

Gender Recognition Act Reform

Consultation Response

Introduction

Stonewall Scotland was established in 2000. Since then we have been campaigning for equality and justice for gay, lesbian, bisexual and transgender (LGBT) people living in Scotland. We work with businesses, the public sector, the Scottish Government, the Scottish Parliament and a range of partners to improve the lived experience of LGBT people in Scotland.

Stonewall Scotland welcomes this consultation on reforms to the Gender Recognition Act, which we believe can greatly improve the lives of trans people in Scotland. The current GRA is sorely in need of updating, and we believe these proposals will help ensure trans people are properly recognised and treated with respect. We are pleased to support the Scottish Trans Alliance's Equal Recognition Campaign, which calls for self-declaration, recognition of non-binary identities, and recognition of young people under 18.

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead. Do you agree or disagree with this proposal?

Agree

Stonewall Scotland strongly believes that a self-declaratory system for legal gender recognition is essential to bring the 2004 Act up to date with international best practice. Although the Gender Recognition Act 2004 was a notable step forward in the journey towards transgender equality, it is now considerably dated and in dire need of reform. The process it introduced is demeaning and intrusive to trans people, and it provides no scope for recognition of non-binary people. A situation has been created where the very laws that stand to protect trans people, offering

them dignity and recognition, are damaging to both trans individuals and, as we will discuss, trans communities. A respondent in our recent research, LGBT in Britain: Trans Report (2018), put this succinctly:

"The Gender Recognition Act allowed me to change my birth certificate, however, the process to do so felt invasive and judged me for not being "trans enough"." Isaac, 24 (West Midlands)

The societal landscape, medical and psychological understanding of trans identities and the context of language and accepted terminology has changed drastically in the last decade. The process of the gender recognition panel and continued pathologisation of trans identities has had a marked and clearly damaging effect on the physical and mental wellbeing of transgender people – evidence heard by the Women and Equalities Committee in 2015 from individuals and organisations described the process as “humiliating” (House of Commons Women and Equalities Committee, “Transgender Equality Report”, 2015, p12). The restrictions imposed on trans young people are out of sync with other rights afforded to those 16 years of age and older, causing a mismatch between their social and legal identities, as well as additional stress and trauma (House of Commons Women and Equalities Committee, “Transgender Equality Report”, 2015, p17).

Finally, a lack of non-binary inclusion leaves a significant portion of the trans population without any legal recognition, meaning that those who identify outside of the binary male and female boxes are left in limbo, forced to legally identify as something they are not – again, the Scottish Trans Alliance have provided evidence of this in their research, which showed that a large number of non-binary people felt they were being excluded from public services as a result of their gender identity not being legally valid (Scottish Trans Alliance, “Non-binary people’s experiences in the UK”, 2016, p9).

These outstanding problems have caused Scotland, and the UK, to be left behind in terms of international best practice, where once we were a beacon of equality and inclusion rights.

Providing Proof

A significant issue with the current GRA is the requirement for a medical diagnosis of gender dysphoria. This, and the burden of providing supporting evidence as ‘proof’, causes significant distress to those applying for a gender recognition certificate. The process of submitting of evidence to the Gender Recognition Panel, where a group of strangers who have never met the applicant have the final say over their legal recognition, has often been referred to as ‘humiliating’ and ‘invalidating’. In Stonewall’s recent report, LGBT in Britain: Trans Report, trans respondents described the panel system as an “archaic, sexist and ... deeply offensive, unnecessary gatekeeper”. Furthermore, this approach is out of step with the growing acceptance that the only person who can identify an individual’s gender identity is themselves (House of Commons Women and Equalities Committee, “Transgender Equality Report”, 2015, p12).

GRA applicants must provide a significant amount of information, which is logistically difficult, time consuming and for many, traumatic. Gender Recognition Panels will ask for the applicant’s birth certificate, as well as copies of any official documents that show their birth name has changed to their current name, proof they’ve lived in their acquired gender for the required time (2 years for standard route, 6 years for alternative route), and any medical reports (UK Government, “Apply for a Gender Recognition Certificate”, Section 4 – “Documents You Must Provide”). In order to prove the applicant has lived in their acquired gender, original copies of a passport, driving licence, payslips or benefit documents, utility bills or other documents of an official nature must be provided. All documents should be in the applicant’s acquired name and gender, and the earliest document must be dated before the beginning of the required time. They must also send a report that includes details of any treatment to change their sexual characteristics, e.g. hormone treatment or surgery from a qualified medical professional. Finally, standard applicants must also ask their GP or surgeon to complete a second report, with at least one of the reports including details of their diagnosis of gender dysphoria. This is an enormous amount of information and detail, especially when we consider that many of these documents cost money to update and may require professional input to have released.

The requirement to submit inappropriate amounts of information about an individual’s journey can cause a significant amount of distress, as outlined in the Women and Equalities Committee Report (House of Commons

Women and Equalities Committee, “Transgender Equality Report”, 2015, p12, 13). Furthermore, although the 2004 Act states that no medical intervention needs to have taken place for legal gender recognition, some applicants are pressured to commit to surgeries in order to satisfy the panel. In oral evidence submitted to the Women’s and Equalities Committee by James Morton, manager of the Scottish Trans Alliance, an example was given about a young trans person who was intensely interviewed about their intentions around surgery (House of Commons Women and Equalities Committee, “Transgender Equality Report”, 2015, p13). This unnecessary questioning can pressure individuals into medical procedures that they do not want, as well as deterring many from seeking legal recognition.

The World Professional Association for Transgender Health (WPATH), an international organisation made up of experts in the field of trans healthcare, have stated in their Identity Recognition Statement that “medical and other barriers to gender recognition for transgender individuals may harm physical and mental health”. Such barriers could include “requirements for diagnosis, counselling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.” (WPATH.com, 2017). They go on to point out that “court and judicial hearings can produce psychological, as well as financial and logistical barriers to legal gender change, and may also violate personal privacy rights or needs.” We agree with this statement and believe that a self-declaratory system would save time, money and significant distress, and would be beneficial to the health of trans people in Scotland.

European Convention on Human Rights and the Yogyakarta Principles

Self-declaration is strongly supported by international human rights frameworks, including the European Convention on Human Rights (ECHR) and Yogyakarta Principles. The Yogyakarta Principles (yogyakartaprinciples.org, 2017) were created by international human rights experts as a guide for UN member states on international legal human rights standards on sexual orientation and gender identity. Principle 31 states that everyone, regardless of their sex, gender, sexual orientation, gender identity or sex characteristics, has the right to legal recognition and access to identity documents that are true to their self. It calls on member states to ensure access to a quick, transparent and accessible mechanism to change names and gender identity. A self-declaratory system would therefore be in line with the Yogyakarta Principles and international human rights legislation. It also specifically states that “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, ... shall be a prerequisite to

change one's name, legal sex or gender", highlighting the extent to which the current system of recognition is out of step with human rights based practice.

While the European Court of Human Rights has not ruled self-declaration to be an essential human right, the European Convention of Human Rights strongly supports the principles of self-declaration for legal gender recognition. Article 8, "Right to Respect for Private and Family Life", holds that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." We contend that the process of the Gender Recognition Panel fails this article, in that someone's gender identity is inherently private and individual, and should not be subject to another's approval. Article 10 holds that "everyone has the right to freedom of expression". We believe that this includes the freedom to express and be legally acknowledged in one's gender identity, without interference by the state. A self-declaratory process for legal gender recognition would therefore be a strong manifestation of freedom of expression. Based on these articles, we feel that a self-declaratory approach is best in line with the Convention, and will best allow trans people in Scotland to access their human rights.

Access to Services and Employment

These proposals would improve the rights, opportunities and access of trans people to services. Holding accurate legal identity documents opens doors to services and opportunities that are afforded to others. They are essential to access accommodation, education and healthcare, and particularly true of employment where a copy of photo ID and potentially a birth certificate are required. Trans people are often forced to 'out' themselves to potential or new employers when providing evidence of their right to work. National insurance and tax records can also reveal someone's trans status at their current place of work without their consent. In cases where a trans person does not have accurate documentation, this potentially leads to them being denied these services, or exposes them to discrimination in the workplace. As these are vital areas where all people need relatively simple and fair access, a self-declaratory system would greatly improve the ability of trans people to equally access public services and employment.

