



**Scottish Parliamentary Briefing**  
**Gender Recognition Reform (Scotland) Bill**  
**October 2022**

## **Introduction**

- Amnesty Scotland and JustRight Scotland welcome the Equalities, Human Rights and Civil Justice Committee's majority support for the Gender Recognition Reform (Scotland) Bill – which will make sensible changes to the process of obtaining legal gender recognition and move Scotland closer towards being a place where trans people can live true to themselves.
- The Committee's majority view that trans people know their own minds and should be trusted to make decisions about their own bodies is a principle which should underpin discussion throughout this process.
- The current UK wide system for obtaining legal gender recognition does not meet international human rights standards, violates the rights of trans people, and places unnecessary barriers in obtaining a Gender Recognition Certificate (GRC). We support Scotland passing its own legislation and joining a number of other countries by moving to a self-declaratory process.
- International best practice and human rights standards including those set out by the World Health Organisation, Yogyakarta Principles, and the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity advocate for a self-declaratory process as set out in the Bill.
- We urge MSPs to vote for this Bill and improve the lives of trans people across Scotland.

## **Gender Recognition Act 2004**

While considered a positive piece of legislation almost 20 years ago, best practice has evolved, and the Gender Recognition Act 2004 (GRA) has been shown not to be working for trans people. The process set out in the GRA does not meet international human rights standards in a number of respects, as discussed below; undermines the dignity of trans people and further stigmatises trans identities.

### *A Medicalised Process*

The current system to change the gender on birth certificates in the UK requires a person to submit a highly detailed psychiatric report confirming they have been diagnosed with gender dysphoria, as well as detailed reports of any medical treatments they have had as part of their transition. These requirements are intrusive and humiliating, violate transgender people's right to privacy, and further stigmatise trans identities. Internationally, many countries have moved or are considering moving away from a medicalised process, driven in part by the World Health Organisation's removal of gender identity from a list of "mental and behavioural disorders" and revised position that trans-related identities are not, and should not be treated as, conditions of mental ill health.<sup>1</sup>

The issue of medical diagnosis was the subject of a Judicial Review in Northern Ireland in 2021. In JR111's Application for Judicial Review, the High Court found that the requirement under the Gender Recognition Act 2004 that an applicant for a gender recognition certificate prove they were suffering from, or had had, a mental "disorder", breached the applicant's ECHR Article 8 right to private and family life.<sup>2</sup> In reaching its decision the NI High Court noted the adoption of new standards by the World Health Organisation in the ICD-11 and by the American Psychiatric Association in DSM-5, which also no longer treats gender identity as a mental disorder.

### *Evidence of living in "acquired gender"*

In addition to providing medical evidence, applicants are also currently required to provide evidence of living in their gender for at least two years to a Gender Recognition Panel (GRP) who they never meet, and who don't have clear, definitive or publicly accessible decision-making criteria.

This requirement is not in keeping with International best practice as set out in the Yogyakarta Principles<sup>3</sup>, the Council of Europe Resolution 2048 (2015)<sup>4</sup>, or the 2021 report by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity<sup>5</sup>, which all call for self declaratory systems. The practice of requiring evidence of having lived as your gender identity for two years means that transgender people have to wait longer than necessary to obtain documents that reflect their gender identity. It is also the case that transgender people may find it difficult to

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<sup>1</sup> <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd>

<sup>2</sup> High Court of Justice in Northern Ireland, *JR111's Application for Judicial Review*, 2021  
<<https://www.judiciaryni.uk/sites/judiciary/files/decisions/JR111%20Application%20for%20Judicial%20Review.pdf>>

<sup>3</sup> <https://yogyakartaprinciples.org/principles-en/>

<sup>4</sup> Council of Europe, *Resolution 2048: Discrimination against trans people in Europe*, 2015  
<<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>>

<sup>5</sup> United Nations Expert on the protection against violence based on sexual orientation and gender identity, Paragraph 91 <<https://undocs.org/A/HRC/47/27>>

demonstrate lived experience, as they are at greater risk of homelessness and unemployment and may not have access to the necessary documents to provide such evidence, for example utility bills, payslips, driving license or passport.<sup>6</sup>

## Human Rights Standards

International legal standards and best practice is moving towards the promotion of accessible procedures for Legal Gender Recognition (LGR), providing respectful processes for transgender people. Rulings of the European Court of Human Rights (ECtHR) reflect this,<sup>7</sup> often finding that rigid LGR processes<sup>8</sup> leave individuals at risk of their rights as enshrined by the European Convention on Human Rights being violated. The ECtHR has provided sufficient case law in recent years to demonstrate how a lack of or insufficient process for LGR is in violation of a transgender individual's rights. The standards set out by the ECtHR have been combined in a document entitled '[Gender Identity Issues](#)'. This document is in no way exhaustive of the standards set by the ECtHR, but it is a useful resource to remind us of the minimum legal standard that Scotland must adhere to under the HRA and ECHR.

