

Angela Constance MSP
Cabinet Secretary for Communities,
Social Security and Equalities
The Scottish Government
St. Andrew's House
Regent Road
Edinburgh
EH1 3DG

1 March 2018

Dear Ms Constance

Consultation Response - Review of the Gender Recognition Act 2004

We are writing to provide a response to the above consultation. Our role as the office of the Children and Young People's Commissioner Scotland is to protect and safeguard the human rights of children and young people in Scotland, with particular reference to the [United Nations Convention on the Rights of the Child](#)¹ (UNCRC)

Background of this proposal

It is important to understand what is being proposed by this legislation. This does not impact upon children and young people's right to affirm their gender identity in day to day life, including in schools. These rights are already enshrined in law via the [Equality Act 2010](#)² and many young people in Scotland have transitioned already. Likewise, these proposals do not impact on children's right to access and consent to medical treatment, which was enshrined in Scots law by the [Age of Legal Capacity \(Scotland\) Act 1991](#)³.

The current consultation focuses solely on the legal process through which that transition is formally recognised by the state and it is vitally important to young people who are transgender, non-binary and intersex because of the rights and protections that formal recognition of gender identity affords.

The UNCRC and gender recognition

The UNCRC does not directly address the issue of legal recognition of gender identity. A number of articles are nonetheless relevant to this consultation. In particular:

¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

² <https://www.legislation.gov.uk/ukpga/2010/15/contents>

³ <https://www.legislation.gov.uk/ukpga/1991/50/contents>

- Article 3: This requires that in all matters concerning a child, their best interests shall be a primary consideration.
- Article 6: States parties are obliged to ensure to the maximum extent possible the survival and development of the child.
- Article 8: Outlines children's right to preserve their identity.
- Article 12: Requires States to provide all children who are capable of forming their own views with the right to express them and for due weight to be given to their views in accordance with their age and maturity.
- Article 16: Provides children with a right to privacy.

General Comments are issued by the UN Committee on the Rights of the Child to assist in interpretation of the rights contained within the UNCRC⁴. Other treaty bodies issue General Comments or similar documents relating to their specific treaty. Of particular relevance to this proposal are General Comments [12 \(on the right of the child to be heard\)](#)⁵ and [20 \(on the Rights of the Child in adolescence\)](#)⁶ and the concept of developing capacities through which children exercise their rights. Both General Comments elaborate on the concept of the evolving capacities of the children, a concept which is explored in full in the UNICEF Innocenti/Save the Children publication [The Evolving Capacities of the Child](#) by Gerritt Landsdown⁷.

Other Human Rights Instruments

The [International Covenant on Civil and Political Rights](#)⁸ (ICCPR) and the [European Convention on Human Rights](#)⁹ (ECHR) are also relevant to this consultation. Both contain articles providing rights to privacy that are extremely close to those contained within Article 16 of the UNCRC. Article 8 of the ECHR has been successfully used to establish a right to legal recognition of gender through the European Court of Human Rights. As all other human rights instruments apply equally to children and adults, this can be interpreted as providing children of all ages with an equal right to recognition.

The Yogyakarta Principles

Although the [Yogyakarta Principles](#)¹⁰ do not have the same status as international law as human rights treaties, they affirm existing human rights in the context of sexual orientation and gender identity. They are an important means through which existing treaties can be interpreting and set an international standard of good

⁴ <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

⁵ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

⁶ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f20&Lang=en

⁷ <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>

⁸ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁰ <https://yogyakartaprinciples.org/principles-en/>

practice with regards to LGBT rights. They were agreed by a panel of experts, in 2006.

In 2017, 8 [Additional Principles](#)¹¹ were added to the original 29. Of these, Principle 31 is relevant to this consultation. It states:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C. While sex or gender continues to be registered:
 - i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
 - ii. Make available a multiplicity of gender marker options;
 - iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
 - iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

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 proposed to bring forward legislation to introduce a self-declaration system for legal gender recognition instead.

¹¹ <http://yogyakartaprinciples.org/principles-en/yp10/>

Do you agree or disagree with this proposal? AGREE

The proposals contained within this consultation are in line with understanding of gender identity used in the Yogyakarta Principles as laid out in Additional Principle 31, the right to legal recognition. They also support the realisation of children's right to an identity (Article 8 of the UNCRC, article 8 of the ECHR). The simplified process proposed by this consultation meets the requirements of Yogyakarta Principle 31 to provide "a quick, transparent and accessible mechanism that legally recognises and affirms each person's self-identified gender identity".

Question 2

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

The statutory declaration model is already successfully used in a number of other countries, including Ireland. We would prefer the wording to be "permanently", rather than "until death". Being mis-gendered or having their former name used after death is a genuine fear for some transgender people.

Question 3

Should there be a limit on the number of times a person can get legal gender recognition? NO

Understandings about gender identity continue to evolve within society. Individual's concepts may likewise evolve. Research shows that the number of people likely to seek to change gender more than once is limited, but it is important that this option is not restricted.

Question 4

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 YES

This seems proportionate, as long as a broad definition of residence is used.

Question 5

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

In 2016, the UN Committee of the Rights of the Child issued General Comment 20 on the implementation of the rights of the child during adolescent. General

Comment 20 outlines the way in which adolescents use “increasing levels of agency to take responsibility for their rights” in line with their evolving capacities as outlined in Article 5 of the UNCRC. Whilst this proposal increases the opportunity for transgender children to realise their rights, it is out of step with existing Scots law with regard to the recognition of capacity in children and young people, which more commonly presumes capacity from the age of 12 and provides children below that age the ability to exercise rights where they have capacity. This is discussed further in our answer to question 6.