Legal interactions, such as those with the police, travel (be that locally or internationally), as well as everyday transactions such as in shops, restaurants, require access to services and documents such as bank accounts, passports, travel passes and proof-of-age photo ID. These services and documents require authentic and accurate definitions of a person's identity, which the process of self-declaration would make more accessible.

International Best Practice

The self-declaratory system is widely recognised as best practice internationally, having been implemented in a number of countries already. Following a successful law suit lodged by a trans woman with the Irish High Court, that stated that the lack of any legal gender recognition in Ireland was a breach of the EU Convention on Human Rights, Ireland passed the 'Gender Recognition Bill 2014' in July 2015 to enable trans people to legally change their gender by way of statutory declaration. The Irish Government adopted this best practice approach after widespread consultation with trans communities and other stakeholders including medical professionals. The process does not require a medical diagnosis of intersex conditions or gender dysphoria, or proof of people having lived in their 'acquired' gender. Trans people over the age of 18 can self-identify by way of statutory declaration. Young people between 16 and 18 still require medical supervision, parental consent, and a court order to change gender. However, at the start of 2018 the Irish Government announced a consultation on whether the Act should be amended to allow for recognition of young people, non-binary people, and intersex people (www.welfare.ie/en/pressoffice/Pages/pr080118.aspx).

In another example, after adding gender identity as a protected characteristic under law in 2014, Malta went on to pass the 'Gender Identity, Gender Expression and Sex Characteristics Act' (GIGESC Bill) in 2015. Like Ireland, the process is a model of self-determination, and is achieved by way of declaring before a notary. The Bill prohibits requests for medical information or a mental health diagnosis. It was amended in 2016 to allow young people to access the process from the age of 16, and although they are still required to go through the court system, their best interests and views are considered, rather than just those of the parents. Transgender Europe (TGEU) welcomed the depathologisation of trans identities and banning of conversion therapies, stating that Malta showed

leadership on the world stage in safeguarding the transgender community (Transgender Europe, “Malta Depathologises Trans Identities”, tgeu.org, 2016).

In perhaps the most progressive and wide-ranging piece of trans legislation in the world, Norway introduced the ‘Legal Gender Amendment Act’ in 2016, based on self-declaration. Any person over the age of 16 can change their legal gender and name by way of filling in a short document and registering it with the local tax office. There is no reflection period, and no diagnosis or compulsory medical intervention or surgical requirements are needed. Young people between 6 and 16 can access the process if at least one parent consents to it (Transgender Europe, “Norwegian Law Amending the Legal Gender”, tgeu.org, 2016). Campaigner Stein Wolff Frydenlund noted that the change in the law has been a big step forward and is leading to a huge improvement for transgender persons in Norway. These changes in Ireland, Malta and Norway show that self-declaration can be implemented simply and with significant benefits for trans people – an article in the Irish Examiner stated that 230 gender recognition certificates had been granted in the two years following the introduction of their bill (Irish Examiner, “230 Gender Recognition Certificates Issued Since 2015”, 2017, irishexaminer.com). As a result, a review of the Act is looking to introduce further provisions for trans young people and non-binary people, as previously mentioned.

Trans people in Ireland, Norway and Malta have welcomed the new laws and the impact they will have on trans people’s lives. John Jeanette Solstad Remø , Norwegian trans activist, said that the new law “will mean transgender people like me will finally be respected for who we really are. I am looking forward to the day I can show my ID which is in accordance with my gender identity and my gender expression,”.

(<https://www.amnesty.org/en/press-releases/2016/03/norway-historic-breakthrough-for-transgender-rights/>) Gabi Calleja, coordinator of the Maltese Gay Rights Movement, said that “many trans men and women have already benefited from the new procedures for legal gender recognition, which are now much more accessible.”

<https://www.timesofmalta.com/articles/view/20160914/life-features/malta-and-lgbtq-equality-one-year-on.624868>

Finally, an Irish senator shared a moving letter to them from a trans person regarding the Irish Gender Recognition Act: “Bills like this mean that one day when I come out to my parents, even if they don’t get it or don’t understand it, they will still accept it, accept me. Bills like this allow us just to live.”

<https://www.irishtimes.com/news/politics/oireachtas/review-of-gender-recognition-act-will-start-by-september-varadkar-announces-1.3078764>

Increasing societal acceptance and decreasing prejudice

For a long time, society has pathologized trans identities, rather than seeing them as a key part of an individual's identity. This pathologisation has led to stigma, hostility and violence which affects trans people every day. Almost half (48 per cent) of trans people having experienced a hate crime in the last 12 months (Stonewall Scotland, "LGBT In Scotland - Hate Crime and Discrimination Report", 2017). 56 per cent of trans people do not feel comfortable using public bathrooms due to fear of discrimination, while two in five (42 per cent) adjust the way they dress to avoid abuse. This abuse also affects young people, with 71 per cent of young trans people facing abuse and discrimination at school as a result of their gender identity (Stonewall Scotland, "School Report Scotland", 2017). Self-declaration would be a huge step forward in depathologising trans identities, giving trans people back autonomy over their lives and identities. We believe that giving trans people the respect and autonomy they deserve will help to increase social acceptance and end the prejudice they face. Because of this, an updated, demedicalised Gender Recognition Act would be a critical step in tackling this hostility and creating a safer and more inclusive society.

Age Limit

Trans young people under the age of 18 are not currently able to apply for legal gender recognition under the Act, a restriction which is unnecessary and can be damaging to their wellbeing and health. For further details, see our response to Questions 5 and 6.

Non-binary Recognition

The current Act gives no legal recognition or provisions to non-binary people; that is, people whose gender identity falls outwith the binary system of male and female. We outline our position on this in response to question 12.

Conclusion

The process of the gender recognition panel is a major issue that leaves Scotland lagging behind international best practice. A self-declaratory system for legal gender recognition that no longer requires medical evidence, evidence of a period of living in an acquired gender, or that pathologises transgender identities would be a huge step forward for the human rights of trans people in Scotland, and would help Scotland to remain a world leader in social equality. Updating the Gender Recognition Act to reflect the needs and rights of trans people in the modern day is not only advisable, it is essential to safeguard the physical, mental and emotional wellbeing of trans people, along with their continued journey towards social and legal equality in today's society.

Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Yes

Statutory declaration

Stonewall Scotland believes that a system based on self-declaration is the best approach, bringing Scotland in line with international best practice. The process for statutory declaration in Scotland is already a fairly simple and straight-forward one, and is used very commonly by trans people for changing their legal name. The process is fully accessible and can be done by printing off a basic format from several locations online (Scottish Trans Alliance, "Statutory Declaration for Change of Name", 2013).

While some countries which use a statutory declaration process require an enforced period of reflection, we do not believe this would add any benefit. A significant barrier in the current GRC process is the amount of time it takes to complete, most notably the provision for a person to evidence two years of lived experience in their acquired gender. To merely replace this requirement with a period of reflection would simply reinforce the idea that trans people cannot be trusted to make decisions about their lives without some kind of oversight. The requirement for a

period of reflection would also not be consistent with other uses of a statutory declaration, such as a change of name (Citizens Advice Scotland, “Changing Your Name”, citizensadvice.org.uk).

Criminal intent

A number of countries have already adopted a self-declaratory system, namely Argentina, Denmark, Ireland, Malta and Norway. There has been no evidence of people amending their gender under these systems with fraudulent intent (University of Bristol Law School Blog, “Transgender Rights in the United Kingdom and Ireland: Reviewing Gender Recognition Rules”, 2017). Under Scottish law, as evidenced in the Scottish Government’s additional information (section 3.32), it is already a criminal offence to knowingly make a false statement through a statutory declaration, and we believe this provides an appropriate disincentive to people who might seek to make a fraudulent claim. Additionally, this would also ensure that people did not make repeated applications lightly.