The [Yogyakarta Principles](#) were created by international human rights experts as a guide for United Nations member states on the application of international legal human rights standards to 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.<sup>9</sup>

In 2021, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity recommended that States: “provide access to legal recognition of gender identity in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression, and adopt all necessary measures so that such recognition: (a) Is based on self-determination by the applicant. (b) Is a simple administrative process. (c) Is not connected with abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce. (d) Includes the acknowledgement and recognition of nonbinary identities in their full diversity and specificity. (e) Ensures that minors have access to recognition of their gender identity.”<sup>10</sup>This is very much in line with Council of Europe Resolution 2048 (2015) referred to above.

In 2017 The UN Special Rapporteur for Health stated: “mental health diagnoses have been misused to pathologize identities and other diversities” and that “the pathologisation of

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<sup>6</sup> LGBT Foundation, 2017: 'Transforming Outcomes: a review of the needs and assets of the trans community

<sup>7</sup> European Court of Human Rights, [Gender Identity Issues](#), 2022, <[https://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_eng.pdf](https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf)>

<sup>8</sup> S.V. v. Italy [55216/08] Para 72 <https://hudoc.echr.coe.int/eng?i=001-187111>

<sup>9</sup> The Yogyakarta Principles, *Principle 31*, 2017 <<https://yogyakartaprinciples.org/>>

<sup>10</sup> United Nations Expert on the protection against violence based on sexual orientation and gender identity, Paragraph 91 <<https://undocs.org/A/HRC/47/27>>

lesbian, gay, bisexual, transgender and intersex persons reduces their identities to diseases, which compounds stigma and discrimination.”<sup>11</sup>

These standards support the Scottish Government’s proposals to remove the requirement for a diagnosis of gender dysphoria and abolish the Gender Recognition Panel.

### **The Gender Recognition Reform (Scotland) Bill**

The Bill proposes to improve the process for trans people to obtain legal gender recognition primarily by introducing a self-declaratory process which will respect their rights to privacy and dignity under the ECHR, as well as better complying with international human rights standards.

#### *Period of time living in “acquired gender” and reflection period*

The Bill proposes a minimum period of three months for which an applicant must live in their “acquired gender”, with a reflection period of a further three months before a certificate is granted. We welcome the significant reduction in the period of time a trans person must live in their “acquired gender” before applying for a Gender Recognition Certificate (GRC) from two years to three months, which would move Scotland closer to meeting the Council of Europe’s requirement of having quick processes.

It is important to note however, that requirements for evidence of living in an “acquired gender” and a period of reflection could contribute to stigma against trans people as it would imply their ability to self determine is not adequate. The reduced time period will still place a burden on trans people to provide evidence of living in their gender. Legal gender recognition should be quick, transparent and accessible: prolonging the length of time individuals must wait before having their gender legally recognised prolongs the length of time that their rights, including their right to privacy, are violated. As the committee has highlighted in its report, the Scottish Government’s rationale for a three month period remains unclear. The Cabinet Secretary has stated that building in a reflection period will enshrine in law the seriousness of this process. It is our view that the statutory declaration fulfils this purpose, and a reflection period only serves to delay the process of obtaining a GRC, in addition to adding a further procedural step as after the three month period, and within two years, the applicant is required to send further written notice confirming they wish to proceed.

#### *Statutory Declaration*

We welcome the committee’s majority view that *“the legal status of a statutory declaration (a witnessed, legal oath), the gravity with which such declarations are made, and the fact that making a false statutory declaration is an offence, together create a robust process for accessing a GRC that is in line with international human rights best practice.”*

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<sup>11</sup> UN Special Rapporteur on the Right to Health, 2017, A/HRC/35/21, para. 48 <<https://www.right-docs.org/doc/a-hrc-35-21/>>

With regards to penalties for making a false statutory declaration there has been some uncertainty around whether Section 14 of the Bill intends to create a new offence. S.14 (1) (2) of the Bill makes reference to the Criminal Law (Consolidation) (Scotland) Act 1995 suggesting that Sections 45 and 46 (2) and (3) of the 1995 Act apply to the Section 14 offence in the Bill, and it is not the intention that someone could be prosecuted under both pieces of legislation for the same false declaration.

Section 45 of the 1995 Act states:

*Where the making of a false statement is not only an offence under the said sections 44 or 46(1) or under subsection (1) or (2) above, but also by virtue of some other Act is a corrupt practice or subjects the offender to any forfeiture or disqualification or to any penalty other than imprisonment or a fine, the liability of the offender under these sections shall be in addition to and not in substitution for his liability under such other Act.”<sup>12</sup>*

That suggests that where the false declaration is also an offence under another Act and the penalty is imprisonment or a fine the liability under the 1995 Act is not additional to, but instead of. If there is no intention to create a new offence, but only to highlight that making a false declaration is an offence it would be useful to amend the wording of the Bill to cross reference the 1995 Act and provide clarity that while a false declaration is an offence carrying serious potential penalties, a new offence is not being created.

### *Applications*

We welcome the Scottish Government’s decision to remove the provision in the draft bill conferring power on the Registrar General to prescribe a fee. We believe that there should be no cost to applicants, so that trans people face no additional barriers to obtaining legal gender recognition. Trans people already face additional financial costs in accessing healthcare or updating identification.