Notwithstanding that, the extension of these rights is particularly important for this group who are at a stage of life when they are transitioning from school to college, work or university; from childhood into adult life. It allows them to make these transitions with the protections that legal recognition of their identity provides them and reduces the potential for accidental outing, for having to explain their transition and from the additional administrative burden that accompanies changing multiple administrative records.

Question 6

We support Option 5.

This option is most in line with the Age of Legal Capacity (Scotland) Act 1991 and the Yogyakarta Principles and Article 12 of the UNCRC, as interpreting via General Comments 12 and 20 of the UN Committee on the Rights of the Child.

Scots law, in the Age of Legal Capacity (Scotland) Act 1991, has a longstanding presumption that children have the capacity to instruct a solicitor and consent to medical treatment from the age of 12. It is possible for a child under this age to exercise these rights if they have the capacity to understand what is involved in that decision. Young people seeking legal recognition of their gender identity may already have exercised these rights, in other aspects of their transition including change of name and consenting to medical treatment relating to their transition. It would be illogical for parental consent to then be required for legal recognition of a transition the young person has been able to effect without it.

Article 2 of the UNCRC states:

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...”

Denying transgender, non-binary and intersex children the ability to exercise their right to legal recognition, or making it contingent on parental consent, may constitute a breach of article 2. Likewise, Yogyakarta Principle 31 (C iii) requires that States:

Ensure that no eligibility criteria, such as ... minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a barrier to change one's name, legal sex or gender.

Save for capacity, children and young people should not be subject to different or additional tests than adults. The process must still be self-declaratory. We are aware that Ireland has introduced a process for under 18s that differs significantly from that for people 18 and over. We would be very concerned if this was the approach taken in Scotland.

Any test of capacity should be consistent with those in section 2(A) and 2(4A) of the Age of Legal Capacity (Scotland) Act 1991. [We have consistently expressed out concern with the test of capacity associated with the extension of right contained within the Education \(Scotland\) Act 2016](#)¹². Implementing additional tests for children with additional support needs is a breach of article 2 of the UNCRC and we believe potentially indirect discrimination under the Equality Act 2010. The same would be true were any additional test of capacity be used in relation to transgender, non-binary and intersex children through the proposed legislation.

Were application for a gender recognition for 12-15 year olds to be subject to parental consent, it is essential that provision be made to enable children with capacity to exercise their rights in cases where:

- a young person's views differ from those of their parents,
- where parents are in disagreement with each other;
- where the young person is looked after
- where there is no one with parental rights and responsibilities.

The operation of such a process must be subject to additional consultation, including work with transgender, non-binary and intersex young people. The process should be grounded in children's rights. We believe that courts are not the appropriate place to decide these matters and children report very mixed experiences of courts listening to their views in other matters.

Question 10

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

This is one protection which young people would gain access to with legal recognition of their transition and supports their right to privacy under Article 8 of the ECHR and Article 16 of the UNCRC. It is particularly important at points where information is being transferred from one service provider to another. Education records are covered by section 22 so this would increase the protections to young people's rights to privacy as they move from school to further education, work or higher education.

¹² <https://www.cypcs.org.uk/ufiles/Extending-Childrens-Rights.pdf>

Question 11

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

This is consistent with the non-discrimination provisions of the ECHR, UNCRC and Yogyakarta Principles. With a move to a self-declaratory model, it is reasonable that an application to and recognition by another jurisdiction be considered equivalent to self-declaration.

Question 12

Should Scotland take action to recognise non-binary people? YES

We support the recognition of non-binary gender identities. Non-binary has become an accepted part of young people's understanding of gender identities. An increasing number of young people identify as non-binary and should be entitled to the same legal recognition of their transgender peers. Yogyakarta Principle 31 (C ii) requires states to make available "a multiplicity of gender marker options". This proposal also supports non-binary children's right to an identity (article 8 of the UNCRC).

This proposal also provides the opportunity to ensure that the births of intersex children can be registered promptly without them being assigned as male or female. Article 7 of the UNCRC states that "the child shall be registered immediately after birth". Together with the extension of legal recognition to children with capacity, this would enable intersex children to assert their identity as they wish, using a social rather than medical model of gender.

Question 13

Which of the identified options to give recognition to non-binary people do you support:

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 YES

Option 5: Incremental approach

Option 6: Amendment of the Equality Act 2010 YES

Non-binary people must be provided with the same legal recognition, rights and protections as transgender people. In addition to gaining access to legal recognition,

the Equality Act 2010 should be amended to provide them with rights and protections prior to obtaining a gender recognition certificate. Not doing so breaches non-discrimination provisions in HR treaties.

Whilst our preference would be for non-binary and intersex people to be granted the same recognition as transgender people through the introduction of additional gender markers, in line with Yogyakarta Principle 31 (C ii), we have no objections to options 1 and 2 as part of an incremental approach towards full recognition (option 5). We acknowledge that adding additional gender markers to administrative systems may be complex. However, Option 2 is entirely inappropriate. It is, in effect, giving non-binary people a document which highlights their differences. This is completely at odds with the approach taken to transgender rights in the Gender Recognition Act 2004 which sought to protect transgender people from disclosure of their status.

We have attached our comments on the Children's Rights and Wellbeing Impact Assessment as a separate document.

In conclusion, we support the proposed self-declaratory model for applications for legal recognition of gender identity. We urge the government to extend this to all transgender, non-binary and intersex young people with capacity, on the same basis as adults and subject to the test of capacity outlined in the Age of Legal Capacity (Scotland) Act 1991.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'B Adamson'. The signature is stylized with a large, looped 'B' and a cursive 'Adamson'.

Bruce Adamson

Children and Young People's Commissioner Scotland