Until death section

While it is important that individuals looking to change their gender do so with an intention to live in that gender permanently, we believe that the inclusion of an ‘until death’ clause is unnecessary. As discussed above, fraudulent changes are already illegal, and people changing their gender usually do so with an intention to remain in that gender permanently. As these proposals are about giving individuals autonomy over their own bodies and identities, we cannot see any benefit to this requirement. Please see below for further information.

Should there be a limit on the number of times a person can get legal gender recognition?

No

Current status

Under the current Act, there is no restriction on the number of times a person can apply for legal gender recognition, and Stonewall Scotland does not believe there is sufficient reasoning to introduce a cap under new legislation. Although we agree that a person should consider their application to be a solemn and honest statement of intent to live in their gender identity in good faith, we feel that due consideration should be given to the fact that

there could be genuine reasons why an individual would transition more than once. Much in the way that marriage is entered into with the intent of the decision being permanent, an application for legal gender recognition should also allow for the possibility that, if someone's decision or situation was to change, they would be able to apply for a new recognition in the same way (although we believe that this would be rare).

Criminal concerns

As referenced in question 2, there is no evidence to suggest that systems of self-declaration would be abused for criminal means. There has been no evidence of fraudulent criminal intent behind applications in other countries who have already passed similar self-declaratory legislation, and few introduce caps or restrictions - Norway, for example, has no such cap on multiple applications. Furthermore, restrictions only undermine the principle of this reform, which is to recognise the personal nature of gender identity and to give individuals autonomy over their lives. We believe that the nature of a statutory declaration, and the law surrounding false claims, are more than suitable to deter criminal intent.

Nonbinary/young persons

A limit on applications could negatively affect individuals with a non-binary identity, or young people exploring their gender, and may result in people not making claims at all. Those who are exploring their identity and trying to best describe themselves could be penalised as their own understanding of their gender evolves. Young people should always receive effective support to discuss and understand their gender identity so that they are enabled to make an informed decision as to whether to change their legal gender identity. However, we should not penalise the small number of cases where their gender identity changes in later years, nor should we give individuals a sense that they would face a punitive process or major legal barriers in future should that happen, as they may lead to some continuing under a gender identity that causes them significant distress. Because of this, we would not recommend a limit on applications.

If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

A. only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?

B. to everyone?

C. Don't know

B. To Everyone

Our stance

Stonewall Scotland strongly believes that the ability to self-declare legal gender identity should be something anyone in Scotland can do, regardless of who they are or where they're from. We believe that in line with Scottish Government's commitment to being a welcoming, open place to all people, the Scottish Government must ensure that access to legal gender recognition is accessible to all. Furthermore, we believe that it is vital that no one should be prevented from accessing the benefits of legal recognition, including better access to services and reduced barriers to employment, simply because of where they are from.

The reasons for that start in the rest of the UK. The UK Government has signalled an intention to consult on this matter, although they have yet to set out the consultation and have not confirmed their intention to legislate for Gender Recognition Reform as yet. We strongly believe it is essential that trans people in England, Wales and Northern Ireland should have the right to have their gender recognised in Scotland.

Many trans people across the world live in countries where there are significant barriers and prohibitive requirements to accessing legal gender recognition, and many from countries where there are no provisions whatsoever. A lot of these countries have laws making it illegal to be trans, exposing people to physical, mental and sexual abuses (International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), "Trans Legal Mapping Report – Recognition Before the Law", 2016).

Many countries that do recognise trans people require forced sterilisation, medical treatments and surgical interventions, violating trans people's bodily autonomy and integrity and causing physical and mental trauma.

According to Transgender Europe, 23 European states require forced sterilisation, 36 require a mental health diagnosis, 23 require invasive surgery, and 8 states have no recognition of trans people's existence in law at all (Transgender Europe, "Trans Rights Europe Map & Index 2016", 2016). Furthermore, many trans people will be coming to Scotland from countries that not only enforce these processes on them, but where transphobic behaviour and attitudes are a cause for serious concern. A report produced by the UN Commissioner for Human Rights in 2015 reported that at least 76 UN states continue to have laws that criminalise trans people, prompting some 1,612 murders of trans people over 62 countries being recorded between 2008 and 2014. This is equivalent to a killing every two days (UN Commissioner for Human Rights, "Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity", 2015). Stonewall's own research found that two in five trans people (41 per cent) have experienced a hate crime here in the UK in the last 12 months. The number jumps to 53 per cent for trans young people between 18 and 24. These statistics show that the problem exists all around the world, including at home, and it is therefore of paramount importance that access to a self-declaratory system is open to all people.

Asylum seekers

Many trans asylum seekers will be coming to Scotland to escape transphobic discrimination and violence in their country of origin and it is vital that they are able to access a process to have their gender identity legally recognised when they arrive here. Stonewall's report into the experiences of LGBT asylum seekers and refugees in the UK found that many has escaped from horrendous acts of violence and abuse, ranging from beatings, to attempted murders, to rape (Stonewall, "No Safe Refuge", 2016). The report details how people face abuse and threats from their own families, their communities and even the authorities and governments in their countries of origin. One interviewee from Nigeria described an attack – "He boiled water and wanted to pour it over my body. I used my hand to throw the bowl out of his hand. This is what gave me this scar." (Stonewall, "No Safe Refuge", 2016, p11).

As many of these people may not be considered to be resident in Scotland while their application for the right to remain is ongoing, we believe that ensuring this process is open to all people is critical in ensuring they are not subjected to further discrimination. Many will have been unable to access updated documentation that proves their gender identity, as they may have faced discrimination for attempting to do so or their country of origin may not

have a process at all. Trans asylum seekers face particular threats of violence and discrimination while in detention, and are often exposed to dangerous situations, such as trans women being placed in male detention centres (Stonewall, “No Safe Refuge”, 2016, p17). Being able to self-declare their gender identity while in Scotland and have that legally recognised would enable new asylum seekers to be housed in gender appropriate environments, reduce the possibility of gender-related discrimination and abuse, and ensure that they are afforded the same rights and provisions as any other person in Scotland.

Offering gender recognition without a requirement for residency or UK citizenship is also best in line with a human rights based approach. The Yogyakarta Principles (Principle 31, C, iii) support the need for an openly accessible process by stating that “no eligibility criteria such as... economic status, health, marital or parental status, or any third party opinion, shall be prerequisite to change one’s name, legal sex or gender (Yogyakarta Principles, “Yogyakarta Principles +10”, 2017, Principle 31). The Scottish Government has already committed to improving the experiences of asylum seekers and refugees coming into Scotland (Scottish Government, “New Scots Refugee Integration Strategy 2018-2022”, 2017), with a focus on seven key themes - needs of asylum seekers, employability and welfare rights, housing, education, language, health and wellbeing, communities, and culture and social connections. As detailed in our answers to previous questions, access to these services requires legal identity documents, which should be up to date and accurate. Ensuring that the process is open to this community would be in line with this strategy, proving Scottish Government’s commitment to a welcome, supportive and integrated community.

The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Do you agree or disagree?

Agree

Our stance

Stonewall Scotland strongly agrees with this proposal. Many trans young people, just like adult trans people, live openly in their identified gender full time, many of them with the full support of their family and friends, as well as their schools and employers. Significantly, trans people around 16 and 17 years old are often at a point of change

in their lives and will be interacting with new communities, be that entering further and higher education, entering the workforce, or planning to move away from home for the first time. It is vital that they are able to legally self-identify in order to avoid the distress caused by continually having to disclose their trans status, or being forced to provide what amounts to incorrect information about themselves when accessing new systems, such as payrolls and student matriculation processes (House of Commons Women and Equalities Committee, “Transgender Equality Report”, 2015, Scottish Trans Alliance Written Submission).

