

Gender Recognition Reform (Scotland) Bill

Stage 1

May 2022

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

This written submission seeks to supplement our previous response to the Scottish Government's consultation on their proposals for the Gender Recognition Reform (Scotland) Bill and add further comment on three specific areas – minimum age of applicants, the proposed role and responsibilities of the Registrar General for Scotland and the introduction of a criminal offence and penalties. Our response is focussed only on the consultation questions related to these areas.

We welcome the Scottish Government's aim to simplify the process and mechanism for obtaining a Gender Recognition Certificate. Legal mechanisms which give effect to human rights obligations should be rights respecting themselves in how they operate, and we note the clear views expressed by trans people about their negative experiences of the existing process. We recognise that this Bill aims to ensure compliance and compatibility with international human rights standards and principles, to remove barriers and enable trans people to have full recognition of their acquired gender in law.

The process for obtaining legal gender recognition engages a broad range of rights. We endorse the human rights overview produced by the Scottish Human Rights Commission, setting out this framework.

The Bill extends to 16 and 17-year-old children, which requires consideration of not just the broad array of human rights which adults also enjoy, but the additional rights of everyone up to the age of 18 as set out in the United Nations Convention on the Rights of the Child (UNCRC). Children in Scotland attain an array of decision-making rights prior to turning 18, and this is consistent with their participation rights and their evolving capacities as they transition from childhood to adulthood. However, this does not mean that they lose their right to protection. Protection and participation are not mutually exclusive, and children's autonomy can be recognised, while also acknowledging the obligation to support and protect them.

Q. Whether applications should be made to the Registrar General for Scotland instead of the Gender Recognition Panel, a UK Tribunal.

The need to provide evidence to the Gender Recognition Panel (GRP), and the experience of engaging with it, has been one of the key barriers raised by trans

people. The UK GRP is a legally constituted Tribunal. It is mandated by law to make decisions and judgments on applications for a Gender Recognition Certificate. The existing requirement for a medical diagnosis of gender dysphoria, or supporting documentation, were included in existing UK law as a safeguard to reflect the nature of the legal decision-making process. The GRP is constituted with legal or medical professionals, qualified to evaluate this information in a judicial process.

By removing the requirement for applicants to have or provide evidence of medical diagnosis, the system will seek to address the current barriers by creating a system which is administrative in nature. The Policy Memorandum accompanying the Bill states that this system could be administered by officials in Scottish Government or the National Records of Scotland (NRS).

The legitimate aim to remove barriers and unnecessary hurdles from the process of obtaining a GRC should be considered with recognition that the State is obliged to balance children's rights to autonomy, with protective and supportive measures, based on their evolving capacities to understand the decision and on the significance and consequences of making it. Non-discrimination obligations (Article 2 UNCRC) require States to actively identify children and groups of children, the realisation of whose rights may require special measures and protections.

These kinds of protections are provided elsewhere in Scots law. For example, section 3 of the Age of Legal Capacity (Scotland) Act 1991 provides, that although a child may have had capacity to enter into a legal transaction, it can subsequently be set aside (if application is made before the young person reaches the age of 21) with no detriment or adverse consequence for the child. These protections should support the rights of the child rather than create a barrier to children and young people exercising their rights.

The Policy Memorandum states that the Scottish Government and the Registrar General will consider further the need for clear and accessible guidance and support for younger applicants to ensure they understand and have carefully considered their decision. We consider this essential. Any new process introduced for 16 and 17-year-olds should ensure that applicants fully understand the implications of legal gender recognition.

The Registrar General for Scotland will receive, consider, process and file Scottish applications for legal gender recognition under the new system. The Bill's Financial Memorandum indicates that anticipated costs are primarily associated with setup of IT systems and application forms, and for recruitment, training and familiarisation events for staff dealing with applications.

The Financial Memorandum also states that Scottish Government will work with NRS to provide information for applicants about applying for legal gender recognition. It continues "Costs in relation to providing this information will be low and covered by the set-up costs."

The Policy Memorandum identifies lower running costs as one of the benefits with moving from a tribunal model. Pursuing efficiencies and simplicity must not interfere with the State's obligations to use its maximum available resources to realise children's rights (Article 4 UNCRC).

