Consultation Response on the Gender Recognition Reform (Scotland) Bill

17 March 2020

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Contents

[1. Executive Summary 5](#_Toc35262850)

[2. Introduction 12](#_Toc35262851)

[2.1. Note on language and terminology 13](#_Toc35262852)

[3. Human rights engaged by legal gender recognition 14](#_Toc35262853)

[3.1. The range of human rights engaged by legal gender recognition 14](#_Toc35262854)

[3.2. The right to respect for private and family life, home and correspondence 15](#_Toc35262855)

[3.3. Positive obligations under Article 8 ECHR 18](#_Toc35262856)

[3.4. Positive obligations: The ‘fair balance’ test 19](#_Toc35262857)

[3.5. Considerations relevant to the general interest in the ‘fair balance’ test 20](#_Toc35262858)

[3.6. Considerations with respect to the experiences of transgender people in the ‘fair balance’ test 21](#_Toc35262859)

[3.7. Subsidiarity, Margin of Appreciation and Living Instrument doctrines 23](#_Toc35262860)

[3.8. The prohibition on torture, cruel, inhuman and degrading treatment 25](#_Toc35262861)

[3.9. Non-discrimination under the ECHR 25](#_Toc35262862)

[4. Relevant Regional Standards 26](#_Toc35262863)

[4.1. Council of Europe 26](#_Toc35262864)

[5. International Standards 27](#_Toc35262865)

[5.1. International Human Rights Treaties 28](#_Toc35262866)

[5.2. General Comments of the UN Treaty Body Committees 29](#_Toc35262867)

[5.3. Yogyakarta and Yogyakarta Plus 10 Principles 31](#_Toc35262868)

[6. Commission response to consultation questions 33](#_Toc35262869)

[6.1. Question 1: Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC? 33](#_Toc35262870)

[6.2. ‘Quick’ 34](#_Toc35262871)

[6.3. Transparent 38](#_Toc35262872)

[6.4. Margin of appreciation and living instrument 38](#_Toc35262873)

[6.5. Conclusion 39](#_Toc35262874)

[7. Question 2: Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC? 40](#_Toc35262875)

[8. Question 3: Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16? 41](#_Toc35262876)

[8.1. Convention on the Rights of the Child 42](#_Toc35262877)

[8.2. Age of Legal Capacity in Scots law 45](#_Toc35262878)

[8.3. Children under the age of 16 46](#_Toc35262879)

[9. Question 4: Do you have any other comments on the provisions of the draft Bill? 47](#_Toc35262880)

[9.1. Schedule 1, PART 1, Section 2 47](#_Toc35262881)

[9.2. Section 9 Review and appeal of decisions 50](#_Toc35262882)

[9.3. Section 11 8U 50](#_Toc35262883)

[9.4. Section 14 Statutory Declarations and detransitioning 51](#_Toc35262884)

[9.5. Consent 51](#_Toc35262885)

[9.6. The rights of non-binary people 52](#_Toc35262886)

[10. Question 5: Do you have any comments on the draft Impact Assessments? 53](#_Toc35262887)

1. Executive Summary

The Scottish Human Rights Commission welcomes the opportunity to comment on the Scottish Government’s proposals to reform the Gender Recognition Act 2004. The Commission is responding to the consultation based on an analysis of the relevant human rights case law and standards, in accordance with its legislative mandate to promote awareness, understanding and respect for human rights.[[1]](#footnote-1)

The scope of this response reflects both the legislative mandate of the Commission, which relates to human rights in devolved areas of policy, and the questions posed by the consultation, specifically around the process by which an individual can obtain a Gender Recognition Certificate (GRC). We have considered these issues primarily with regard to the European Convention on Human Rights (ECHR), which contains legally binding standards through the Human Right Act 1998 and the Scotland Act 1998. We have also referenced and given consideration to non-binding but guiding and evolving human rights principles and standards.[[2]](#footnote-2)

The Commission acknowledges there are a wider range of considerations outside of the scope of its response with regard to the legal and practical consequences of obtaining legal gender recognition. We have set out a basic outline of a human rights based approach to consideration of these issues.[[3]](#footnote-3) However, many of these relate to the operation of the Equality Act 2010. Our sister National Human Rights Institution and the Equality Regulator in Scotland, the Equality and Human Rights Commission, has addressed these issues in its consultation response.

Questions around the process for obtaining legal gender recognition engage civil, political, economic, social and cultural rights including rights to physical and mental integrity, respect for private and family life, to marry, to work and to social security, as well as the general prohibition on discrimination which is a feature of all human rights treaties.

Gender identity and gender expression are primarily protected by Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life, home and correspondence. The European Court of Human Rights (the Court) has held that gender identity is a core component of an individual’s personal development and is ‘one of the most intimate areas of a person’s private life.’[[4]](#footnote-4)

Since the 1980s, transgender people[[5]](#footnote-5) from across Europe have brought a number of cases in relation to legal gender recognition, and the conditions attached to it, to the European Court of Human Rights. Most of these cases have been considered through the lens of Article 8 of the ECHR. A short summary of some of the key relevant points from this jurisprudence is set out below:

* Gender identity and gender expression are protected by Article 8 of the ECHR. People may rely on this protection regardless of whether they have undertaken medical or surgical treatment with respect to their gender identity.[[6]](#footnote-6)
* ECHR case law has made clear that States Parties must provide a process through which a person can change their legal gender.[[7]](#footnote-7)
* In its consideration of legal gender recognition processes, the Court will generally view the issues through the lens of a State’s positive obligations towards the protection of private and family life, and will apply its ‘fair balance’ test.[[8]](#footnote-8)
* The ‘fair balance’ test will weigh considerations in the general interest with the interests of transgender people. States must demonstrate that there is a concrete prospect of harm to the general interest of the community as a whole in order to justify interferences with the Article 8 rights of transgender people.[[9]](#footnote-9)
* Requiring transgender individuals to undergo sterilisation or compulsory treatment before they can be granted legal recognition of their acquired gender represents asking individuals to make an unacceptable trade-off between their rights to bodily integrity and their right to respect for privacy.[[10]](#footnote-10)
* Requiring that an individual undergoes a complete change of appearance is a violation of their Article 8 rights.[[11]](#footnote-11)
* The Court is of the view that chromosomal sex is not definitive in determining legal sex, either for the purposes of gender recognition or for assessing the effects of a change of gender.[[12]](#footnote-12)
* The Court has found that the imposition of a lengthy period living in the acquired gender before being eligible for surgery failed to take into account the individual needs of an older transgender person in ill-health and was found to be a breach of Article 8.[[13]](#footnote-13)

In addition to the jurisprudence of the European Court of Human Rights, there are a number of other relevant non-binding regional and international standards including guidance from the Council of Europe[[14]](#footnote-14) a Parliamentary Resolution from the Council of Europe,[[15]](#footnote-15) and the Yogyakarta Principles and Yogyakarta Plus 10.[[16]](#footnote-16)

There is wide variation in the legal processes used for gender recognition worldwide, as shown in Annex E of the consultation document, and it is too early to tell if a consensus will emerge whether regionally in Europe or globally. Likewise, regional or international best practice will require research assessing the operation in practice of these legal processes, beyond gathering statistical information on the numbers of applications.

### The proposed reforms

On the basis of both the case law analysis and the general standards, the Commission has provided an analysis of the Scottish Government’s proposals in our responses to each individual consultation question. Our key points are summarised below.

* The Commission welcomes proposals to shorten the process for obtaining legal recognition, to remove the requirement for a diagnosis of gender dysphoria and to abolish the Gender Recognition Panel. These three steps will move legal gender recognition in Scotland closer to the standards set out both in human rights law and in regional and international guidance on the realisation of rights in this area.
* The Commission agrees with the Scottish Government’s conclusion that it must provide a system of legal gender recognition in line with its positive obligations to enable the enjoyment of Article 8 rights by transgender people.[[17]](#footnote-17)
* The Commission notes that elements of the current process by which a person can obtain legal recognition of their acquired gender may fail to meet ECHR standards; in particular the requirement to live for 2 years in the acquired gender before applying for a GRC.[[18]](#footnote-18)
* The European Court of Human Rights has held that state processes for legal gender recognition which require (a) medical examination(s) and a diagnosis of gender dysphoria are within the margin of appreciation for states.[[19]](#footnote-19) However, it could reasonably be anticipated that the margin of appreciation afforded by the Court may shift as increasing numbers of states move away from diagnostic models, as indicated for example in the 2019 annual report of the EU Fundamental Rights Agency[[20]](#footnote-20)and the annual Rainbow Index surveys conducted by ILGA Europe.[[21]](#footnote-21)
* A shift away from diagnostic models in some European countries[[22]](#footnote-22) has taken place following the development of guiding standards by the Council of Europe, the development and evolution of the Yogyakarta Principles,[[23]](#footnote-23) changes to the World Health Organisation International Classification of Disease, and the recommendations of the UN Special Rapporteur on the Right to Health and the Independent Expert on Sexual Orientation and Gender Identity.[[24]](#footnote-24)
* Shortening the timescales associated with obtaining a Gender Recognition Certificate is in line with regional and international guiding standards. The Commission is of the view, on the basis of the available case law brought before European Court of Human Rights, that the proposed 6 month period is likely to fall within the margin of appreciation available to the Scottish Government in designing this legislation. However, it is likely that the Government’s stated aims for this period could be met in a less restrictive/more proportionate way, such as through the proposed statutory declaration and associated criminal conviction for fraudulent use. The Commission notes that the requirement to live in the acquired gender brings with it a lack of clarity and certainty both for applicants and for the Registrar General for Scotland, as the proposed issuer of Gender Recognition Certificates.
* With regard to the requirement of a period of reflection, the Commission is not clear that this is necessary to secure the Scottish Government’s stated aim of ensuring the seriousness of the process.
* The Commission strongly recommends that if the Bill is passed as it stands, the Scottish Government should commit to undertaking a review of the process set out in the legislation. This will allow for consideration of how the legislation is working in practice, the consequences of this, and to hear the experiences of transgender people who have applied for a GRC under the new system, as well as people who have not applied, the Registrar General and any relevant expert stakeholders. Such a review will allow the government to ensure that the time period does not present a disproportionate barrier to attaining legal gender recognition. This is in line with the recommendation of the European Court of Human Rights to keep a watching brief on this issue.[[25]](#footnote-25) The Commission also recommends that the Scottish Government should consider building some flexibility into the timescales in the event of exceptional circumstances, such as ill-health.
* The Commission does not oppose the proposal to reduce the minimum age at which a person can apply for legal gender recognition from 18 to 16, as in line with the Age of Legal Capacity (Scotland) Act 1991 and the approach of the Convention on the Rights of the Child. Consideration should be given to extending this to persons under the age of 16 in line with an evolving capacities approach, whilst ensuring appropriate safeguards are in place.
* The Commission notes that a human rights based analysis can be a helpful tool to support discussion on broader issues and concerns raised by this reform and sets out at the end of its response a human rights framework with guiding questions to assist with such an analysis.

