes are able to receive a GRC for no cost and those with higher incomes pay a token amount.

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

Not Answered

If yes, please outline these comments.:

32. Gendered Intelligence believes that the reforms to the Gender Recognition Act as proposed by the Scottish Government will have no detrimental impact on others and will indeed only affect trans applicants. This is in line with the Scottish Government's own Equality Impact Assessment, which was informed by a wide range of stakeholders including Rape Crisis Scotland and Scottish Women's Aid.

33. The ongoing and deliberate conflation of the Equality Act 2010 and the Gender Recognition Act 2004 amongst those opposed to trans equality or existence has been a red herring. The Scottish Government must go further in addressing and arguing against this. The wider mediascape has endorsed this conflation, to the detriment of trans people in the UK who simply wish to get on with their lives and have legal gender recognition in line with their rights.

Single-sex spaces

34. The Equality Act 2010 will ensure that trans people have continued access to single-sex spaces in line with their gender identity. This is not going to change in any way if the GRA is reformed. With regards to the exceptions/exemptions contained in the Equality Act, it is stated (p150) "A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim."

35. This serves to say that trans people can be excluded from single sex spaces where it is a proportionate means of achieving a legitimate aim; conversely, it is also a fact that trans people cannot be excluded unless it is a proportionate means of achieving a legitimate aim.

36. The "Services, Public Functions and Associations: Statutory Code of Practice" (EHRC, 2011, 13.60, p198) says "any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual [sic] person should only occur in exceptional circumstances".

37. EHRC guidance further says that "care should be taken in each case to avoid a decision based on ignorance or prejudice. Also the provider will need to show that a less discriminatory way to achieve the objective was not available."

38. As a trans-led organisation, we are aware that trans people have been visiting single-sex spaces with no issue for as long as trans people have existed, the recent furore around this being entirely a media creation of a trans bogeyman.

39. Services across the UK and Scotland, including but not limited to rape crisis centres, are already effectively running admission under a system of self-ID with no issue.