Rights afforded to 16 year olds

Scotland has in recent years made great improvements in the rights afforded to young people ages 16 and over. At present, they are considered legally capable of consenting to many adult decisions, including entering marriage or a civil partnership, joining the army, entering the workforce, consenting to medical treatment and surgery, voting in Scottish elections, and recording a change of name. Ensuring a legal right to self-declaration of gender identity would simply be consistent with these other rights in Scotland (as evidenced by the Scottish Government’s additional information, 4.05, 4.06). We would not recommend a court order system such as is used in the Republic of Ireland, as this would both be inconsistent with how young people currently access their rights, continue the problematic system the current Act provides, and furthers the narrative that trans people, including trans young people, do not know what is best for themselves.

Which of the identified options for children under 16 do you most favour?

Option 1 – do nothing for children under 16

Option 2 – court process

Option 3 – parental application

Option 4 – minimum age of 12

Option 5 – applications by capable children

None of these options

Option 3 – parental application

Our stance

Stonewall Scotland believe it is vital that trans young people under 16 are able to access gender recognition. It is known that young trans people are aware of their identity early in life - psychologists are aware that children develop their gender from as early as three (Ann M. Gallagher & James C. Kaufman. “Gender differences in mathematics: An integrative psychological approach”, 2015).

It is essential that all young people have space to explore who they are, and that's why LGBT youth provision is so important in Scotland, and why it is vital that the Scottish Government continues to support and invest in it. We also must support schools to allow all young people, including gender non-conforming young people, who may or may not be lesbian, gay or bisexual, to be able to explore who they are. Those who are trans should receive the specific support they need to understand what that means for them. Scottish Government investment in women's organisations that are LGBT inclusive and LGBT organisations who can work with schools to provide this support is vital and will ensure Scotland provides every LGBT young person with the support they need.

Alongside this support, legal recognition would ensure that no young person suffers because of the discrepancy between their legal and social identities.

Allowing children and young people to access gender recognition allows them to best access their rights under the United Nations Convention on the Rights of the Child (UNCRC) (United Nations Office of the High Commissioner on Human Rights, “Convention on the Rights of the Child”, 1990). These include Article 2 (that children and young people should be protected against all forms of discrimination) Article 8 (the right to identity, including gender identity and sexual orientation), Article 12 (the right to express opinions and be listened to) and Article 14 (the right to freedom of expression). Recognising the right to protection from harm, the right to self expression and identity,

and the right to opinion means that all trans young people under 16 should have the right to the legal recognition of their gender identity, however they choose to express it. This is further enforced by Article 3 – that the best interests of the young person be respected.

By providing an accessible process to young trans people under 16 years old, the Scottish Government would be fulfilling its commitment to using the UNCRC as a framework to guide its work ensuring the rights of children and young people are recognised, respected and promoted equally (Scottish Government, “Children’s Rights”, beta.gov.scot).

It is extremely important to note at this stage that allowing trans young people under the age of 16 to access legal gender recognition is not about access to medical treatment, but about recognising them for who they are and supporting them to be themselves. Bullying, discrimination and poor mental health are at critically high rates in young trans people, and all are linked to a lack of acceptance (Almeida et al 2009, Emotional Distress Among LGBT Youth; Coggan et al 2012, Association between Bullying and Mental Health Status in New Zealand Adolescents). 71 per cent of trans young people in Scotland today are bullied in school, while 96 per cent of trans young people have deliberately self-harmed. More than two in five (43 per cent) of trans young people have attempted to take their own lives (Stonewall Scotland School Report, 2017). Accessibility to legal gender recognition would improve children’s wellbeing by allowing them to be recognised for who they are, and protecting them from having their gender identity questioned or erased. It would also serve to normalise trans identities from an early age, and support young people, teachers and parents to become more accepting.

In line with the Scottish Government’s proposals for a self-declaratory model above the age of 16 years old, we believe that a process which mirrors this for under 16’s would be fair and accessible. With this in mind, our preferred option is recognition by parental application (option 3). While this is an imperfect model, we believe it to be the most appropriate in supporting children and young people to access their rights.

Problems with Options 1, 2, 4, and 5

Before we discuss the merits of parental application, it is important to consider the disadvantages of other proposals.

Option 1 – doing nothing for those under 16 –does nothing to support trans young people or help prevent discrimination against them. Failing to recognise trans young people fails to allow them to access their rights.

Option 2 – court process – is too similar to the current system under the 2004 Act. At present, a court application route (such as that adopted by the Republic of Ireland for 16/17 year olds) requires medical supervision, diagnosis and proof. As has been argued many times in the previous questions, judicial process can be difficult for young people, causing significant distress and trauma. Insisting that children appear in front of a court also furthers the pathologisation of trans identities. Finally, it would be likely that courts or tribunals would need expert evidence, which could cause an increase in costs and time needed.

Option 4 – minimum age of 12 – carries many of the same issues as option 1. While we believe that allowing young people between the age of 12 and 15 to self-identify would be highly progressive and show a strong understanding of the ability of trans young people to understand who they are, it still leaves trans young people below that age with no process whatsoever, which leaves them vulnerable and without recognition.

Option 5 – applications by capable children – raises the question of what we consider the definition of capable to be. We believe that there is a risk trans young people, including those with neurodiverse development, would be stigmatised by this process, and unfairly blocked from accessing their rights. We would also be concerned as to how a young person's capability is assessed. As referenced in the Scottish Government's additional information (sections 4.37 – 4.41), an assessment would likely be done by a registered medical practitioner or practicing solicitor. We believe this would hold many of the disadvantages of the current system, which leads to great distress for applicants, pathologises trans people and introduces the potential for harm and discrimination. While we believe that this option has the potential to be an accessible and fair route to allow all trans young people, regardless of age, to self-declare, at present we do not see a route towards achieving this without significant problems.

Option 3

Although there are disadvantages to option 3 – parental consent – we believe that it is the most appropriate option at this time. While we would prefer to recognise the autonomy and capacity of young people, we believe that difficulties with the capacity model (as detailed above) make Option 5 more problematic.

We believe that in Option 3, the process of requiring consent from at least one parent or guardian with parental rights and responsibilities (PRRs) would be in keeping with the process of updating many similar changes in terms of documentation. Consent is required by under 16s to update passports and medical records, register a change of name, and gain access to many services. Extending this process to legal recognition of gender identity would be consistent in how young trans people under 16 years old access similar pathways. Additionally, this would also mirror the process under which adults self-declare for their gender recognition under the proposed changes.

As mentioned before, there are issues that would arise if a young person were unable to change their legal gender due to lack of parental consent. While this would be deeply distressing, it is likely that a young person in this situation would be facing significant issues at home already. For example, a young person denied consent to change their gender may not be able to present as their true gender at home, use a chosen name, or be addressed by their correct pronouns. These issues may well take greater precedent for them than legal recognition, and indeed may be an issue of their own safety. While distressing, these are unfortunate facts for many trans young people.

In circumstances where a trans young person under 16 years old were refused consent for gender recognition by a parent or guardian, there must be a process for them to apply for legal recognition in their best interests. The Children (Scotland) Act 1995 sets out how this process could be operated, regarding “the welfare of the child concerned as its paramount consideration” taking account of the young person’s age and maturity, and giving them an opportunity to express their opinions and be heard.

In short, a trans young person under the age of 16 who is refused parental consent to access legal gender recognition would have the right to apply to the courts to access that process. This is the model under which Malta

(Transgender Europe, “Gender Identity, Gender Expression and Sex Characteristics Act 2015”, 2015, tgeu.org) and Argentina (Transgender Europe, “Argentina Gender Identity Law”, 2012, tgeu.org) operates under international best practice, and at the moment, the most appropriate. This would also be the process by which a trans young person who has no parent or guardian with PRRs would access legal gender recognition, such as those in care or who may be homeless. However, the involvement of children and young people in judicial proceedings is a challenging and nuanced one, and careful consideration must be given as to how young people are supported through this. It is critical that young people who seek to change their legal gender, particularly those who lack parental consent, are able to access emotional support and guidance to help them through this period.

Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes

Current state

Stonewall Scotland believes that the introduction of a requirement for spousal consent would be unnecessary and problematic. As the situation stands under the 2004 Act, the Gender Recognition Panel will only supply a married applicant with a full Gender Recognition Certificate (GRC) if their spouse has confirmed in writing their consent to stay in the marriage. If that spouse chooses not to consent, the Panel will issue an interim GRC, and either party may seek a divorce on that basis.

Although under the 2004 Act, the spouse of a trans person in a Scottish marriage cannot directly prevent them from obtaining recognition, the process under which they will need to go of settling a divorce and applying to the Sheriff Court for a full GRC is time-consuming and costly. This is an unnecessary barrier to legal gender recognition and should not be replicated or exacerbated under the new self-declaratory system being proposed.

Potential for harm

Additionally, we are concerned that providing for a veto would give a spouse the potential for malicious behaviour in the case of a relationship breakdown. We are especially concerned for the wellbeing of trans people who may be in abusive relationships, and against whom this provision could be used to disempower and control. In written evidence submitted to the Women and Equalities Committee's 'Transgender Equalities' report, Dr. Karl Rutledge stated that, in the case of a vindictive or abusive partner who refuses to consent to the GRC or a divorce, the power this gives them over their trans partner is substantial and dangerous. Dr Rutledge noted that no other stage of transition, be that social, medical or surgical, can be stopped or slowed by a partner or spouse (House of Commons Women and Equalities Committee, "Transgender Equality Report", 2015, Dr Karl Rutledge Written Evidence). A number of other witnesses also raised concerns about this, including the Gender Identity Research and Education Service (GIRES), UK Trans Info, RISE, and Galop (House of Commons Women and Equalities Committee, "Transgender Equality Report", 2015, p15).

Existing provisions - Annex H

Annex H of the Scottish Government's additional information describes the provision in the 2004 Act for allowing a GRC to be quashed, following a request by an applicant's spouse, their civil partner, or the Secretary of State if the application for recognition was secured under fraud. We agree with the Scottish Government's proposals that a spouse or civil partner would no longer be able to make an application to quash a GRC.

Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

Yes

Current state

Under the Marriage and Civil Partnership (Scotland) Act 2014, it is currently not possible for a mixed sex civil partnerships to be recognised. When one partner is issued a GRC, the couple can either choose to change their civil partnership to a marriage, or end the civil partnership entirely. We agree with the Equality Network's view that the only way of removing this loophole from the law on marriage and civil partnerships is to open up civil partnerships to couples regardless of gender (Scottish Government, "Review of Civil Partnership", 2015, Equality Network response no. 1060508039). It's important to note that due to the fact that the current Act's processes force trans people to live in their acquired gender and gather evidence of such for two years before they are able to apply for a GRC, they will have already taken measures to live in their gender identity for considerable time. This means that they will, for all intents and purposes, they will be living in mixed-gender civil partnerships already, and simply haven't received their legal recognition yet. Legally, they will be seen as same-sex, but this is a matter of administration – socially speaking, this change has already happened.

Non-binary impact

Additionally, recognition of non-binary gender identities will have an impact on marriage and civil partnership. The language in the law refers to spouses or partners as binary male and female genders, and terms like "same-sex" exclude non-binary people. Opening civil partnerships to include mixed-gender couples would not only allow for the choice of how a partnership could be legally recognised, but would be yet another step forward in recognising non-binary identities as equal and valid.

Should legal gender recognition stop being a ground of divorce or dissolution?

Yes

Grounds for divorce or dissolution

Stonewall Scotland believes that having legal gender recognition as a specific ground for divorce or dissolution reinforces the discriminatory view that trans people are somehow dissatisfactory to be in a partnership with. Under the current Act, an interim GRC is issued by the Gender Recognition Panel when a spouse in a marriage does not consent to the application for gender recognition, or if one of the partners in a civil partnership is applying but not

the other. This interim GRC can then be used for grounds of divorce or dissolution. According to the Divorce (Scotland) Act 1976, the other ground is that the marriage or civil partnership has broken down irretrievably. This can be awarded if a) the couple live apart for one year and both parties consent to the separation, b) the couple live apart for two years (which does not require consent), c) unreasonable behaviour or, in relation to marriage, d) adultery. We believe that this definition is sufficiently broad that there is no need for a specific clause that, in effect, discriminates against trans people for their gender identity.

Are any changes to section 22 (prohibition on disclosure of information) necessary?

No

Section 22 exists to protect trans people's privacy and contributes directly to the safety and wellbeing of those who have acquired legal gender recognition. We would be open to discussions about whether the implementation and enforcement of section 22 can be improved, but do not believe other changes are required at this time. We believe that the exemptions in the Act, as laid out in the Scottish Government's additional information (sections 6.03 – 6.04), cover all reasonable requirements for the disclosure of information. Any additional exemptions would likely contravene the European Convention on Human Rights Article 8 – the right to a private life – and could place the applicant's safety at risk (Council of Europe & European Court of Human Rights, "European Convention of Human Rights", 1953). Additionally, any information that has been obtained in an official capacity should remain undisclosed as far as is possible.

Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes

Stonewall Scotland believes that those who have already been legally recognised in their acquired gender should have no reason to apply again for recognition in Scotland. Similarly to Question 4, we believe that recognising people in their acquired gender from when they arrive in Scotland is the only option in line with Scottish Government's commitment to making Scotland a welcoming, open place to all people from all backgrounds (Scottish Government, "New Scots Refugee Integration Strategy 2018-2022", 2017).

Asking people to go through legal recognition again could have significant negative consequences. The current processes under the 2004 Act requiring unwieldy amounts of evidence is further compounded when you consider that people from international origins may have to provide expensive translations of medical reports, may require a new diagnosis of gender dysphoria and may be forced to relive what was an intrusive and humiliating time. We believe this is an unacceptable situation to enforce, and that automatically accepting a gender recognition document from another jurisdiction would provide much needed simplicity and promotion of wellbeing for international applicants.

Overseas track

The current overseas track for legal gender recognition exists to allow for Scotland to recognise applications from countries with laws that have a similar nature to the 2004 Act. The move to a self-declaratory system would bring Scotland in line with international best practice, and would in effect remove the need for the overseas track to exist. As noted in the Scottish Government's additional information (section 6.25 – 6.28), other countries have already adopted this practice. Malta, for example, has legislation that states that a final decision made about a person's gender identity, determined by a competent foreign country or authority, is automatically recognised with no further process required (Government of Malta, "Gender Identity, Gender Expression and Sex Characteristics Act", 2015). Under the UK 2004 Act, a trans person who has already acquired legal gender recognition in a country within the European Economic Area does not need to make an application in the UK, if they are a national of that country (UK Government, "Gender Recognition Act 2004", 2004). Additionally, the overseas route provides a list of approved countries which could realistically be used to automatically accept gender recognition processes from those territories without the need for the route to be maintained (UK Government, "The Gender Recognition (Approved

Countries and Territories) Order 2011”, 2011). We also agree that, should the Scottish Government legislate to fully recognise non-binary gender identities, those identities should be recognised on arrival.

Exemption orders

In circumstances where there was concern over the process under which a person acquired legal recognition, or in specific individual cases, we agree with the Scottish Government’s additional information proposal that a public policy exemption order would be a fair solution (Annex H, 16). This would be consistent with the powers provided by the 2004 Act to quash a GRC under direction of the Secretary of State, whom we believe we should be responsible for this process.

Asylum seekers

As discussed in response to Question 4, many trans asylum seekers will be coming to Scotland to escape transphobic discrimination and violence in their country of origin and it is vital that they are able to have their gender identity legally recognised when they arrive here. As stated above, many will be unable to access translated or even original documentation from within detention centres. Stonewall research showed that trans asylum seekers face particular threats of violence and discrimination while in detention, with one report revealing that trans women are often placed in male detention centres. Trans detainees face particular danger in having to share bedrooms and communal showers with other detainees, which exposes them to considerable threat. Having their gender identity documents automatically recognised would allow them to avoid this with greater ease (Stonewall, “No Safe Refuge”, 2016).

Should Scotland take action to recognise non-binary people?