1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to comment on the Scottish Government’s proposed Gender Recognition Reform (Scotland) Bill (the Bill).

The scope of the Commission’s response reflects both the legislative mandate of the Commission, which relates to human rights in devolved areas of policy, and the questions posed by the consultation, specifically around the process by which an individual can obtain a Gender Recognition Certificate. We have considered these issues primarily with regard to the European Convention on Human Rights (ECHR), which contains legally binding standards through the Human Right Act 1998 and the Scotland Act 1998. We have also referenced and given consideration to non-binding but guiding and evolving human rights principles and standards.[[26]](#footnote-26)

The Commission acknowledges there are a wider range of considerations outside of the scope of its response with regard to the legal and practical consequences of obtaining legal gender recognition. We have set out a basic outline of a human rights based approach to consideration of these issues.[[27]](#footnote-27) However, many of these issues relate to the operation of the Equality Act 2010. Our sister National Human Rights Institution and the Equality Regulator in Scotland, the Equality and Human Rights Commission, has addressed these issues in its consultation response.

Before answering the specific consultation questions, the Commission sets out some general context in relation to legal gender recognition. This includes an outline of the range of human rights engaged by legal gender recognition, and a more detailed discussion of the jurisprudence of the European Court of Human Rights (the Court) under Article 8, the right to respect for private and family life, and Article 3, the prohibition on torture, cruel, inhuman and degrading treatment (section 3).

This will be followed in sections 4 and 5 by a consideration of regional and international standards, guidance and principles in relation to legal gender recognition, including Council of Europe guidance, relevant standards from the international human rights treaties, and the Yogyakarta and Yogyakarta Plus 10 Principles.

Finally, in sections 6-10, the Commission will provide answers to the individual consultation questions.

* 1. Note on language and terminology

The Commission recognises that appropriate language and terminology are an essential element of any discussion in relation to human rights issues and ensure respect for the identities of people concerned.

This paper refers throughout to trans or transgender person/s or people. In line with both the Equality Act 2010 and the European Convention on Human Rights, the Commission uses the term transgender to include people who are proposing to transition, are in the process of transitioning or have transitioned to their acquired gender. This includes people who have not sought, and do not intend to seek medical or surgical interventions.

Transgender people may choose to define and describe themselves in a range of different ways including, but not limited to:

‘trans’, ‘transgender’, ‘transgender woman’, ‘transgender man’, ‘woman’, ‘women’, ‘man’ ‘men’, ‘she/her’, ‘he/his’, ‘they/their’

People whose gender identity and biological sex at birth align may choose to define and describe themselves in a range of different ways including, but not limited to:

‘man’, ‘woman’, ‘men’, ‘women’, ‘cis-woman’, ‘cis-women’, ‘cis-man’, ‘cis-men’, ‘she/her’, ‘he/his’, ‘they/their’

Non-binary people may choose to define and describe themselves in a range of different ways and may prefer not to use nouns and pronouns which are gendered, preferring, but not limited to: ‘they/their’ and ‘non-binary person.’

Intersex people may choose to define and describe themselves in a range of different ways including but not limited to:

‘intersex’, ‘man’, ‘woman’, ‘men’ ‘women’, ‘she/her’, ‘he/his’, ‘they/their’.

Please note that where the paper directly quotes laws or court judgments, these will use the terminology included in the judgment, which may reflect out-of-date, or seldom used, language and terminology in relation to transgender people, for example ‘transsexual.’

1. Human rights engaged by legal gender recognition

This section will provide an overview of the human rights issues engaged by legal gender recognition, followed by a more detailed discussion of the approach which the European Court of Human Rights has taken in considering cases concerning legal gender recognition, in particular in relation to the right to respect for private and family life (Article 8 of the European Convention on Human Rights/ECHR),the prohibition on torture, cruel, inhuman and degrading treatment (Article 3 ECHR) and the prohibition on discrimination in connection with other ECHR rights (Article 14 ECHR).

This section will also include analysis of the Court’s interpretation of Article 8 ECHR as creating positive obligations on States to provide a process of legal gender recognition, and its use of the ‘fair balance’ test in weighing the general interest with the interests of transgender people to determine the nature and extent of such obligations. It will include a discussion of the Court’s approach to subsidiarity and margin of appreciation in its judgments on legal gender recognition processes.

* 1. The range of human rights engaged by legal gender recognition

Gender identity, gender expression and the processes in place for gender recognition engage a range of civil, political, economic, social and cultural rights. These include, but are not limited to:

* The right to respect for private and family life, home and correspondence;[[28]](#footnote-28)
* The prohibition on torture, cruel, inhuman and degrading treatment, including rights to bodily and mental integrity;[[29]](#footnote-29)
* The right to marry and found a family;[[30]](#footnote-30)
* The right to freedom of expression;[[31]](#footnote-31)
* The right to the highest attainable standard of physical and mental health;[[32]](#footnote-32)
* The prohibition on discrimination;[[33]](#footnote-33)
* The right to social security;[[34]](#footnote-34)
* The right to equality before the law;[[35]](#footnote-35)
* The right to work, and to just and favourable conditions of work.[[36]](#footnote-36)

This response will now set out some additional detail with regard to the right to respect for private and family life, and its importance for legal gender recognition.

* 1. The right to respect for private and family life, home and correspondence

Gender identity and gender expression[[37]](#footnote-37) are primarily protected by Article 8 of the European Convention on Human Rights[[38]](#footnote-38) which reads:

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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.”[[39]](#footnote-39)

In relation to Article 8 of the Convention, the Court has found that gender identity and personal development are ‘a fundamental aspect of [the] right to respect for private life.’[[40]](#footnote-40) In the key case of *Christine Goodwin v UK*, the Court set out that:

“the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”[[41]](#footnote-41)

Following the *Goodwin* case, the UK Government instituted a system for legal gender recognition through the Gender Recognition Act 2004.

In the later cases of *A.P., Garçon and Nicot* *v France*,[[42]](#footnote-42) the Court held that the protection of gender identity under Article 8 includes both people who have chosen to undertake medical or surgical interventions as part of gender reassignment and those who have not:

“The Court’s judgments in this sphere have hitherto concerned legal recognition of the gender identity of transgender persons who had undergone reassignment surgery, and the conditions of access to such surgery. However, it cannot be inferred from this that the issue of legal recognition of the gender identity of transgender persons who have not undergone gender reassignment treatment approved by the authorities, or who do not wish to undergo such treatment, does not come within the scope of application of Article 8 of the Convention.

The right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals.”[[43]](#footnote-43)

The protections provided by Article 8 of the European Convention therefore apply whether or not someone has chosen to undergo medical and/or surgical treatment in relation to their gender identity. In this respect, the Human Rights Act 1998/ECHR shares the approach of the Equality Act 2010 of protecting transgender people regardless of the stage of exploration and/or transition that a person has reached with respect to their gender identity. The Equality Act 2010 included the category of ‘gender reassignment’ as a protected characteristic following cases brought by transgender women under EU law,[[44]](#footnote-44) which had the effect of amending one of the Equality Act’s precursors, the Sex Discrimination Act 1975.[[45]](#footnote-45) Gender reassignment is defined in the Equality Act as follows:

“A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of reassigning the person’s sex by changing physiological or other attributes of sex.”[[46]](#footnote-46)

Therefore the human rights protections available through the Human Rights Act 1998/ECHR, and the Equality Act 2010 prohibitions on specific discriminatory conduct apply regardless of the stage of exploration and/or transition that a person has reached with respect to their gender identity.

* 1. Positive obligations under Article 8 ECHR

The Court has viewed the issue of State processes for gender recognition through the lens of a State’s ‘positive obligations’ towards human rights – i.e. the actions a State should take to enable enjoyment of the rights in question. In this respect the Court has said in *A.P., Garçon and Nicot* that:

“the issue to be determined is whether respect for the applicants’ private lives entails a positive obligation for the State to provide a procedure allowing them to have their gender legally recognised without having to fulfil the conditions of which they complain.”[[47]](#footnote-47)

In *Hämäläinen*, a case concerning a transgender person who complained to the Court of a breach of her Article 8 and Article 14 rights since the full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership, the Court adopted a similar ‘positive obligations’ argument:

“The question to be determined by the Court is whether respect for the applicant’s private and family life entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. The Grand Chamber therefore considers it more appropriate to analyse the applicant’s complaint with regard to the positive aspect of Article 8 of the Convention.”[[48]](#footnote-48)

Thus far the Court’s approach to legal gender recognition processes has been through the lens of positive obligations, as well as ensuring that measures taken are not themselves disproportionate interferences with an individual’s Article 8 rights. The Court’s mechanism for doing so is set out below in the ‘fair balance’ test.