In relation to 16 and 17-year-olds, consideration of costs does not explicitly factor in the development of the "additional, careful consideration to applications from 16 and 17-year-olds" or the "sensitive investigation, which could include face-to-face conversations with applicants". It is unclear what specialist support may be commissioned or drawn upon to create these processes and ensure they are rights respecting and appropriate for young people. The participation of children and young people in developing these systems is not mentioned.

Article 12(2) UNCRC requires that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child". The Bill proposes to move to an administrative process, and although there is recognition that special consideration be given to 16 and 17-year-olds, this needs further explanation.

The role of the Registrar General for Scotland and NRS will need to be adequately resourced and supported if it is to fully respect, protect and fulfil children's rights. It is not clear from the available detail whether the proposed new statutory powers of the Registrar General would ensure sufficient protections for the child's rights of privacy in a child-friendly administrative justice system.

The Bill does not provide any guidance to define what is meant by "living in an acquired gender". Currently the Gender Recognition Panel sets out the criteria, but the proposed Bill seeks to remove the involvement of the Panel. If there is to be a process which applies to children there is a need for these criteria to be set out in order that staff dealing with applications can make an assessment of a child's understanding of it. Similar guidance is required to interpret what is meant by a "person who has an interest" and who may apply to the Sheriff for the revocation of the certificate.

Q. Whether the minimum age for applicants for obtaining a GRC should be reduced from 18 to 16.

Minimum ages should, without exception, be consistent with all rights set out in the UNCRC. This means that in areas where children's protection is at risk (for example, in the justice system), all children under the age of 18 should be afforded special protection. Where minimum ages are necessary to correct for potential abuses of power (for example, sexual consent), their enforcement should never run counter to children's rights. In areas where age restrictions serve no protective purpose and potentially curb children's development, freedoms, and even protection (for example, the freedom to choose or leave a religion, access to complaints mechanisms), minimum ages should be avoided. Finally, where tensions are present between children's protection and autonomy (for example, consent to medical treatment), children's capacity should be the deciding factor and should not be judged generally, but in relation to the issue at hand and the best interests of the individual child. This

judgement should take into account the social and cultural norms in a given context, and the power imbalances at play in questions of consent.

Setting age limits (both minimum and maximum) may be required by the principle of legal certainty and the rule of law, but will always be arbitrary to a degree, since every child develops in a unique way.

Scots law has developed in an often *ad hoc* manner to set a range of different age thresholds for children. This creates a landscape that is confusing and inconsistent and the age thresholds often appear arbitrary to children themselves. For example, children can still be held criminally responsible at the age of 12, but are unable to vote until 16 (for Scottish Parliament and local government elections) or 18 for UK elections or referendums.

Furthermore, the inconsistent definition of 'a child' in Scots law remains complex and unresolved, meaning that in some legal processes, including the criminal justice and mental health systems, children may technically reach the age of maturity and be treated as adults at 16, while in others, such as education and some care and protection proceedings, they are rightly recognised as children up to the age of 18.

We have consistently expressed the view that age limits in some areas of Scots law are not consistent with the provisions of the UNCRC. With the commitment in Scotland to fully incorporate the UNCRC into Scots Law, if new age limits are to be created in legal processes, they must support the progressive realisation of children's rights.

The Convention requires that 16 and 17-year-olds be treated as children in all circumstances. Children's participation rights exist from birth, and in Scotland they attain an array of decision-making rights prior to turning 18. This is consistent with their evolving capacities as they transition from childhood to adulthood. However, this does not mean that they lose their right to protection. Rather, and as the Committee states in General Comment No.20, "the right to exercise increasing levels of responsibility does not obviate States' obligations to guarantee protection". Protection and participation are not mutually exclusive, and children's autonomy can be recognised, while also acknowledging the need to support and protect them.

There is no mechanism in the proposed Bill for setting out how an individual child's understanding of the process and its consequences would be assessed. The Scottish Government has not set out the way in which the process of statutory declaration would seek to balance these considerations for 16- and 17-year-olds, to guarantee them similar protections as provided for in the Age of Legal Capacity (Scotland) Act 1991.

In other contexts, under existing Scots law, for example, where a child is entering into a legal transaction, instructing a solicitor, or consenting to medical treatment, there is a requirement for professional judgement to be made on a case-by-case individual basis.