Yes

Stonewall Scotland strongly believes that non-binary recognition is a vital part of this proposal and strongly encourages the Scottish Government to create legislation to this effect. Updating the Gender Recognition Act to reflect the needs and rights of trans, including non-binary, people in the modern day is not only advisable, it is necessary to safeguard the physical, mental and emotional wellbeing of those people, along with their continued

journey towards social and legal equality in today's society. The Scottish Government has already dedicated itself to doing so within this Parliament session, with First Minister Nicola Sturgeon noting that with legal gender recognition comes public understanding of the barriers that non-binary people face. The Scottish Government has already identified (in sections 7.01 – 7.07) that actions to ensure the inclusion of non-binary identities could lead to higher levels of understanding and acceptance, and reduce discrimination.

We would argue that without recognition of non-binary identities, reforms to gender recognition law could not be seen as in line with international best practice. The third gender marker of "X" has already been introduced in Canada (CBC News, "Transgender N.W.T., residents can now change birth certificates to reflect gender", 2017) and in New Zealand (New Zealand Government, "What you need to renew or apply for a passport – Information about Changing Sex/Gender Identity", 2017) on official identification documents, including passports.

The Yogyakarta Principles maintains that states should "take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity" and "ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity". The World Professional Association for Transgender Health (WPATH) released a statement on legal gender recognition on November 15th 2017, which states: "WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose" (WPATH.com, 2017).

In summary, these statements firmly set the precedent that recognising non-binary identities in law is directly linked to access to services, personal safety and health and wellbeing. We agree with these conclusions and, as such, strongly recommend recognising non-binary gender identities under law in line with these proposals.

If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.

Option 1: Changes to administrative forms

Option 2: Book of Non-binary Identity

Option 3: Limited document changes

Option 4: Full recognition using proposed self-declaration system

Option 5: Incremental approach

Option 6: Amendment of the Equality Act 2010

None of the above options

Introduction

Stonewall Scotland strongly believes that non-binary recognition is critically important in ensuring that Scotland's gender recognition laws are in line with international best practice. We support Option 4 – full recognition using proposed self-declaration system – as outlined in previous answers. We believe that steps taken to improve the process of recognition for binary trans people must also be available to non-binary people, who deserve the same level of recognition and respect. Anything else would lead to an inconsistent and confusing system.

We also believe that pursuing Option 1 – changes to administrative forms, Option 3 – limited document changes, and Option 6 – seeking amendments to the Equality Act 2010 that, in addition to a self-declaratory system, are important in ensuring the proposed changes deliver full and comprehensive equal rights and protections for non-binary people in Scotland.

Option 1 – Changes to administrative forms

Changes to administrative forms would allow for the capture of accurate and valuable data which is frequently lacking when it comes to trans issues. Updating administrative forms such as those used for equality monitoring purposes, access to services such as healthcare and justice, enrolling in education, and in the workforce would

allow for the facilitation of better service provision, research into specific gendered discrimination and crime, and public policy.

According to research conducted by the Scottish Trans Alliance, 34 per cent of non-binary people had been told services did not know enough about non-binary identities to help them, and 11 per cent had been refused access to those services based on their gender identity. 65 per cent of respondents felt that services were never inclusive of non-binary identities in terms of the visible images and language used in forms, leaflets and information. A large number of respondents felt that this lack of visibility negatively impacted their access to services, mental health and validity. These numbers were replicated similarly across nearly all public services, including GP surgeries, education, mental health services, sexual health services and the police (Scottish Trans Alliance, “Non-binary People’s Experiences in the UK”, 2016). Therefore, increasing the availability of such data would have a significant real world impact on non-binary people’s access to services.

Stonewall Scotland’s ‘Getting Equalities Monitoring Right’ guide on how to monitor and collect equalities information was produced in partnership with the Scottish Trans Alliance, and includes information on how to include non-binary questions and why these matter. (Stonewall Scotland & Scottish Trans Alliance, “Getting Equalities Monitoring Right”, 2017). We believe this may be helpful in adapting administrative forms. We would also strongly recommend that non-binary people are included and consulted in the development of these forms in order to improve the quality of data captured and ensure questions are accessible.

Changes to administrative forms to include non-binary gender identities would go a long way to supporting the validation of these identities, reduce stigma and discrimination, improve access to public services, and strengthen the legal recognition of non-binary people in Scotland. However, we also believe it is insufficient as a means of offering legal recognition, and must be pursued in addition to Option 4 – self-declaration.

Option 2

As noted by the Scottish Government’s additional information (section 7.10 – 7.11), Option 2, a Book of Non-Binary Identity would provide no legal recognition and as such we do not believe that this would be worthwhile.

Option 3 – Updates to identity documents

We believe that there is a need to ensure all identity documents with a gender marker carry an option to recognise non-binary identities. Similarly to Option 1, allowing documents such as passports and driver's licences to reflect the true nature of those identities would further support the rights of non-binary people to be fully legally recognised. At present, there are no provisions in place to recognise non-binary genders on these documents, leading to non-binary people being issued with inaccurate forms of ID. This frequently causes difficulties for non-binary people who struggle to have ID that correctly represents them, and often struggle to have their identity recognised – according to research by the Scottish Trans Alliance, a number of non-binary people have had difficulty providing proof of their ability to work, as well as difficulty providing their qualifications and even being refused access to public services, on account of their non-binary identity (Scottish Trans Alliance, “Non-binary People's Experiences in the UK,” 2016). Ensuring that these documents can be updated to recognise non-binary identities will therefore need to be a consequence of any legal recognition.

Many countries already offer non-binary gender markers on official documentation. In New Zealand (New Zealand Government, “What You Need to Renew or Apply for a Passport – Information About Changing Sex/Gender Identity”, 2017), Denmark (Transgender Europe, “Denmark: X in Passports and New Trans Law Works”, 2014) and Canada (Government of Canada, “Change the Sex on your Passport or Travel Document – Change your Sex to X”, 2017), passports have the option for sex to be identified with an ‘X’ for unspecified, in addition to the usual ‘M’ for male and ‘F’ for female. This was highlighted as a recommendation by the Women and Equalities Committee to the UK government, and as the issuing of passports and driver's licences are reserved matters we believe the Scottish Government should work with the UK to ensure this recommendation is met, alongside including their own amendments to Scottish record systems.

The Scottish Government's additional information (section 7.21) raises the issue of Community Health Index (CHI) numbers, which are allocated to every patient under NHS Scotland records. The number has a unique identifier within it that is allocated based on gender, and while it is possible to have this number changed, there is no provision to recognise non-binary identities.

While CHI numbers are used to allow NHS Scotland services to issue appointments and treatments for gender-related health issues, many trans people have updated their CHI number to reflect their acquired gender identity, while still requiring the ability to access treatments and support around their sex assigned at birth. For example, a trans feminine person who has transitioned from assigned male may still require a prostate exam in later life, but will not be included in this screening as they will have a CHI number that states they are female. This also means they will be offered screenings inappropriate to their physical bodies. A greater flexibility around how the CHI system operates may be required, as referenced in section 7.22, that allows for patients with gender identities different from their birth sex characteristics to access the important and appropriate services they require. As with Option 1, we believe that changes to identity documents and records to include non-binary gender identities would strengthen the legal recognition of non-binary people in Scotland. In this respect, however, we believe that Option 3 must be pursued alongside options that offer formal legal protection and recognition.

Option 4 – Full recognition using proposed self-declaration system

As discussed in previous questions, we believe that full legal recognition under a self-declaration system for all trans people, including those of non-binary identity, will best allow trans people to be recognised fairly, and without needless distress. The ongoing lack of non-binary inclusion leaves a significant portion of the trans population without any legal recognition, meaning that those who identify outside of the binary male and female boxes are left in limbo, forced to legally identify as something they are not. As outlined in response to Question 1, a self-declaratory system for legal gender recognition would be a huge step forward for Scotland in remaining a world leader in social equality.