* 1. Positive obligations: The ‘fair balance’ test

In its consideration of the positive obligations upon States, the Court has frequently applied what it refers to as a ‘fair balance test’ to situations in which transgender people have brought Article 8 claims in relation to national gender recognition systems.

In assessing whether interferences with Article 8 are permitted, consideration is given to the specific conditions set out under Article 8 (2). State interferences with the right to respect for private and family life may be justifiable if they are lawful, proportionate and necessary in a democratic society for any of the aims of:

* Protecting national security, public safety or the economic well-being of the country,
* Preventing disorder or crime,
* Protecting health or morals, or for the protection of the rights and freedoms of others.[[49]](#footnote-49)

The Court’s reasoning will include consideration of whether a particular interference was lawful, if it had a legitimate aim under Article 8 (2), and if the State’s actions were a proportionate way of achieving the stated aim.

The ‘fair balance test’ takes a similar approach insofar as the Court has described this test as striking:

“a fair balance between the competing interests of the individuals concerned and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance.”[[50]](#footnote-50) [[51]](#footnote-51)

In the Court’s jurisprudence on cases connected to gender recognition, it has set out a range of factors as being of particular relevance in considering the general interest/interest of the community as a whole.

* 1. Considerations relevant to the general interest in the ‘fair balance’ test

The first of these relates to the impact of gender recognition and related processes upon civil status and civil status records. The Court has held as relevant to the general interest: ‘safeguarding the principle of the inalienability of civil status’,[[52]](#footnote-52) the impact on the birth register system’[[53]](#footnote-53) and ‘ensuring the reliability and consistency of civil status records and more generally ensuring legal certainty.’[[54]](#footnote-54) In addition, in *Goodwin,* the Court recognised the wider implications of such changes:

“The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance.”[[55]](#footnote-55)

* 1. Considerations with respect to the experiences of transgender people in the ‘fair balance’ test

Under the ‘fair balance’ test, the general interests described above are weighed against the rights of transgender individuals. The Court has shown that it will take into account the following kinds of factors as relevant to the interests of transgender people:

* Administrative inconvenience related to not having documentation matching the acquired gender, particularly if this reaches a threshold of distress or is a barrier to other rights such as social security or employment;[[56]](#footnote-56)
* The stress and alienation arising from a discordance between the social reality and the status imposed by law which refuses to recognise the change of gender. This conflict can cause a transgender person to experience feelings of vulnerability, humiliation and anxiety;[[57]](#footnote-57)
* Unacceptable trade-offs between rights to bodily integrity and rights to legal gender recognition.[[58]](#footnote-58)

If it can be shown that the conditions attached to legal gender recognition processes (or the lack of such processes altogether) create disproportionate impacts of the type described above on transgender people, when compared with the impact on the ‘general interest’, then the fair balance tilts in the interest of protecting the Article 8 rights of transgender people.[[59]](#footnote-59)

It should be noted that in its considerations of both the general interest and the interests of transgender individuals, the Court has found that there must be a real or concrete prospect of substantial detriment to either party for the ‘fair balance’ to tilt in one direction or the other. If the general interest cannot be shown to be at real and concrete risk of detriment by legal gender recognition processes, the fair balance will tilt towards protecting the rights of the individual in question. In *Goodwin* the Court stated:

“No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”[[60]](#footnote-60)

If, as in *Hämäläinen*, the Court judges that there is no concrete and substantial detriment to the individual from the protection of the general interest (in this case because the conversion of a marriage into a civil partnership on the same terms as the marriage was not viewed as detrimental by the Court),[[61]](#footnote-61) the status quo will tend to be maintained (since State parties will usually be the party whose arguments relate to the general interest).

In this way, the ‘fair balance’ test is a way to measure the legitimacy and proportionality of the requirements of legal gender recognition processes across Council of Europe states.

The Court will also always apply the principle of subsidiarity and one mechanism for achieving this, the margin of appreciation, in its judgments. These are discussed below.

* 1. Subsidiarity, Margin of Appreciation and Living Instrument doctrines

Subsidiarity is a core principle in the Court’s decision making.[[62]](#footnote-62) It reaffirms the importance of the role of national governments and other public bodies such as courts in making decisions which are appropriate to the local context. Subsidiarity means that States have some licence to establish systems and processes for gender recognition which are the most appropriate in their specific national context.[[63]](#footnote-63)

One way in which the Court seeks to ensure subsidiarity is through the margin of appreciation, which is the level of discretion a State has in relation to the implementation of qualified rights.[[64]](#footnote-64) However, it should be noted that where particularly intimate spheres are involved, the margin of appreciation will tend to be narrower.[[65]](#footnote-65)

In the past, the margin of appreciation has been an important factor in influencing the Court’s reasoning as to whether States should provide processes enabling legal recognition. Since the obligation to provide legal recognition has been established, it has also been found to apply to the ‘rules [a State] lays down in order to achieve a balance between the competing public and private interests.’[[66]](#footnote-66)

Related to this the ECHR is considered to be a ‘living instrument’ which means that the standards of the Convention are not to be regarded as static, rather they should be reflective of societal changes and adopt an evolving interpretation[[67]](#footnote-67) where appropriate.

When considering the margin of appreciation available to States in the implementation of their positive obligations in meeting Article 8, the Court will consider:

* medical and scientific developments;
* social developments, including attitudes towards transgender people across Council of Europe States;
* the consensus on sensitive moral or ethical issues which arise from processes enabling legal gender recognition, for example marriage.[[68]](#footnote-68)

With respect to medical and scientific developments, while the Court has been willing to engage in consideration of these, it has not found them to be determinative in its reasoning in relation to legal gender recognition. For example, while the Court has been willing to consider that the biological elements of sex are of relevance to determining a person’s gender identity, it has not found these to be a determinative factor in making decisions on legal gender recognition processes:

“While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex, the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.”[[69]](#footnote-69)

The principles of subsidiarity and margin of appreciation are important factors in deciding whether State legal gender recognition achieves a ‘fair balance’. However, it should be noted that neither principle detracts from the requirement of States to secure rights in a way that is ‘practical and effective’ rather than ‘theoretical and illusory.’ [[70]](#footnote-70)

* 1. The prohibition on torture, cruel, inhuman and degrading treatment

In addition to Article 8, gender recognition processes have also been found to engage Article 3 of the Convention, which sets out the prohibition on torture, cruel, inhuman and degrading treatment. It should be noted that unlike Article 8, Article 3 is an absolute right, meaning that States are absolutely prohibited from engaging in conducts which meet the threshold of torture, inhuman and degrading treatment. In the above named cases of *A.P., Garçon and Nicot* *v France*, although no violation of Article 3 was found, the Court held that where gender recognition requirements included the need to undergo medical treatment which had the effect or potential effect of causing sterilisation, these engaged Article 3. The Court considered these aspects of the case under Article 8, since they considered that State conditions which required that a person ‘trade-off’ their Article 3 rights to physical integrity in order to attain legal recognition of their acquired gender, or conversely have to forfeit rights to legal recognition by choosing not to undergo medical treatment were unacceptable.

* 1. Non-discrimination under the ECHR

Article 14 of the European Convention on Human Rights is a prohibition on discrimination in the realisation of the rights in the Convention and provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”[[71]](#footnote-71)

The Article is not a standalone right and attaches to another provision in the Convention.

Several cases which have been brought to the European Court of Human Rights by transgender people have asked the Court to consider whether applicants’ Article 14 rights have been infringed[[72]](#footnote-72) but the Court has primarily chosen to deal with the issues through Article 8 of the Convention, regarding these as the primary concern and that separate issues do not arise under Article 14.[[73]](#footnote-73)

1. Relevant Regional Standards
   1. Council of Europe

The Commission notes that a range of other regional and international guiding human rights standards provide parameters for gender recognition processes. Following on from and influenced by the jurisprudence of the Court, the Council of Europe itself has developed standards, both through the office of the Commissioner for Human Rights[[74]](#footnote-74) and through the Parliamentary Assembly. In 2015, the Council of Europe Parliamentary Assembly passed the following resolution with respect to legal gender recognition:

“6.2 As concerns legal gender recognition:

6.2.1. develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

6.2.2. abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person’s gender identity in laws regulating the procedure for changing a name and registered gender;

6.2.3. remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights;

6.2.4. consider including a third gender option in identity documents for those who seek it;

6.2.5. ensure that the best interests of the child are a primary consideration in all decisions concerning children.” [[75]](#footnote-75)

The standards developed in relation to gender recognition by the Council of Europe are therefore that it should be ‘quick, transparent and accessible’ and ‘based on self-determination.’ These standards have been adopted in the Council of Europe Commissioner for Human Rights’ Guide to Legal Gender Recognition.[[76]](#footnote-76) Such standards are not legally binding on Council of Europe states but represent an important set of guiding expectations.

1. International Standards
   1. International Human Rights Treaties

Non-discrimination in the realisation of rights is an obligation on states across all of the international human rights treaties and the elimination of discrimination is an immediate obligation. All the international human rights treaties contain provisions which oblige states to take administrative and judicial steps to eliminate both *de facto* and *de jure[[77]](#footnote-77)* discrimination on the basis of a range of characteristics, which generally include ‘race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’[[78]](#footnote-78) While gender identity is not explicitly listed in the set of characteristics on the basis of which discrimination is prohibited, this list is not exhaustive and other characteristics can be protected through the ‘and other status.’

