

# Review of the Gender Recognition Act 2004

## NUS Scotland consultation response

**NUS Scotland represents around 500,000 students at college or university in Scotland through our member students' associations. We promote, defend and extend the rights of students.**

**NUS Scotland LGBT+ Campaign represents Lesbian, Gay, Bisexual, Trans, Undecided/Questioning or Queer students across Scotland. As part of this year's priority campaign, NUS Scotland LGBT+ aims to eliminate barriers in accessing gender recognition both legally and in student institutions like universities, colleges, and students' unions.**

- 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?**

### **Agree.**

The additional information provided for this question rightly recognises that a system of self-declaration constitutes international best practice.

NUS Scotland believes that gender is a complex and personal feeling, and that trans people know their gender identity best. This stands against the current system which requires the involvement of medical professionals and therefore hinders self-determination.

We believe the current process of legal gender recognition is unnecessarily complicated, intrusive, and financially inaccessible. The requirement to evidence having lived in one's "acquired" gender for two years is, in practice, difficult and expensive to acquire. The requirement to have a psychiatric diagnosis of gender dysphoria adds additional difficulties as in most cases, this diagnosis is dependent on attending a Gender Identity Clinic, which can come with lengthy waiting times. In August 2016, the National Gender Identity Clinical Network for Scotland (NGICNS) reported waiting times for the Sandyford Clinic had increased from

9 months to a year.<sup>1</sup> Additionally, as there is no clear and public outline of the decision criteria, the decisions made by tribunal are inherently subjective.

Moving to a self-declaratory system would also make a valuable contribution to the depathologisation of transgender identities. This contrasts with the status quo, which requires diagnosis of gender dysphoria and psychiatric treatment. While this treatment may be desired by some trans people, it should not be a requirement to be recognised under the law. Furthermore, the documents required (such as a report detailing which treatment a person has undergone, and why they have not undergone certain other treatment) are needlessly intrusive. Tying this treatment to legal recognition would ultimately harm body autonomy.

Our stance is that the legal change of gender is a process that should be easy to complete, financially accessible, and not requiring any external experts. We therefore do not support the proposal of an application fee.

## **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.**

We support the change to a system of statutory declaration as this provides the best way to ensure any application made ought to be serious and legitimate, while providing a simple process. However, while change of gender is an important decision, we recognise that one's gender may change over time and no person should be penalised for changing their gender more than once. The intent to live as a specific gender until death should therefore only act as a provision against fraud and not as a precaution against fluid gender identities.

We do not think that a period of reflection would be appropriate. A system of self-declaration is essential for transgender autonomy and implementing a period of reflection would undermine this purpose.

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

In accordance with the answer given to question two, we also oppose a limit on the number of times a person can change their gender. We do not see any harm inflicted by any person changing their gender multiple times as we regard gender as fluid in nature. We would like the Scottish Government to recognise the ability of trans people to make their own decisions about their own identities. Additionally, research from Transgender Europe shows that in over 3,000 applications in Argentina (where transgender people can self-declare outside their own gender), none have been found to be fraudulent.<sup>2</sup> As stated above, the statutory declaration system places a sufficient precaution on any cases of fraud.

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<sup>1</sup> [National Gender Identity Clinical Network for Scotland \(NGICNS\) Annual General Meeting, NHS Scotland, August 2016.](#)

<sup>2</sup> ["Legal Gender Recognition in Europe: Toolkit", TGEU December 2013.](#)

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

**To everyone.**

We welcome the proposed option to open the self-declaration system to everyone. As NUS Scotland represents a significant number of international students, we believe that these students should have the opportunity to apply for gender recognition regardless of citizenship, and that they should be able to do this before moving to Scotland. We also believe that this process would be especially important to asylum seekers and refugees, who will inevitably come into contact with the Scottish legal system and should have the opportunity to be legally recognised as the gender they identify with.

**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?**

**Agree.**

NUS Scotland represents a large number of students in further education under the age of 18, and University students who are 17 at the start of their course. Research conducted by NUS LGBT+ in 2014 shows that trans students face specific difficulties related to the lack of recognition of their identity, and that they stand out within LGBT community as being particularly vulnerable and unconsidered by HEIs.<sup>3</sup>

We strongly believe that legal recognition would make it easier for trans students in further and higher education and that they would benefit from being able to legally change their gender without parental consent. This would ease the application process, during which students are often obligated to disclose their gender at birth. Such a move would also put Scottish policy in line with Scots aged 16 or 17 being able to vote and get married.

