



Scottish Government Consultation

Review of the Gender Recognition Act 2004

March 2018

About Together

Together (Scottish Alliance for Children's Rights) is an alliance of children's charities that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. We have over 380 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs. Our activities include collating an annual *State of Children's Rights* report to set out the progress made to implement the UNCRC in Scotland. The views expressed in this submission are based on the UNCRC and other international human rights treaties and do not necessarily reflect the specific views of every one of our member organisations.

Together would like to thank our member organisation LGBT Youth Scotland and their partners Equality Network, Scottish Trans Alliance, and Stonewall Scotland for their support and expertise.

Together has chosen to respond to select questions in the consultation. These are questions 1, 5, 6, 12 and 13.

Question 1

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?

Together welcomes proposals from the Scottish Government to introduce a self-declaratory system for legal gender recognition. These proposals engage a range of children's rights as outlined in the United Nations Convention on the Rights of the Child (UNCRC) including the articles which comprise the General Principles of the Convention: article 2 (non-discrimination), article 3 (best interests of the child), article 6 (right to life) and article 12 (right to be heard). Other rights engaged by these proposals include article 5 (the child's evolving capacities), article 8 (the right of the child to preserve their identity) and article 13 (freedom of expression).

The UN Committee also addresses the rights of transgender children and young people in General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence¹:

Adolescents who are lesbian, gay, bisexual, transgender and intersex commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion

¹ CRC/C/GC/20: Para 33 and 34.

from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information ... These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness.

The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy ... It urges States to ... repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures.

In its 2016 Concluding Observations, the UN Committee on the Rights of the Child (the UN Committee) raised concerns regarding the level of discrimination that children and young people from certain groups, including those who identify as transgender, continue to experience.² The UN Committee recommended that the UK (including Scotland) ‘strengthen awareness-raising and other preventive activities against discrimination and stigmatisation’ to ensure the rights of these groups are protected.³

The current system requires a psychiatric diagnosis of gender dysphoria and this results in a process which is centred on medical evidence rather than the views and experiences of the transgender child or young person themselves. A self-declaratory system would help in protecting the rights of children and young people during this process, particularly their right to be heard in decisions that affect them. Furthermore, the current process incurs costs for the applicant of at least £140.⁴ A new process should be made as accessible as possible to ensure equal access for all transgender people regardless of income.

The Scottish Government should ensure that legislation fully complies with the UNCRC and all other jurisprudence from the UN Committee in order to ensure transgender children and young people have access to a legal gender recognition system which respects their dignity and rights. Introducing a self-declaratory system for legal gender recognition is a necessary and important step in tackling discrimination and ensuring the rights of transgender children and young people living in Scotland are protected.

Question 5

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?

Children and young people have the right to have their views heard and taken into consideration in decisions that affect them in accordance with their age and maturity:

Article 5 of the UNCRC states that:

² CRC/C/GBR/CO/5: Para 21(c)

³ CRC/C/GBR/CO/5: Para 22.

⁴ UK Government (2018). Apply for a Gender Recognition Certificate <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply> [Date accessed: 23.2.18].

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 12 of the UNCRC states that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The approach enshrined in the UNCRC advocates taking account of every child's individual characteristics and experiences. Article 5 sets out the evolving capacities of children and introduces the idea that children should be able to exercise their rights as they acquire the competence to do so. It seeks to encourage respect for children's capacity to exercise their rights and involve them in decisions, while balancing this with the need to protect them from harm. It acknowledges that children's development is a journey and, together with the right to be heard (Article 12), children are entitled to be involved in decisions affecting them from the earliest possible age. Parental guidance should be geared towards supporting children to exercise their rights and make their own decisions, respecting the extent to which children can do this for themselves.

Under its international obligations to the UNCRC, the Scottish Government should take UNCRC articles into account when establishing minimum ages on particular issues. This is reinforced domestically through the duties placed on Ministers through the Part 1 of the Children & Young People (Scotland) Act 2014. Together therefore welcomes the Scottish Government's consideration of proposing that 16-17 year-olds should be able to apply for and obtain legal recognition of their gender.

Question 6

Which of the identified options for children under 16 do you most favour? Please select only one answer.

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

If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views.

Whilst Together welcomes proposals for the lower age limit at which young people can apply for legal gender recognition to be extended to 16, laws which prescribe ages at which certain rights

come into play 'do not reflect the reality of decisions and level of responsibility of which children are capable.'⁵ As stated above, children and young people have the right to have their views heard in decisions that affect them, particularly those which relate to their identity and self-expression such as legal gender recognition. Together therefore recommends that a process is made available to children and young people under the age of 16 who wish to apply for legal gender recognition. However, Together does not take a specific position on which of the identified options (options 2-5) should be favoured for transgender children and young people under the age of 16.

Whatever system is implemented should ensure that children and young people's rights are fully embedded and remain at the centre of the process. In particular, article 12 (right to be heard) and article 5 (evolving capacities) of the UNCRC should be paramount in considerations regarding children and young people.

It is therefore essential that, in the case of legal gender recognition, the evolving capacities of the child are fully considered and taken into account. Any system which is implemented which allows children and young people to apply for legal gender recognition should ensure that children and young people's participation is embedded throughout and that every child and young person has access to free, confidential support and advocacy. Every step must be taken to ensure that the child or young person fully understands and is aware of the impact of the process, what it consists of (including any risks), and what undertaking legal gender recognition will mean for them in the future. Safeguards should be put in place so that any children, young people (and their parents and carers, when necessary) are given adequate support and advice throughout the process.

Question 12

Should Scotland take action to recognise non-binary people?

Together believes that Scotland should take action to recognise non-binary people.

Article 2 of the UNCRC states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Scottish Government therefore has a duty to protect the rights of all children, including those who identify as non-binary.

Legal recognition is an essential step in ensuring the rights of non-binary people are respected. Consultation with non-binary people has indicated that they feel that their lack of legal recognition can result in exclusion from services and negative impacts on their self-esteem and mental health.⁶ To fulfil their obligations under the UNCRC, the Scottish Government must take all appropriate

⁵ Lansdown, G. (2005). The Evolving Capacities of the Child, p.49. <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> [Date accessed: 23.2.18].

⁶ Scottish Government (2017). Consultation on a review of the Gender Recognition Act (2004) p. 43.

measures to protect non-binary children and young people from discrimination, including legal recognition of non-binary as a gender identity.

Question 13

If you answered Yes to Question 12, which of the identified options to give recognition to nonbinary 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

Together supports options 1, 3, 4 and 6 outlined in the consultation paper.

Option 4 in particular would allow those who identify as non-binary to have access to the same legal gender recognition process as transgender men and women, thereby ensuring that all children and young people have equal access to this process regardless of their gender identity.

Additional

Together welcomes the comprehensive Child's Rights and Wellbeing Impact Assessment that was published with the consultation paper, and recommends that the CRWIA is continually updated as the Bill progresses.

For further information, please contact Joanna Shepherd, Assistant Policy Officer

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