This is reaffirmed by the fact that many of the different treaty bodies have sought to issue Concluding Observations to States under review which raise concerns over discriminatory treatment of transgender individuals. A 2016 survey of the Concluding Observations of a number of UN treaty body committees[[79]](#footnote-79) by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) found that Concluding Observations making recommendations against discriminatory treatment of transgender people were made with respect to more than 25 countries in 2015 alone.[[80]](#footnote-80)

* 1. General Comments of the UN Treaty Body Committees

Aside from the inclusion of gender identity and gender expression within general non-discrimination provisions, most of the UN Treaty Body Committees have sought to articulate the relevance of these issues to their specific remit through General Comments. [[81]](#footnote-81) For example, the Committee on Economic, Social and Cultural Rights has confirmed that:

“gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”[[82]](#footnote-82) [[83]](#footnote-83)

The Committee on the Elimination of All Forms of Discrimination Against Women has also sought to articulate the relevance of its provisions to transgender women. CEDAW is part of a ‘comprehensive international human rights legal framework directed at ensuring the enjoyment by all of all human rights and at eliminating all forms of discrimination against women on the basis of sex and gender.’ The Committee which monitors the Convention has been clear that, like the European Convention on Human Rights, CEDAW is a dynamic instrument which ‘accommodates the development of international law.’ The Convention, initially drafted in 1979, defines discrimination against women as ‘any distinction, exclusion or restriction made on the basis of sex.’ The Committee has in recent years clarified that to interpret the Convention as only applicable to sex-based or biologically-based discrimination is too restrictive, and that it should also be understood to cover gender based discrimination:

“Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1.”[[84]](#footnote-84)

The Committee has gone on to recognise that intersectional discrimination should be included within the types of discrimination which States Parties must take immediate steps to address including discrimination based upon sex, gender and gender identity.

“Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences.”[[85]](#footnote-85)

* 1. Yogyakarta and Yogyakarta Plus 10 Principles

The Yogyakarta Principles are two sets of principles developed by international human rights experts.[[86]](#footnote-86) The first set of principles,[[87]](#footnote-87) published in 2006, articulates already existing rights in the context of sexual orientation and gender identity, similar to the way in which the groups rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) articulate universal human rights in the context of race discrimination, women’s rights, children’s rights and disabled people’s rights respectively.

The second set of principles, developed in 2017, known as ‘Yogyakarta Plus 10’ set out ‘Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.’[[88]](#footnote-88) These additional principles include civil, political, economic, social and cultural rights not articulated, or not fully articulated in the first set of principles.[[89]](#footnote-89)

The Yogyakarta Principles are not an international human rights treaty which States sign and ratify. They are however, increasingly referred to as representing international best practice since they align with the human rights framework developed at international and regional level, offering protections in the same way as the group rights treaties.[[90]](#footnote-90) For example, they have been used in a number of contexts,[[91]](#footnote-91) featuring in recommendations from states to each other in Universal Periodic Review processes,[[92]](#footnote-92) being adopted by Special Rapporteurs,[[93]](#footnote-93) influencing UN guidance notes on asylum claims related to LGBTQI discrimination,[[94]](#footnote-94) being referenced by the CoE Commissioner for Human Rights,[[95]](#footnote-95) being referenced in a dissenting opinion by ECtHR judges,[[96]](#footnote-96) being referenced by the European Court of Justice (ECJ) Advocate General in a case at the ECJ to determine whether gay and lesbian people form a particular protected group for the purposes of asylum,[[97]](#footnote-97) and being cited by the Inter-American Court on Human Rights, which has issued an advisory opinion to Costa Rica around gender recognition on the basis of the Principles.[[98]](#footnote-98)

1. Commission response to consultation questions

On the basis of both the case law analysis and the general standards set out above, the Commission has provided an analysis of the Scottish Government’s proposals in our responses to each individual consultation question. For ease of analysis, we have repeated much of our reasoning in responding to each of the questions.

* 1. Question 1: Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

As set out above in the introduction to our submission, the European Court of Human Rights has held that States must provide a way for a person to obtain legal recognition of their acquired gender[[99]](#footnote-99) and the conditions and eligibility criteria for these should not compromise a person’s bodily integrity or privacy by, for example, requiring medical treatment or a permanent change of appearance.[[100]](#footnote-100)

Following cases from the UK, France, Germany, Switzerland and Turkey among others, the Council of Europe sought to develop a set of standards with respect to the process of gender recognition, issued in the form of two publications from the office of the Council of Europe Commissioner for Human Rights in 2009 and again in 2015, and also in 2015 by Resolution 2048 of the Parliamentary Assembly of the Council of Europe. [[101]](#footnote-101) The standards developed in relation to gender recognition by the Council of Europe are therefore that it should be ‘quick, transparent and accessible’ and ‘based on self-determination.’ These standards, although non-binding, represent an important marker of evolving human rights standards for Council of Europe States.

Our response will now consider whether the proposal of 3 months living in the acquired gender meets these standards, both in terms of the stipulated length of the process and with respect to the ‘real-life’ experience requirement.

* 1. ‘Quick’

The Scottish Government has proposed that a person must live in their acquired gender for at least 3 months before applying for a Gender Recognition Certificate. This is a significantly shorter period than under the current Gender Recognition Act 2004. In the consultation document, the Scottish Government sets out its motivations to speed up the process of gender recognition as follows:

* to reduce the intrusiveness and stress of the process; delays and difficulties can lead to mental ill-health, including both depression and suicidal feeling[[102]](#footnote-102)
* the length of the current process creating risks that transgender people are forced to reveal their status when they would not otherwise choose to do so[[103]](#footnote-103)
* to align with Council of Europe standards.

These goals are to be welcomed and reflect the changes to the system which are required on the basis of the experiences of transgender people from across Scotland as described in the consultation analysis,[[104]](#footnote-104) as well as the evolution of regional and international standards.

With respect to the Council of Europe standards, there is little guidance as to what is intended by ‘quick’ other than that ‘the duration from application to full legal recognition is not unreasonably long.’[[105]](#footnote-105) Case law from the European Court has found that the blanket application of a two year waiting period for surgery despite the applicant’s age and ill-health, was held to be in breach of Article 8.[[106]](#footnote-106) This has led the Council of Europe to conclude that ‘mechanically applied waiting periods before gender reassignment surgery may violate Article 8 of the ECHR.’[[107]](#footnote-107) It is not clear that the circumstances set out in the *Schlumpf* case are immediately analogous to the Scottish Government’s proposals, since this period is not being applied to eligibility for surgery but to legal recognition. However, this is an indication that a blanket period which fails to take into account individual circumstances may fail to strike a fair balance.

The definition by a government of a specific period of time in which a person must live in their acquired gender before being able to apply to alter their birth certificate will always be to some extent arbitrary, given that every person’s exploration of their gender identity and gender expression will be very different. Given that ‘the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities,’[[108]](#footnote-108) it will be important to establish whether such a period strikes a fair balance between the rights of the community as a whole and those of transgender people. In assessing this, it will be important to establish the intended aim for this period; considerations of the proportionality of a measure will be assessed against this legitimate aim.

### Legitimate aim

As noted above, the Commission welcomes the aims set out by the Scottish Government for the reforms to legal gender recognition as a whole and notes that these broadly coincide with the kinds of considerations which the European Court of Human Rights will consider in its fair balance test (see section 3 above).

The Government has set out the following with respect to the specific aims for the 3 month period lived in the acquired gender prior to application. In her statement to Parliament with regard to legal gender recognition, the Cabinet Secretary for Social Security and Older People set out the following, which alludes to the 3 month pre-application and 3 month reflection period timetable:

“In addition, applicants will be required to state in that statutory declaration that they have already been living in their acquired gender. Currently, applicants for gender recognition certificates are required to have been living in their acquired gender for a minimum of two years. It is the Scottish Government’s opinion that that period should be reduced. Our initial proposal is for a three-month period, but that, too, will be fully consulted on. The draft bill will propose that, after an application for gender recognition has been made and has been checked to ensure that the necessary information and statutory declaration have been provided, there will be a mandatory three-month reflection period before a gender recognition certificate can be granted. At the end of that period, the applicant will need to confirm that they still wish to proceed. Therefore, applicants will need to have lived in their acquired gender for at least six months before a gender recognition certificate can be granted. Making a false statutory declaration is, and will remain, a criminal offence, the potential punishment for which includes up to two years’ imprisonment. Retaining the requirement for a statutory declaration, making it clear that a false declaration is a criminal offence and building in time for reflection will enshrine in law the seriousness of the process. No one should doubt that it is a significant undertaking, or that it will require the same level of commitment from the individual as the existing system does.”[[109]](#footnote-109)

While there is little explanation as to how and why this length of period has been identified, the Cabinet Secretary has confirmed that it is her intention that this 3 month period will contribute towards ensuring the ‘seriousness of the process’, noting that it is a ‘significant undertaking’ requiring the ‘same level of commitment as the existing system.’ The European Court of Human Rights has noted that:

"Nor, given ….the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.”[[110]](#footnote-110)

Applying the Court’s ‘fair balance’ test, it is clear that the keeping of consistent and coherent public records by the State is a legitimate part of the general interest, [[111]](#footnote-111) and the Scottish Government’s stated aim of ‘ensuring seriousness’ may legitimately be considered relevant to this interest. However, careful consideration must be given as to why the legal safeguard of a statutory declaration with an associated criminal conviction for people who make frivolous or fraudulent applications would not be sufficient to secure the stated aim of ensuring that individuals take the process seriously.