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

We support the right to self-determination for children as far as reasonably possible. However, NUS Scotland does not represent children under the age of 16. Therefore, we would support the approach of LGBT Youth Scotland, which identifies option 3 as the best approach.

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

**Yes.**

<sup>3</sup> ["Education beyond the Straight and Narrow, NUS UK, May 2014](#)

As stated previously, we believe in the principle of self-determination and believe that the necessity for spousal consent violates this principle. There is no reason for a spouse's opinion of their partner's gender to be valued higher than the trans person themselves. Furthermore, a requirement for spousal consent cannot stop anyone from transitioning medically or socially, it simply causes further incongruence between a person's legal status and actual life. Upholding the requirement for spousal consent would greatly harm transgender rights and autonomy.

**8. 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.**

**Agree.**

NUS Scotland has long supported the introduction of civil partnerships regardless of gender, and it was part of the Equality Network's Equal Marriage campaign that NUS Scotland took part in.

We believe all couples should be able to apply for civil partnerships. This would not only reduce administrative effort, but also make the law clearer in regard to non-binary people for whom, as of now, it is uncertain whether they could get married, apply for a civil partnership, or both.

Additionally, we believe that under the current complicated process to obtain legal gender recognition there are already mixed-gender couples in civil partnerships as not every trans person has applied for legal recognition of their gender.

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

**Yes.**

We believe that there is no reason to have legal gender recognition as a separate ground of divorce or dissolution, as we believe legal recognition in itself is unlikely to cause a divorce (as separate from social or medical transition, such as undergoing hormone therapy or coming out to friends and family). We believe this would unnecessarily stigmatise trans identities. There is no need for this to be separate from the "irretrievable breakdown of the marriage", as many other reasons such as adultery or abuse are not seen as separate criteria.

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

**No.**

No further exemptions are necessary and any protected information that has been obtained in an official capacity should remain undisclosed.

**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.**

With the proposals to move to a self-declaratory system, there is no need for additional scrutiny of the procedures other countries use for gender recognition. The processes for legal gender recognition in other countries will, under the system being proposed by the Scottish Government, either be similar or more complicated than the Scottish system, meaning that there is no reason to need a secondary confirmation.

As mentioned before, we believe that this step would be of great benefit to international students who may currently need to provide translations of medical reports from their home countries, and spend further time waiting.

**12. Should Scotland take action to recognise non-binary people?**

**Yes.**

Please find more information in regards to NUS Scotland's stance in the answer to question 13.

**13. 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**

**Option 1**

**Option 3**

**Option 4**

**Option 6**

We fully support full recognition of non-binary people using the proposed self-declaration system (Option 4). However, we also think changes to administrative

forms (option 1) and document changes (option 3) are necessary to fully implement legal equality for non-binary people. Furthermore, Option 6 could provide valuable changes not just for non-binary people, but for binary trans people too.

Legal recognition for non-binary people would be a huge step towards a more progressive and accepting society. It would not only formally recognise non-binary identities as real, but would also end the current necessity for non-binary individuals to identify as either male or female. This legal recognition should follow the same process as the recommended process for legal recognition for trans men and trans women does.

We also believe that in accepting non-binary identities, valuable steps can be taken to question the current ways gender is tied to sex. For example, point 7.22 in the additional information raises Community Health Index (CHI) numbers as an example of a system that would need to be adapted for non-binary people. However, even currently, while transgender individuals can change their CHI number to reflect their gender identity, they will receive information for treatments that they have no need of accessing (e.g. trans women will be asked to be tested for cervical cancer).

In regards to the Equality Act, we would recommend that the wording be amended from "gender reassignment" to "gender identity" as it will improve the protections for all trans people and not just the ones who have undergone surgery or have applied for legal recognition.

**14. If 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.**

While the list identified covers the main points needing amendments, we would recommend legislation similar to the Interpretation Act of 1978 which amends all laws to include the feminine as well as the masculine gender, unless it is clear that this goes against the original intention. This Act could be amended to make the language more neutral and non-binary inclusive, without changing every law individually.

**Contact information:**

If you have any questions, please contact:

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