Option 5

Option 5, an incremental approach involving further research is insufficient, and will not offer protection or recognition for non-binary people. We believe that this consultation will provide the Scottish Government with more than enough research and reasoning to support the full legal recognition of non-binary gender identities. Stonewall's LGBT in Britain: Trans Report (2018), and the UK Government's LGBT Survey (which is currently open for responses) will also provide large volumes of information on the experiences of non-binary people.

Option 6 – Amendment of the Equality Act 2010

Stonewall Scotland believes that legal recognition must be accompanied by protection from discrimination and harassment in order to be meaningful, and that amendment to the Equality Act 2010 is critical to this. As it currently stands, the Equality Act 2010 makes it illegal to discriminate against a person undergoing 'gender reassignment' (UK Government, "Equality Act 2010", 2010). This means that a person who is proposing to undergo, is undergoing or has undergone a process or part of a process to reassign their sex by changing their physiological or other characteristics of sex is protected under the law from discrimination, harassment or victimisation, as well as those who are perceived to have, or associate with someone who has this protected characteristic. It is important to note that the Act made this provision available without the need for medical treatment. Furthermore, it is unclear whether non-binary people are meaningfully protected by the current wording of the legislation. This ambiguity around their lack of protection leads to confusion and uncertainty for those affected.

As with the Gender Recognition Act 2004, the terminology used in the Equality Act has become outdated. The Equality and Human Rights Commission, as referenced in the Scottish Government's additional information (section 7.34), recommended that the definition of the protected characteristic should be broadened to include all people who face ill treatment as a result of their gender, including both gender identity and expression (House of Commons Women and Equalities Committee, "Transgender Equality", EHRC Written Evidence, 2016). This would provide comprehensive cover over many areas of discrimination that, at present, are too ambiguous. For example, a person who declares themselves non-binary and chooses to not pursue any other actions (such as changing their name, appearance, or characteristics), but instead continues to express their gender in the way they always have, could be subject to discrimination that is not easily attributed to a current protected characteristic. This also applies for cis-gender people whose gender expression differs from the 'traditional narrative' that society may expect people to conform to, such as a woman who presents in a masculine fashion. Amending the protected characteristic this way would ensure not only protections for all trans people, including non-binary people, but also cis-gender people who face similar issues simply for their gender expression.

For further information on amendments to the Equality Act, please see our response to the final question.

Scotland Act 2016

The Scotland Act 2016 allows for some areas of equalities to be legislated for in Scotland, specifically “equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority”. The legislation further outlines that while the Equality Act may not be amended by devolved administrations, supplementary provisions can be added. Therefore, although amendments directly to the Equality Act are a reserved matter for the UK Government, there is potential for Scotland to legislate for additional protections applying to specific characteristics, such as gender expression. However, this legislation would only apply to public bodies, and would fail to add critical protections against discrimination in areas such as employment and provision of services. Therefore, ideally we would prefer to see consistent protection for all areas across the UK.

These amendments, along with changes to passports and other documents, are likely to need Scottish Government to work collaboratively with the UK Government to ensure reasonable and consistent protections. We do not see this as a reason for delaying legal recognition and other GRA reforms, and furthermore, believe there is an opportunity for Scottish and UK Governments to work together to provide a comprehensive package of reform covering devolved and reserved areas.

At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Are you aware of other impacts we have not identified?

Yes

Stonewall Scotland agrees with the Scottish Government’s additional information on this question (section 7.26, Annex J). We believe there are also a number of pieces of historic legislation that will have been passed long before the recognition of non-binary identities was being considered. As a result, many of these laws and documents will include language that refers to men and women as binary constructs, where they describe situations intended to include all people. Moving forward, should non-binary identities be fully recognised in law,

action should be taken to amend such language to make it inclusive of all gender identities, and ensure future uses of these descriptions do the same. Updating language to reflect non-binary identities will also help eradicate male biased language in legislation.

Family law

As with above, language should be made inclusive of all gender identities and actions taken to prevent assumptions that there are only two genders. We believe that references to binary genders need to be amended to reflect the parental status of a person, rather than their gender, to recognise the role that person played in the relationship between parent and child. This would ensure that non-binary people would be included under the law based on their reproductive capabilities and role, rather than what is currently a case of binary gender identity, and would also ensure current rights afforded to parents and their responsibilities under the law remained the same afterwards. This would also address the current problem where family law makes no reference to trans men having babies, except having to be listed as the mother on the birth certificate.

Marriage law

We agree with the Scottish Government's proposals for changes to marriage law. Provisions would certainly need to be made to recognise non-binary people, and allow them to enter into marriage and civil partnerships. As outlined above, we support civil partnerships being opened up to mix sex couples to ensure that those transitioning while in a civil partnership need not convert to a marriage unless they wish to. This would also have the benefit of ensuring equal access to civil partnerships to cis-heterosexual couples.

Registration law

In addition to allowing for a non-binary gender identity to be recorded, we would recommend the Scottish Government consider the approach taken by Malta under the 'Gender Identity, Gender Expression and Sex Characteristics Act' (GIGESC Bill) which was passed in 2015. The Bill allows for new parents or guardians to forgo entering a gender marker on a birth certificate, until the child can make their own decision. It also regulates health care, prohibits genital surgeries on intersex infants, and reforms public data collection (Transgender Europe, "Malta Adopts Ground-breaking Trans and Intersex Law", 2015).

Criminal law

We agree with the Scottish Government's observations on gender-specific offences. Although we are not able to identify any legislation where gender specific criminal offences remain, we would be happy to work with the Scottish Government to identify any such laws and how they would be addressed.

Victims of crime

We agree with the Scottish Government's observations in relation to victims of crime, and believe that, where situations arise when a non-binary person is given a choice as to the gender of the person delivering a service to them (such as airport security checks, police interviews and medical examinations), it would be reasonable for the non-binary individual to request that person be the gender of their choice, and not be matched based on sex characteristics or gender assigned at birth.

Gender Quotas

Diversity on public bodies and boards, including within Government itself (Scottish Government, "Women On Board: Quality through Diversity, Scottish Government Consultation on the Introduction of Gender Quotas on Public Boards", 2014), is an asset, and something that should be built upon. It is the strong view of Stonewall Scotland that trans women are women and trans men are men, and as such should have no impact on gender diversity quotas. Rather, we believe that the barriers to women in society are equally felt by trans women and non-binary people, and visibility of this population would support and benefit women's rights, not hinder them. Equal representation in this manner would also combat other inconsistencies, such as the gender pay gap, by ensuring a real democratic meritocracy which combats historic and ongoing discrimination against women and trans people alike (Engender, "Equal Voice, Equal Power: The Case for Gender Quotas in Scotland", 2016). We welcome the amendments to the draft Gender Representation on Public Boards (Scotland) Bill, where the language was changed in line with the Equality Act 2010, protecting the representation of women (here defined as someone who identifies as a woman, including trans women as per gender reassignment under the Equality Act 2010), and the removal of the quota for men, allowing accessibility for non-binary people (Scottish Government, "Gender

Representation on Public Boards (Scotland) Bill”, 2017). In relation to these proposals to amend the Gender Recognition Act 2004, we believe there would be no major impact within gender representations on public boards.

Do you have any comments about, or evidence relevant to:

- (a) the partial Business and Regulatory Impact Assessment;
- (b) the partial Equality Impact Assessment;
- (c) the partial Child Rights and Wellbeing Impact Assessment; or
- (d) the partial Privacy Impact Assessment?

Business and Regulatory Impact Assessment

We agree with the content of the BRIA. We believe the estimated cost of setting up the self-declaration system of between £250,000 - £300,000 (section 3.9.5) to be reasonable and proportionate, given the nature and impact of the proposals. Scotland’s population was estimated to be 5,373,000 in 2015 (National Records of Scotland, “Mid-2015 population estimates Scotland and corrected population estimates for mid-2012, mid-2013 and mid-2014”, 2016). The Gender Identity Research & Education Society (GIRES) estimates that 1 per cent of the population identifies as trans, including non-binary people (BBC, “Gender Dysphoria and Transgender”, 2017, bbc.co.uk), which gives an estimate for 53,730 trans people in Scotland. At the upper estimate, this means a spend of £5 per trans person in the country. Additionally, using the Scottish Government’s estimated annual running costs of £100,000 per annum (section 3.9.9), based on the assumption that the number of applications will not exceed 400 per year, the running costs break down to £250 per application, which we do not consider disproportionate.