In addition, it would need to be demonstrated that the prospect of detriment to the general interest from fraudulent or frivolous applications must be concrete and substantial. With respect to this, the Commission notes that other jurisdictions, such as Ireland, which base their systems only on self-determination and have no requirement for a period lived in the acquired gender have reported no or very low levels of fraudulent or frivolous misuse of gender recognition legislation.[[112]](#footnote-112) It is unclear therefore, whether the requirement for a period lived in the acquired gender is necessary to protect the general interest.

* 1. Transparent

The second of the Council of Europe’s standards relates to transparency, described as required to ‘enhance legal certainty as to a predictable outcome for the applicant and the relevant authorities.’[[113]](#footnote-113) Here it should be noted that it is unclear how someone would demonstrate that they had lived in their acquired gender for this period. This lack of clarity adds uncertainty to the process.

It is also unclear how compatible a requirement for a period of ‘real life’ experience is with the principle of self-determination set out in the Council of Europe standards, since such a period seems to imply some kind of evaluation by an external body.

* 1. Margin of appreciation and living instrument

A consideration of the practice in other Council of Europe member states in relation to the ‘real life experience’ element will be relevant to proportionality. In the *A.P., Garçon and Nicot* cases, the Court examined the conditions set out by the French State in relation to legal gender recognition. In relation to requirements for medical examinations and a diagnosis of gender dysphoria, the margin of appreciation was found to be a relevant factor in considering whether these conditions could be held to be a breach of the applicants’ Article 8 rights. The Court would in all probability take a similar approach to consideration of the ‘real life experience’ test. Data shows that such a requirement for a period of ‘real life experience’ remains common among European countries. For example, in the Fundamental Rights Agency’s 2014 survey of LGBT people across Europe, almost two thirds of respondents said they would have to go through a ‘real life experience’ test.[[114]](#footnote-114) However, some states have changed their legislation since this survey was undertaken, and the Scottish Government consultation report identifies that Belgium, Denmark, Ireland, Iceland, Malta, Norway and Portugal all operate systems based on self-determination. This may support the view that the margin of appreciation will begin to shift with respect to real life experience tests. As the ECHR is considered a ‘living instrument’ it is important to consider how the Convention is likely to be interpreted going forward based on evolving consensus around issues relating to gender recognition.

* 1. Conclusion

The Commission commends the Scottish Government’s proposals for reducing the length and stress of the process of legal gender recognition. While the Government’s proposed 3 month period may well conform with the ‘general interest’ in the ‘fair balance’ test, it is not clear that these aims could not be met in a less restrictive/more proportionate way, such as through the proposed statutory declaration and associated criminal conviction for fraudulent use. The Commission notes that the requirement to live in the acquired gender brings with it a lack of certainty both for applicants and for the Registrar General for Scotland as the proposed issuer of Gender Recognition Certificates, as to how this criterion could be met.

While in the Commission’s view it is unlikely that the European Court of Human Rights would view this 3 month period, or the proposed subsequent 3 month period of reflection as a disproportionate interference with a person’s right to gender identity as protected by Article 8, the Commission notes that the margin of appreciation is likely to change over time as more Council of Europe States move towards self-determination models.

If the Scottish Government chooses to implement these periods, the Commission recommends that:

* Some form of discretion is built into the total time period so that for example, people in exceptional circumstances can make quicker applications;
* There is a post-legislative review, which has regard to the experience of transgender people in any new system, as well as the Registrar General and any other relevant experts, to ensure that the new proposals do not act as a deterrent to gender recognition. This is recommended in related jurisprudence from the Court.[[115]](#footnote-115)

1. Question 2: Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

In the Commission’s view, consideration of the question with respect to a 3 month period of reflection follows a similar argument to consideration of the proposed requirement for a 3 month period of living in the acquired gender.

As above, the Commission notes that the Government has offered very little information with respect to how and why the stated 3 month period has been specified. Given that this period therefore appears to be a largely arbitrary period of time, it will be important to consider whether it meets the ‘fair balance’ test, that is, if a measure is proportionate after weighing the implications of the general interest against the interests of transgender individuals.

As noted in Q1, the Scottish Government has sought to justify these proposals as a means of ensuring the ‘seriousness’ and ‘significance’ of the process as one which requires ‘commitment’ from the applicant. These aims appear to connect to the general interest of preventing fraudulent applications and maintaining the coherence and consistency of civil status records. While such aims are a relevant consideration, it is again unclear as to why such aims could not be achieved through a statutory declaration and associated criminal sanction for fraudulent use alone.

In the *A.P., Garçon and Nicot* cases, the Court examined the conditions set out by the French State in relation to legal gender recognition. In relation to requirements for medical examinations and a diagnosis of gender dysphoria, the margin of appreciation was found to be a relevant factor in considering whether these conditions could be held to be a breach of the applicants’ Article 8 rights. The Court would in all probability take a similar approach to consideration of the ‘period of reflection.’ Annex E of the Scottish Government’s consultation paper suggests that the requirement for a period of reflection is still a relatively common feature of legal gender recognition processes. In light of this, it is unlikely that the European Court of Human Rights would construe a 3 month reflection period as being outwith the margin of appreciation for States Parties.

If the Scottish Government chooses to implement this period of reflection, the Commission recommends that:

* Some form of discretion is built into the total time period so that for example, people in exceptional circumstances can make quicker applications;
* There is a post-legislative review, which has regard to the experience of transgender people in any new system, to ensure that the new proposals do not act as a deterrent to gender recognition. This is recommended in related jurisprudence from the Court.[[116]](#footnote-116) Such a review should also consider evidence from the Registrar General and any other relevant experts.

1. Question 3: Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

The Commission agrees with the proposals to reduce the minimum age at which a person can apply for legal gender recognition from 18 to 16 as in line with the Convention on the Rights of the Child and the Age of Legal Capacity (Scotland) Act 1991. In particular the Commission notes the importance of legislating on issues of gender recognition to take account of the future incorporation of the Convention of the Rights of the Child into Scots law as announced by the Deputy First Minister John Swinney on 20th November 2019.[[117]](#footnote-117)

* 1. Convention on the Rights of the Child

The Convention on the Rights of the Child sets out that the age of majority, when a person has full legal capacity to make decisions should be considered to be 18 years unless ‘under the law applicable to the child majority is attained earlier’ as is currently the case in Scotland.[[118]](#footnote-118) However, it also recognises the ‘evolving capacities’ of the child to make decisions about their lives.[[119]](#footnote-119)

The central purpose of the Convention is to accord children and young people the status of rights holders, and therefore the Committee on the Rights of the Child has argued in its General Comments that setting a minimum age in legislation should only be undertaken where this is consistent with the principles of the Convention.[[120]](#footnote-120) This requires a careful weighing of the rights of children and young people to identity, autonomy and participation, with the need to provide protections, for example from exploitation and abuse:

“The Committee emphasizes that the right to exercise increasing levels of responsibility does not obviate States’ obligations to guarantee protection.[[121]](#footnote-121) Gradual emergence from the protection of the family or another care environment, together with relative inexperience and lack of power, can render adolescents vulnerable to violations of their rights. The Committee stresses that engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them will lead to more effective protection. By being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection.

In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.” [[122]](#footnote-122)

Similarly, the European Union Fundamental Rights Agency in its recent project on Mapping Minimum Age Requirements notes that:

“The setting of age requirements for the acquisition of certain rights or for the loss of certain protections needs to balance the concept of the child as a subject of rights whose evolving capacities must be respected, with the concept of the state’s obligation to provide special protection. Finding the right balance is not an easy task.”[[123]](#footnote-123)

The Commission agrees that, as documented in the Scottish Government’s Child Rights and Well-being impact Assessment, the issue of gender recognition engages the rights within the Convention on the Rights of the Child, in particular Articles 2, 3, 5, 12 and 16, which protect rights to non-discrimination, the best interests of the child, the rights of the parent or legal guardian of the child in the context of the child’s evolving capacities, the rights of the child to express their views on issues which affect them and the right to privacy, which as has already been discussed, protects rights to gender recognition and gender expression.

Of particular relevance is the importance of taking a person-centred approach which has due regard for a young person’s maturity and ability to understand the consequences of their actions. The Committee on the Rights of the Child has set out its interpretation of State obligations to respect, protect and fulfil Convention rights in its General Comments. In its General Comment 20 on rights during adolescence, the Committee notes that:

“While the Convention recognizes the rights of all persons under 18 years, the implementation of rights should take account of children’s development and their evolving capacities.”[[124]](#footnote-124)

In addition, the General Comment advocates that adolescents use ‘increasing levels of agency to take responsibility for their rights’ in line with their evolving capacities. The Committee singles out LGBTQI young people as being in need of particular protections during adolescence:

“Adolescents who are lesbian, gay, bisexual, transgender and intersex commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information. In extreme cases, they face sexual assault, rape and even death. 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 condemns the imposition of so-called ‘treatments’ to try to change sexual orientation and forced surgeries or treatments on intersex adolescents. It urges States to eliminate such practices, 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.”[[125]](#footnote-125)

In light of the Committee’s comments, the Commission agrees that 16 and 17 year olds should be eligible for legal gender recognition. This is supported by Scots law on the age of legal capacity, outlined below.