The Scottish Government has said it will consider the need for further guidance for 16 and 17-year-olds "to ensure they understand and have carefully considered their

decision”. In the Ministerial Statement commencing this stage of the Bill, there was recognition of the rights protections to which children are entitled:

“Under the oversight of the registrar general, National Records of Scotland will routinely give additional, careful consideration to applications from 16 and 17-year-olds. It will provide support on the process and, when necessary, will undertake sensitive investigation, which could include face-to-face conversations with applicants. Every 16 or 17-year-old who applies will be offered and encouraged to take up the option of a conversation with NRS to talk through the process.”

(Meeting of the Scottish Parliament. 03 March 2022. <https://www.parliament.scot/chamber-and-committees/official-report/whatwas-said-in-parliament/meeting-of-parliament-03-03-2022?meeting=13611>)

From this limited information, it is unclear how this process will be developed or implemented. Nor is it obvious that NRS currently has the expertise to undertake such a role. The organisation is likely to require additional specialised staffing to properly fulfil it. Alternatively, another organisation could be funded to provide children and young people with impartial information, advice and support prior to making an application. As such it is difficult to determine whether this process will provide sufficient safeguards and protection, including for children’s privacy rights, without creating the additional barriers which trans young people have said they would find unhelpful.

It is important to balance these considerations around protection. Limiting access may prevent realisation of other rights. Some young people consider it particularly humiliating when they have to repeatedly confirm whether they identify as male or female or explain why their identification documents are inconsistent. This most commonly occurs when children are sitting national examinations, or making applications for further education, employment, or to government agencies.

We note that the CRWIA accompanying the Bill does not explicitly consider the situation for care experienced children and young people, who may be legally ‘looked after’ under the Children’s Hearings (Scotland) Act 2011, until they are 18. These young people have legal rights to additional support and assistance from the State and their Corporate Parents up to the age of 26, in accordance with the Children and Young People (Scotland) Act 2014.

Additional consideration for care experienced children and young people may be particularly relevant in relation to Section 8 of the Bill which proposes to insert a new subsection into the 2004 Act, as 8S (1)(c) which provides that “**a person who has an interest** in a gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that— c) the person to whom the certificate was issued was **incapable** of— (i) **understanding the effect** of obtaining the certificate, or (ii) validly making the application for the certificate”.

It is unclear whether in practical terms, this provision would interfere in an individual’s rights to private and family life under Article 8 of the ECHR; and for 16- and 17-year-olds, Article 16 of the UNCRC by challenging their legal capacity. ‘A person who has an interest’ could be a number of local authority staff involved in the life of a care experienced young person, and as such, more detail is needed in terms of how this would be managed.

As raised in our previous response, we note that there appears to be little research into the circumstances of children who choose to de-transition, and therefore little on which to base decisions around the appropriate levels of protection and safeguards. We continue to advocate for ongoing consideration by the Scottish Government of emerging research and evidence on consent, capacity, autonomy and protection.

Q. If you have any comments on the offences of knowingly making a false application or including false information.

The use of the criminal law is entirely inappropriate in relation to children in this situation.

Section 14 of the Bill modifies the 2004 Act by inserting a new subsection 22A(3)(a) to introduce criminal penalties for offences committed under the Act, where, “on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or (b) on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both)”.

By including a criminal penalty for making a false statutory declaration there is a risk that children will be adversely affected, and unnecessarily criminalised. The CRWIA does not evidence any assessment of the potential negative impacts of these proposals, despite the possibility of criminalisation of under 18s. It is important that children and young people are prevented from the prospect of criminalisation as a result of this Bill.

Any child who is alleged to have committed an offence in Scotland is entitled to the rights enshrined in the UNCRC, with particular reference to Article 40. These children and young people must be provided with support and assistance instead of prosecution in the adult criminal justice system to protect their human rights as children.

The Bill provides no assistance to the court on the evidence required to determine the truthfulness of a statutory declaration. This is particularly significant for individuals given the criminal consequences of making a false declaration.

The requirement for a statutory declaration of an intention to live ‘permanently’ in an acquired gender has particular implications for children and young people. As we have raised in our previous response, the State is obliged to take account of children’s evolving capacities and provide the appropriate levels of protection.

Further consideration is needed around the whole process for children and the assessment of longer-term implications of the proposed provisions in this section, to avoid these kinds of unintended consequences for Scottish children through being defined as adults for the purposes of this administrative process. We do not agree with penalising or criminalising children and young people, through the introduction of criminal offences and penalties in relation to this Bill. The Bill, if enacted, must be amended to ensure that children and young people cannot be criminalised in consequence of their application for a Gender Recognition Certificate.