We believe this is a fair cost for the Government to absorb, as one of the main limitations to the 2004 Act system is the cost to trans people, many of whom already have significant expenditure expected of them during transition (including updating other forms of ID such as passports and driving licences, name changes, and additional healthcare options outwith the Gender Identity Clinic system such as hair removal or private care costs). Accordingly, we believe any start up costs and running costs with the self-declaration system will be offset by the

probability that the new proposed system will be cheaper in the long term than the current Gender Recognition Panel. For example, the current requirement for psychiatric reports and a diagnosis of gender dysphoria for recognition is likely to add significant costs to NHS Scotland's mental health and primary care services. Removing these requirements is therefore likely to lead to reduced costs in this area.

We agree with the Scottish Government's comments about the expected minimal cost of implementing provisions for people under the age of 16 and non-binary people (section 3.10 – 3.11.4, 3.12 – 3.13.10) should the Government establish these systems following our recommendations in this consultation.

Equality Impact Assessment

Stonewall broadly agree with the content of the EIA. However, we disagree with the argument that extending civil partnership to mixed-sex couples would undermine them in any way. On the contrary, Stonewall believes that making civil partnerships accessible to all has the potential to strengthen it as an institution by validating its equality with marriage for those same-sex couples who entered civil partnerships from their inception.

Child Rights and Wellbeing Impact Assessment

We mostly agree with the content of the CRWIA. However, we are concerned at the lack of detail in a number of key questions. Stage 1, question 2 asks what likely impacts the policy will have on children and young people and is simply answered with an affirmation that there will be impacts with no detail. There is significant scope within this question to detail the impact a self-declaration system would have on children and young people. We believe there is a need to detail the positive impacts the ability to self-declare legally would have in education, especially from the perspective of bullying and discrimination and the effects these have on health and wellbeing. More information on this can be found in our recent research, School Report Scotland (Stonewall Scotland, "School Report Scotland", 2017). Additionally, the impacts on children who are in care or on the child protection register should be closely inspected, as trans young people are already vulnerable to abuse and it is vital specific support is available to them and their carers/guardians.

Stage 2, question 2 asks how the policy will affect the wellbeing of children and young people as defined by the Scottish SHANARRI wellbeing indicators. The answer simply states that all the indicators are relevant. We believe

there is scope for a much more detailed answer that discusses the impact the proposals will have on the wellbeing of trans children and young people, broken down by indicator. A holistic approach is recommended, where evaluation is made of the physical, mental, emotional, social, environmental and spiritual needs and aspects of a person. This would ensure a comprehensive assessment of the impacts that this question seeks to answer (Sonya Wallace, "The Importance of Holistic Assessment", 2013, researchgate.net). We recommend the Scottish Government return to this CRWIA and address these key areas.

Privacy Impact Assessment

We agree with the content of the PIA. However, a note should be made of the changes due to come into effect May 2018 when the General Data Protection Regulation comes into effect and any impacts this will have upon the proposals.

Do you have any further comments about the review of the Gender Recognition Act 2004?

Stonewall Scotland would like to take the opportunity to address some of the more common misconceptions that are being perpetuated in the media and in public discourse around the impacts of these proposals. Several points have been raised by organisations and individuals who are claiming significant problems around what a self-declaratory process would mean for women especially, which are based on misunderstanding and public perception. Unfortunately, many of these points are problematic and are causing major distress and confusion.

There is a concern that allowing trans people to self-identify will have an adverse impact on women-only safe spaces, such as refuges, rape crisis centres, prisons and hospitals, to name a few. As the process of obtaining a Gender Recognition Certificate is purely for the sake of updating one's birth certificate to reflect their true gender, and as this process already exists, there will be no impact on the access women have to these spaces. Trans people, and trans women especially, already have a legal right to access these spaces and be respected in their gender identity, protected under the Equality Act 2010.

No rights or provisions are provided under the Gender Recognition Act 2004 as to who can access what space, and the proposals being considered under this reform introduce no such new rights of provisions either. There have been no cases where a birth certificate has been required to prove one's gender when accessing safe spaces or women only services in the past, and this will remain true under an amended Act. All women, including trans women, will continue to be safe using single sex services.

Furthermore, rape crisis centres and women's refuges in Scotland have accepted trans women on the basis of self-declaration for many years. Not only has this not undermined the safety of these spaces for other women, but it has allowed these essential services to support a diverse range of vulnerable women who need their support. We are delighted that so many organisations in this sector, including Scottish Women's Aid, Rape Crisis Scotland and Zero Tolerance, have added their support to these proposals. In their joint statement of support, they say :

"All violence against women organisations that receive Scottish Government funding provide trans-inclusive services. The requirement for trans inclusion plans has been in place for six years, and has not given rise to any concerns or challenges of which we are currently aware. Rather, trans women have added to our movements through their support, through volunteering, and as staff members of our organisations.

" <https://www.engender.org.uk/news/blog/frequently-asked-questions-womens-equality-and-the-gender-recognition-act/>

Where a person has the right to request a service provider be of a particular gender, such as in healthcare or when dealing with the police, this will continue to be the case. The trans population is so small that there will be no significant impact on the provision of this right, and should a situation arise where a service user requests someone else than the person assigned to them, this will continue to be provided within reason.

As we discussed in Question 14, gender diversity quotas in leadership positions, employment and public opportunities would continue to be balanced based on a person's self-declared gender, as is already the case. Trans people are already considered under diversity quotas as the gender they identify as, and no impact would be felt by a self-declaratory system.

There have been a number of concerns raised in the media around the impact of these reforms on children specifically. Mainly, a lot of accusations have been made against the NHS that children are being encouraged to “become transgender”, take hormone therapy and seek surgical interventions. This is factually untrue, as no person under the age of 18 is allowed to undertake any gender affirmation surgery or mainstream hormone replacement therapy. While hormone blockers may be prescribed, these simply act as a “pause button” on a person’s puberty. The claim that 16 years old is too young to obtain legal gender recognition is challenged and debunked by our evidence in this consultation response where we discuss similar rights already afforded to young people of this age, as well as multiple examples of international best practice where this is the norm.

A claim that non-trans people will have their dignity and privacy within gender-segregated spaces infringed upon has two main problems. Firstly, in the case of places such as changing rooms, fitting rooms and toilets, trans people have long been using these areas with little to no problems. Rather it is more likely, given the nature of discrimination and abuse seen against trans people, that it is trans people who will in fact have faced issues when trying to access these spaces. This also raises the issue of how trans people’s dignity and privacy is maintained, considering the widely evidenced and acknowledged trauma and difficulty they go through in simply being legally recognised. It is also worth bearing in mind that access to spaces and services is dealt with under the Equality Act, not the Gender Recognition Act. Everyone deserves dignity and safety – equal recognition under the law would begin to normalise trans identities, reducing the discrimination and abuse faced by the trans community.

Finally, a number of claims have been raised where people are concerned that anyone will be able to simply identify as a woman by filling in a form, which would allow them to access safe spaces and harass or attack women. Firstly, the process under which a statutory declaration is issued, as we have referenced in our response, makes it a criminal offence to knowingly make a fraudulent claim, which we believe will dissuade any such attempt. Secondly, as we have referenced before, the process of the Gender Recognition Act 2004 gives no one the legal ability to enter such spaces – proof of gender is not requested when entering a segregated space such as a changing room or toilet. People who would wish to cause harm to women in these spaces could do so without identifying as female, and there are considerable protections under the law for this already. Claims such as these

demonise trans people, who are a vulnerable, minority population wishing simply for accessible legal recognition for the support of their already lawful rights and protections, their mental and physical wellbeing, and their dignity and safety.

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