* 1. Age of Legal Capacity in Scots law

The Convention on the Rights of the Child defines a child as every human being below the age of 18 years unless ‘under the law applicable to the child majority is attained earlier.’[[126]](#footnote-126)

Under Scots Law, a person of or over the age of 16 years has legal capacity to enter into any transaction,[[127]](#footnote-127) where a ‘transaction’ means ‘a transaction having legal effect,’[[128]](#footnote-128) and includes ‘the giving by a person of any consent having legal effect’ as well as ‘the bringing or defending of, or the taking of any step in, civil proceedings.’[[129]](#footnote-129)

The proposed process of legal gender recognition appears to be in line with the intentions of the provisions in the Age of Legal Capacity Act. Taken together with the General Comments of the Committee on the Rights of the Child on the importance of taking into account the maturity and evolving capacities of young people, the case for 16- 17 year olds to be eligible for legal gender recognition processes is strong. The Commission therefore supports the proposal to reduce the minimum age at which a person can apply for legal gender recognition from 18 to 16.

* 1. Children under the age of 16

As set out above the CRC takes an approach which recognises the evolving capacities of the Child to be balanced with the safeguards that are required in recognition of the differing pace of development in children and young people under 16.

In domestic law the Age of Legal Capacity (Scotland) Act provides some specific exceptions to legal capacity at 16, for example, relevant to this consultation, any child under the age of 16 may provide consent to medical treatment where a qualified medical practitioner is satisfied that they understand the nature and consequences of such treatment,[[130]](#footnote-130) and any child under 16 may instruct a solicitor in a civil matter where they have a general understanding of what it means to do so.[[131]](#footnote-131) Both of these exceptions are relevant to decisions which a child or young person could take in order to make a social and/or medical transition; and such decisions would be possible without reference to the proposed changes to the GRA.

The question therefore arises as to whether, if children of the age of 12 and over are able to give consent to begin to effect a transition, why they should not also be able to have such a transition legally recognised, given that the inability of transgender people to have their gender legally recognised has been held to be a violation of Article 8 rights, which apply equally to children and young people.

While the General Comments of the Committee on the Rights of the Child on children’s evolving capacities remain relevant, so too do the safeguards required with respect to the differing pace of development in children and young people under 16.

It will therefore be vital that any proposals to reduce the age at which children and young people may apply for a Gender Recognition Certificate to below 16 are able to take into account each individual child’s ability to understand the consequences of a decision to change their legal sex.

Alongside this children under the age of 16 should receive independent and impartial support with respect to their gender identity, and the Government should strive to increase tolerance, understanding and support for transgender young people. Indeed, General Comment 20 notes the importance of States providing young people with:

“measures to help them to thrive, explore their emerging identities, beliefs, sexualities and opportunities, balance risk and safety, build capacity for making free, informed and positive decisions and life choices, and successfully navigate the transition into adulthood.”[[132]](#footnote-132)

The Commission notes the importance of young people accessing the appropriate independent and impartial support in exploring and making decisions about gender identity. We also recommend that in any post-legislative review, the Government should undertake to work alongside transgender young people to ensure that the age of eligibility for legal gender recognition strikes the right balance between protection and freedom to establish gender identity before embarking on other major milestones in education, employment and relationships.

1. Question 4: Do you have any other comments on the provisions of the draft Bill?
   1. Schedule 1, PART 1, Section 2

The Commission agrees with the repeal of the Gender Recognition Panel and the repeal of the requirements set out in sections 2 and 3 of the GRA 2004, namely the requirements for a diagnosis of gender dysphoria, a 2 year period living in the acquired gender and the reports of 2 medical practitioners.

As the Commission has set out in section 6.2 of this paper, lengthy application periods may not meet ECHR standards. The current process does not appear to align with the Council of Europe recommendations that legal gender recognition processes should be ‘quick, transparent and accessible’ and ‘based on self-determination.’ The current process can result in transgender individuals facing a long period of administrative inconvenience, stress, alienation and an increased risk that their identity may be involuntarily revealed. These factors have all been identified as areas which the European Court of Human Rights will consider as of relevance in its considerations of the rights of transgender people.

The requirement for a diagnosis of gender dysphoria, while within the margin of appreciation of Council of Europe members states, is increasingly recognised as outdated. Scots law already has provisions to the effect that transsexualism and transvestism should not be considered as ‘mental disorders.’[[133]](#footnote-133) The adoption of new standards in the International Classification of Diseases (ICD-11) recognise that being transgender is not a mental health problem and that its description as such has stigmatised transgender people. The UN Special Rapporteur for Health has said that “mental health diagnoses have been misused to pathologize identities and other diversities” and that “the pathologization of lesbian, gay, bisexual, transgender and intersex persons reduces their identities to diseases, which compounds stigma and discrimination.”[[134]](#footnote-134)

The UN Independent Expert on Sexual Orientation and Gender Identity has said that the changes to the International Classification of Disease will go some way to address such stigma, but that Governments around the world will need to take proactive steps to tackle this:

“This reclassification will have a significant impact on the wrong perception of some forms of gender as a pathology, will promote the visibility of those forms of gender and will allow individuals to access better health care. In this connection, the mandate holder notes that pathologization has had a deep impact on public policy, legislation and jurisprudence, thus penetrating all realms of State action in all regions of the world and permeating the collective conscience. Eradicating the conception of some forms of gender as a pathology from everyday life will be a long and difficult process and the mandate holder is convinced that strong proactive measures will be required to that end.”[[135]](#footnote-135)

It is likely that as acceptance, support and understanding of transgender people grows in Council of Europe States, requirements in relation to legal gender recognition will change, and thus the margin of appreciation will shift, meaning that there will be more limited examples of medical requirements in place. The Commission is of the view that the Scottish Government’s proposals to remove the requirements of gender dysphoria and medical evidence are a positive step.

Outwith the context of gender recognition, the Commission notes that under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), everyone has the right to the enjoyment of the highest attainable standard of physical and mental health, clarified in General Comment 14, and in General Comment 22 on sexual and reproductive health.[[136]](#footnote-136) The Commission notes that addressing health inequalities is a key focus for NHS Scotland and that transgender people face significant and well-documented health inequalities[[137]](#footnote-137) which require to be addressed, as is the case with other groups of people.

* 1. Section 9 Review and appeal of decisions

Section 9 of the Bill deals with the review and appeal of decisions. An applicant may request a review of the Registrar General’s determination on the ground that the application was either incorrectly rejected or that the wrong type of GRC was issued. A further right of appeal to a sheriff is provided for where an applicant remains dissatisfied with a decision.

Section 9 of the Bill provides for a new section 8S, which enables a ‘person who has an interest in a gender recognition certificate’ to apply to the sheriff for revocation on certain grounds. Those grounds are that:

* the Registrar General has issued the wrong type of gender recognition certificate;
* the application was fraudulent;
* the person to whom the certificate was issued was incapable of understanding the effect of obtaining the certificate; or validly making the application for the certificate.

Further, a person who has an interest in a confirmatory gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that the application was fraudulent. Where an application described above is granted, the sheriff must revoke the certificate and, if relevant, issue a new certificate or refer the matter back to the Registrar General.

Given the significant impact an application for revocation under the new section 8S could have, the Commission believes clarity is needed around who can be deemed to have an interest in the process and the criteria that must be satisfied to allow a party to make such an application. Similarly, the rights of an applicant to challenge or contest an application for revocation should be clearly articulated.

* 1. Section 11 8U

This section of the Bill empowers the Registrar General for Scotland to make provisions about the form and manner in which an application is to be made. The Commission notes that one of the principles on legal gender recognition set out by the Council of Europe is that it should be ‘accessible.’ This means that the costs should not be prohibitive, but also that information and guidance on how to apply should be clear and easy to find. The Commission notes that the costs are likely to be ‘considerably lower than £140’, based on the Scottish Government’s analysis. Current fees for other civil status processes are £30 for each party in the submission of marriage notices, and £40 for a change of name.

* 1. Section 14 Statutory Declarations and detransitioning

The Commission is aware that some transgender people subsequently detransition, i.e. they stop the process of transitioning to a different gender or they take steps to revert to their pre-transition gender. The Commission is concerned that there is a lack of clarity within the provisions as to the legal implications of s14 (new s22 of the GRA 2004) of the draft bill for a transgender person who detransitions. At present, s14 (1) provides that if a person ‘knowingly makes a statutory declaration in accordance with this Act or regulations made under it which is false in a material particular,’ that is an offence. It is unclear as to whether or not a person who obtains a GRC in good faith under this Bill and who later detransitions, may be liable for criminal prosecution in relation to their statutory declaration. More clarity is required with regard to this area.

* 1. Consent

It is vital that applicants for a GRC fully understand the legal consequences of making a false statement in the statutory declaration required under s8C of the draft Bill, as well as those of applying for and holding a Gender Recognition Certificate. The Commission agrees with the position of EHRC Scotland stated at paragraph 14 of their submission to the Gender Recognition Reform (Scotland) Bill:

“In order to ensure there is full understanding and valid consent, we consider that the application process must enable applicants to demonstrate that they have received all the necessary information about, and have fully understood and considered:

* 1. The legal consequences, such as changes to marriage/civil partnership, pension and social security rights
  2. The social consequences, such as how it may affect their day to day interactions with friends, family, neighbours and colleagues, and how they can best prepare to manage their change in status
  3. The personal consequences, such as the impact of the decision on their mental and emotional well-being in the short and longer-term, and sources of support they have or could turn to if needed as they adjust to their decision.”[[138]](#footnote-138)

It will also be essential that people who may need support to make decisions, such as people with learning disabilities, receive accessible and impartial support within the current legislative framework on legal capacity.