We would also highlight Section 8Q (4), which gives the registrar discretion to accept late applications for review of a decision. This is welcome but should be underpinned by a statutory test for accepting or refusing a late application which makes clear a presumption in favour of accepting late applications unless unreasonable to do so. In 8R (2) there seems to be no discretion for a sheriff to accept a late appeal of a review decision which we feel is unjustified and may have a discriminatory impact on many, including those in insecure housing whose address may change often and at short notice.

### *Person of Interest Provision*

We note the committee’s recommendation that:

*“...some provision for a “person with interest” to appeal the award of a GRC to the Registrar General should be included in the Bill, but that it must be very tightly drafted to provide clarity on who is an interested party, and on what grounds they can appeal.”*

As we highlighted in our written and oral evidence, we believe this part of the Bill is too widely drawn and agree the legislation needs to be more specific regarding who a person of interest would be. Currently there is room for vexatious claims which could further delay the

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<sup>12</sup> Criminal Law (Consolidation) (Scotland) Act 1995 S.45

process of obtaining a GRC, not to mention the significant potential stress, time and cost of defending litigation for the applicant. We would prefer to see the Scottish Government narrow down within the primary legislation who may apply for revocation and under what rationale and for the legislation to be accompanied by clear guidance.

### *Ordinarily resident*

We welcome the committee's exploration of the definition of ordinary residence as a criterion for eligibility, particularly in relation to those who have chosen to make Scotland their home but are not yet ordinarily resident with regard to their migration status.

We would like to see specific provisions in the Bill to ensure that trans people seeking some form of leave to remain, including refugees and asylum seekers can apply for legal gender recognition. For example Section 8 of the Maltese Gender Identity, Gender Expression and Sex Characteristic Act 2015<sup>13</sup> states: "*A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days.*"

We note that the committee has asked the Cabinet Secretary for further clarity around the term and advocate for an amendment or guidance that either requires simple residence or specifically includes certain categories of people with some form of leave. We note the Cabinet Secretary has expressed concern that this may relate to a reserved area, as being in some way connected to immigration<sup>14</sup>, however it is our view that this does not raise an issue of competence, as the provision would not be "related to" a reserved matter under Section 29(2)(b) of the Scotland Act, following the approach adopted by the UK Supreme Court to interpretation of "relates to". In determining legislative competence provisions of Acts of the Scottish Parliament legislation are to be construed as narrowly as required for them to be within competence, if such a reading is possible. "Relates to" is not so wide as to cover all provisions that affect a reserved matter in any way. The focus is on the purpose of the provision, why it was enacted, not slight, indirect or remote effects. Applying that approach, express inclusion of people seeking leave to remain, including refugees and asylum seekers, would not constitute a provision that "relates to" nationality, immigration, asylum (Scotland Act 1998 Schedule 5 B6). Its purpose would be to ensure that all trans people residing in Scotland have access to the same process for recognition of their gender identity, avoiding discriminatory exclusion of those seeking some form of leave to remain. Neither the purpose nor effect would be to alter in any way the immigration status of those trans people.

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<sup>13</sup> Maltese Government, *Gender Identity, Gender Expression, and Sex Characteristics Act*, 2015  
<<https://legislation.mt/eli/cap/540/eng/pdf>>

<sup>14</sup> Equalities, Human Rights and Civil Justice Committee Stage One Report para 323:  
<https://digitalpublications.parliament.scot/Committees/Report/EHRCJ/2022/10/6/d81c72da-4070-4355-aacb-cc58d9c1bc08#Introduction>

On a separate but related issue, we note discussion regarding cross border operation of differing systems for gender recognition in Scotland and the rest of the UK and whether GRCs issued in Scotland will be recognised by the UK Government. We do not foresee that a divergence in registration systems for obtaining a GRC within the UK would present a challenge. The devolved nations diverge on a number of legal issues without prohibitive jurisdictional complexity. Examples include the age at which young people can marry without parental consent, and the process for registering legal name changes. Those who have had their gender recognised outside of the UK can often apply for a GRC in the UK on a self-ID basis. The UK Government lists over 40 countries from which those with a GRC can apply in the UK through a streamlined route without the need to provide medical reports. Among others, this list includes countries such as Belgium, Iceland and Denmark - where domestic legislation sets out that the requirement for a medical or psychiatric intervention to obtain a GRC is illegal, and that applicants are only required to make a declaration through a simple administrative process.

## **Conclusion**

Overall, we think that this Bill is an important step forward in improving the way that trans men and women can be legally recognised as who they are in Scotland. The Scottish Government has been consulting on reforming the GRA to bring it into line with international standards since 2017, and the proposed Bill would make vital improvements to the current legislation and remove breaches of fundamental human rights experienced by many trans people embedded within the current process.

While there is still significant room for the Bill to make further improvements to the process of legal gender recognition, not least by making provision for non-binary people, we support it and believe that if passed it will represent a significant step forward in combating the breaches of rights that people experience in the current process.