* 1. The rights of non-binary people

The Commission notes that the European Court of Human Rights has not yet considered the human rights issues arising from legal recognition of non-binary people. There have been a number of cases brought before national courts which have reached different conclusions with respect to the obligations on States to provide processes of legal recognition for non-binary people.[[139]](#footnote-139)

There are also a number of examples of national and federal governments providing legal and policy responses to the issue, for example through including non-binary gender markers in identification documents and passports.[[140]](#footnote-140)

The Commission notes that the human rights issues which have been set out above in section 3 in relation to legal gender recognition of transgender people are also relevant to non-binary people.[[141]](#footnote-141) The ECHR right to respect for private and family life protects gender identity and gender expression, extending to the right of a person ‘to establish details of their identity as individual human beings.’[[142]](#footnote-142)

The Commission supports the introduction of a working group on non-binary issues and recommends that a human rights based approach is taken to the consideration of this issue, which has regard to relevant human rights jurisprudence, norms and standards.

Similarly the Commission recognises that the proposed legislation has implications for intersex people and this should also be given careful consideration in order to meet their specific needs.

1. Question 5: Do you have any comments on the draft Impact Assessments?

As the Commission set out in our introduction, the issue of legal gender recognition engages both our own mandate and that of the Equality and Human Rights Commission Scotland. As such, we provide analysis of the following Impact Assessments from a human rights, and not Equality law perspective.

The Equality Impact Assessment provided with the Bill sets out a range of concerns raised by stakeholders with respect to the proposed changes to legal gender recognition during the period of the previous consultation. These included:

* Access to women’s safe spaces
* Risk of abuse
* Intimate medical care
* The Accuracy of statistical information[[143]](#footnote-143)

The Commission notes that a human rights based analysis can be a helpful tool to support discussion of balancing rights. An example of a rights based approach to this process is to undertake a FAIR analysis,[[144]](#footnote-144) which evaluates the facts, the rights at stake, the standards connected to those rights, identifies who is responsible for implementing these and keeps this under review.

The Commission outlines here the basis of a human rights based approach which may be of use in assessing the issues raised in the previous consultation. The process described below is illustrative only. It is not intended as comprehensive, nor does it provide a full analysis of the issues above but rather provides the outline of a framework under which to consider them.

### ‘FAIR’ Outline

**F**acts: What are the lived experiences of the individuals involved and what are the important facts to understand?

E.g.

* What is the lived experience of transgender people in obtaining a Gender Recognition Certificate?
* What is the lived experience in relation to women only/single or separate sex spaces or services?
* What evidence and factual information is available regarding risks to interferences with rights?

**A**nalyse rights: Develop an analysis of the human rights at stake

E.g.

* What ECHR rights are engaged?
* What are the positive obligations on states? E.g. both to establish a legal gender recognition system (Art 8) and to protect everyone against violence (Art 8, 2 and 3)
* Where a qualified right, such as Article 8 of ECHR, is engaged is the interference strictly necessary and proportionate? E.g. Is there a reasoned legitimate aim, such as protecting the rights of others, and is it proportionate (the minimum necessary interference with the right to achieve the aim)?
* What other international standards or principles (binding and non-binding) are engaged which are relevant for the analysis? E.g. ICCPR, CEDAW, CRC, Council of Europe, Parliamentary Resolutions, Yogyakarta Principles and Yogyakarta Plus 10 etc

**I**dentify responsibilities: Identify what needs to be done and who is responsible for doing it

E.g.

* Who are the “duty bearers” in relation to the above? E.g. the government in relation to the system of legal gender recognition, the police, the prison service, local authorities, health boards, the Registrar General for Scotland, the National Statistics Office, the Regulator and Inspection bodies?
* What do they need to do to ensure all rights are upheld based on the facts and the human rights analysis?

**R**eview actions: Make recommendations for action and later recall and evaluate what has happened as a result

E.g.

* Is there a commitment to review the operation of the system in relation to the above, based on the facts and the human rights analysis?
* Is there appropriate accountability and redress in the system for when rights are not being met?

1. Scottish Commission for Human Rights Act 2006, s2 [↑](#footnote-ref-1)
2. Commissioner for Human Rights, 2009, ‘Human Rights and Gender Identity, Council of Europe, available at <https://rm.coe.int/16806da753>, Council of Europe, November 2015, ‘Protecting Human Rights of Transgender Persons: A short guide to legal recognition’, available at <https://rm.coe.int/1680492119>, Council of Europe, Parliamentary Resolution 2048, 2015, ‘Discrimination against transgender people in Europe.’ The Yogyakarta Principles, available at <http://yogyakartaprinciples.org/principles-en/> [↑](#footnote-ref-2)
3. See section 10 of this consultation response [↑](#footnote-ref-3)
4. *Van Kuck v Germany*, June 2003, Application No 35968/97, para 56 [↑](#footnote-ref-4)
5. See note at 2.1 regarding use of terminology throughout this response. [↑](#footnote-ref-5)
6. *A.P. Garçon and Nicot v France*, April 2017 (Application nos. 79885/12, 52471/13, 52596/13) [↑](#footnote-ref-6)
7. *Case of Christine Goodwin v UK, July 2002*, (Application no. 28957/95) [↑](#footnote-ref-7)
8. Supra 7, see also *Hämäläinen v Finland*, July 2014, (Application no. 37359/09) [↑](#footnote-ref-8)
9. Supra 7, para 91 [↑](#footnote-ref-9)
10. Supra 6 [↑](#footnote-ref-10)
11. Supra 6 [↑](#footnote-ref-11)
12. Supra 7, para 82 [↑](#footnote-ref-12)
13. *Schlumpf v Switzerland*, 2009, Application Number 29002/06 [↑](#footnote-ref-13)
14. Commissioner for Human Rights, 2009, ‘Human Rights and Gender Identity, Council of Europe, available at <https://rm.coe.int/16806da753>,

    Council of Europe, November 2015, ‘Protecting Human Rights of Transgender Persons: A short guide to legal recognition’, available at <https://rm.coe.int/1680492119> [↑](#footnote-ref-14)
15. Council of Europe, Parliamentary Resolution 2048, 2015, ‘Discrimination against transgender people in Europe.’ [↑](#footnote-ref-15)
16. The Yogyakarta Principles, available at <http://yogyakartaprinciples.org/principles-en/> [↑](#footnote-ref-16)
17. Supra 7 [↑](#footnote-ref-17)
18. Supra 13 [↑](#footnote-ref-18)
19. Supra 6 [↑](#footnote-ref-19)
20. Fundamental Rights Agency, 2019, ‘Fundamental Rights Report 2019’ available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf>, see pages 69-70 [↑](#footnote-ref-20)
21. See <https://www.ilga-europe.org/rainboweurope> for comparable data from 2015-19 [↑](#footnote-ref-21)
22. Since 2015, France, Ireland, Norway, Greece, Belgium, Luxembourg and Portugal have joined Malta, Denmark and some regions of Spain in not requiring a diagnosis of gender dysphoria/psychological analysis. See 21 above for further information. [↑](#footnote-ref-22)
23. UN Independent Expert on Sexual Orientation and Gender Identity, July 2018, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ A/73/152 [↑](#footnote-ref-23)
24. See 134 and 135 below [↑](#footnote-ref-24)
25. *Rees v UK*, Application no. [9532/81](https://hudoc.echr.coe.int/eng#{"appno":["9532/81"]})., ECHR 1986, paragraph 47: ‘The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.’ [↑](#footnote-ref-25)
26. Commissioner for Human Rights, 2009, ‘Human Rights and Gender Identity, Council of Europe, available at <https://rm.coe.int/16806da753>, Council of Europe, November 2015, ‘Protecting Human Rights of Transgender Persons: A short guide to legal recognition’, available at <https://rm.coe.int/1680492119>, Council of Europe, Parliamentary Resolution 2048, 2015, ‘Discrimination against transgender people in Europe.’ The Yogyakarta Principles, available at <http://yogyakartaprinciples.org/principles-en/> [↑](#footnote-ref-26)
27. See section 10 of this consultation response [↑](#footnote-ref-27)
28. Article 8, HRA/ECHR, Article 17 International Covenant on Civil and Political Rights (ICCPR), Article 16 Convention on the Rights of the Child (CRC), Article 22 Convention on the Rights of Persons with Disabilities (CRPD) [↑](#footnote-ref-28)
29. Article 3, HRA/ECHR, Convention Against Torture (CAT), Article 7 ICCPR, Article 37 CRC, Article 15 CRPD [↑](#footnote-ref-29)
30. Article 12 HRA/ECHR, Article 23 ICCPR, Article 10 ICESCR, Article 5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 16 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 23 CRPD [↑](#footnote-ref-30)
31. Article 10 HRA/ECHR, Article 19 ICCPR, Article 5 ICERD, Article 13 CRC, Article 21 CRPD [↑](#footnote-ref-31)
32. Article 12 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 ICERD, Articles 10, 12 and 14 CEDAW, Article 24 CRC, Article 25 CRPD [↑](#footnote-ref-32)
33. Article 14 HRA/ECHR, Article 2 ICCPR, ICERD, Article 2 ICESCR, CEDAW, Article 1 CAT, Article 2 CRC, Article 5 CRPD [↑](#footnote-ref-33)
34. Article 9 ICESCR, Article 5 ICERD, Articles 11 and 14 CEDAW, Article 26 CRC, Article 29 CRPD [↑](#footnote-ref-34)
35. Article 16 ICCPR, Article 5 ICERD, Article 15 CEDAW, Article 12 CRPD [↑](#footnote-ref-35)
36. Articles 6 and 7 ICESCR, Article 5 ICERD, Articles 11 and 14 CEDAW, Article 32 CRC, Article 27 CRPD [↑](#footnote-ref-36)
37. The United Nations provides some definitions of relevant terminology in ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law, Second Edition, HR/PUB/12/06/Rev.1 [↑](#footnote-ref-37)
38. Incorporated into UK law through the Human Rights Act 1998 [↑](#footnote-ref-38)
39. European Convention on Human Rights, Article 8, <https://www.echr.coe.int/Documents/Convention_ENG.pdf> [↑](#footnote-ref-39)
40. *Van Kück v Germany*, June 2003, (Application no. 35968/97), paragraph 75 [↑](#footnote-ref-40)
41. *Case of Christine Goodwin v UK*, July 2002, (Application no. 28957/95), paragraph 90 [↑](#footnote-ref-41)
42. *A.P. Garçon and Nicot v France*, April 2017 (Application nos. 79885/12, 52471/13, 52596/13), paragraph 94 [↑](#footnote-ref-42)
43. Supra 42, paras 94-95 [↑](#footnote-ref-43)
44. *P v S and Cornwall CC* [1996] IRLR 347 [↑](#footnote-ref-44)
45. Through the Sex Discrimination (Gender Reassignment) Regulations 1999 [↑](#footnote-ref-45)
46. Equality Act 2010, s7 [↑](#footnote-ref-46)
47. Supra 42, paragraph 99 [↑](#footnote-ref-47)
48. *Hämäläinen v Finland*, July 2014, (Application no. 37359/09) para 64 [↑](#footnote-ref-48)
49. European Convention on Human Rights, Article 8, <https://www.echr.coe.int/Documents/Convention_ENG.pdf> [↑](#footnote-ref-49)
50. Supra 42, paragraph 101 [↑](#footnote-ref-50)
51. Supra 48, paragraph 65, ‘The principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance.’ [↑](#footnote-ref-51)
52. Supra 42, paragraph 132 [↑](#footnote-ref-52)
53. Supra 41, paragraph 87 [↑](#footnote-ref-53)
54. Supra 42, paragraph 132 [↑](#footnote-ref-54)
55. Supra 41, paragraph 91 [↑](#footnote-ref-55)
56. *B v France*, March 1992, (Application no. 13343/87), Supra 41 [↑](#footnote-ref-56)
57. Supra 41 [↑](#footnote-ref-57)
58. Supra 42 [↑](#footnote-ref-58)
59. Supra 41 para 93 [↑](#footnote-ref-59)
60. Supra 41, para 91 [↑](#footnote-ref-60)
61. Supra 48, The Court held that ‘current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and that a fair balance has been struck between the competing interests in the present case.’ [↑](#footnote-ref-61)
62. See Mowbray, A, 2015, ‘Subsidiarity and the European Convention on Human Rights’ in *Human Rights Law Review*, 15, 313-341. He discusses subsidiarity as ‘a principle which intends to govern the distribution of powers between different authorities.’ According to Mowbray, in the Court’s jurisprudence, subsidiarity has been taken as the responsibility of governments to guarantee the rights under the Convention and to provide an effective remedy, and of victims to exhaust domestic remedy and finally of the Court itself not to substitute its own assessment of facts for those of domestic courts. The principle has developed over time. [↑](#footnote-ref-62)
63. Supra 41, para 85 [↑](#footnote-ref-63)
64. See Greer, S, 2015, ‘The exceptions to Articles 8 to 11 of the European Convention on Human Rights’ Council of Europe Publishing: Human Rights Files No 15, page 15 [↑](#footnote-ref-64)
65. Supra 48, para 67 [↑](#footnote-ref-65)
66. Supra 48, para 75 [↑](#footnote-ref-66)
67. *Tyrer v United Kingdom* (1978) 2 EHRR 1 [↑](#footnote-ref-67)
68. Supra 48, para 75 [↑](#footnote-ref-68)
69. Supra 41, para 82 [↑](#footnote-ref-69)
70. Supra 41, para 74 [↑](#footnote-ref-70)
71. European Convention on Human Rights, Article 14, <https://www.echr.coe.int/Documents/Convention_ENG.pdf> [↑](#footnote-ref-71)
72. Supra 41, 42, 48 [↑](#footnote-ref-72)
73. Ibid [↑](#footnote-ref-73)
74. Supra 2 [↑](#footnote-ref-74)
75. Council of Europe, Parliamentary Resolution 2048, 2015, ‘Discrimination against transgender people in Europe.’ The Parliamentary Assembly of the Council of Europe is made up of 324 delegates from each of the Council of Europe members states. Each state is represented by a delegation of between 2 and 18 representatives reflecting the party political balance of the national parliament, the number being dependent on population of the country. 68 representatives voted in favour, 23 against and 12 abstained. Both UK representatives voted in favour of the resolution. [↑](#footnote-ref-75)
76. Supra 2 [↑](#footnote-ref-76)
77. *De facto* discrimination is discrimination ‘in fact’ or ‘in practice’, which can arise from an action, omission, practice or policy which has the effect of treating a person or group of people unfairly. *De jure* discrimination is discrimination in law. [↑](#footnote-ref-77)
78. ICCPR, Articles 2 and 3, ICESCR Articles 2 (2) and 3, ICERD, Articles 1 and 2 ,CEDAW, Articles 1 and 2, CAT, Articles 1 and 2 CRC, Articles 2 and 4, CRPD, Articles 3b, 4 and 5, [↑](#footnote-ref-78)
79. The Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC), the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Committee on the Rights of the Child (CRC), the Committee Against Torture (CAT), the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD) [↑](#footnote-ref-79)
80. Nolan H, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2015, ‘United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics’ (Geneva: ILGA, September 2016). Concluding observations are a UN Committee’s assessment of a State’s compliance with a particular treaty and recommendations for better observance, see Scottish Human Rights Commission, 2018, Social Security (Scotland) Bill, Stage 2 Briefing, available at <http://www.scottishhumanrights.com/economic-social-cultural-rights/social-security/> [↑](#footnote-ref-80)
81. General Comments are the authoritative view of the Committee which oversees a particular human rights treaty as to the substance of the rights, see also 80. [↑](#footnote-ref-81)
82. Committee on Economic, Social and Cultural Rights, General Comment, 2nd July 2009, ‘Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights’, E/C.12/GC/20, para 32, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en> [↑](#footnote-ref-82)
83. See also for example, Committee on Economic, Social and Cultural Rights, General Comments No. 20 (E/C.12/ GC/20), 2009, para. 27, and No. 22 (E/C.12/GC/22), 2016, at paras. 9, 23; Toonen v. Australia, Human Rights Committee, Communication No. 499/1992 (CCPR/C/50/D/499/1992), para. 8.7; Committee on the Rights of the Child, General Comments No. 4 (CRC/GC/2003/4), 2003, para. 6, and No. 9 (CRC/C/ GC/9), 2007, para. 8; Committee against Torture, General Comments No. 2 (CAT/C/GC/2), 2008, para. 21, and No. 3 (CAT/C/GC/3), 2012, paras. 32, 39. [↑](#footnote-ref-83)
84. Committee on the Elimination of All Forms of Discrimination Against Women, 16th December 2010, ‘General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the

    Elimination of All Forms of Discrimination against Women,’ CEDAW/C/GC/28, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/28&Lang=en> [↑](#footnote-ref-84)
85. Ibid para 18 [↑](#footnote-ref-85)
86. Signatories include Manfred Nowak, formerly the UN Special Rapporteur on Torture and currently UN Independent Expert leading the United Nations Global Study on Children Deprived of Liberty, Professor Philip Alston, currently Special Rapporteur on Extreme Poverty and Human Rights, Mary Robinson, former United Nations High Commissioner for Human Rights, Judith Mesquita, Paul Hunt, former UN Special Rapporteur on the right to Health and Elizabeth Evatt, former Chair of the UN Committee on the Elimination of All Forms of Discrimination Against Women and Professor Michael o’ Flaherty, current Director of the EU Fundamental Rights Agency [↑](#footnote-ref-86)
87. The Yogyakarta Principles, available at <http://yogyakartaprinciples.org/principles-en/> [↑](#footnote-ref-87)
88. The Yogyakarta Principles Plus 10, available at <http://yogyakartaprinciples.org/introduction-yp10/> [↑](#footnote-ref-88)
89. Including the right to state protection, the right to legal recognition, the right to bodily and mental integrity, the right to be free from criminalisation and sanction of sexual orientation, the right to be free from poverty, the right to sanitation, information and communication, the right to truth in connection with redress for human rights abuses and the right to the practice cultural diversity in relation to sexual orientation and gender identity. [↑](#footnote-ref-89)
90. O’Flaherty, M and Fisher, J, 2008, ‘Sexual Orientation, Gender Identity and International Human Rights Law:

    Contextualising the Yogyakarta Principles’ in *Human Rights Law Review* 8:2 [↑](#footnote-ref-90)
91. O'Flaherty, M, 2015, ‘The Yogyakarta Principles at Ten’, *Nordic Journal of Human Rights*, 33:4, 280-298 [↑](#footnote-ref-91)
92. For example, Netherlands to Canada in Cycle 1 available at <https://www.upr-info.org/sites/default/files/document/canada/session_4_-_february_2009/ahrc1117cane.pdf>, Slovenia to Peru in Cycle 2 available at <https://www.upr-info.org/sites/default/files/document/peru/session_14_-_october_2012/ahrc2215perue.pdf>. See UPR Info Search Database for further information at https://www.upr-info.org/database/ [↑](#footnote-ref-92)
93. See for example Report of the Special Rapporteur on the Right of Everyone the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 2010, A/HRC/14/20 5; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 2009, A/64/21 [↑](#footnote-ref-93)
94. UN High Commissioner for Refugees, 2012, ‘Guidelines on International Protection no. 9:

    Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ , available at <https://www.unhcr.org/509136ca9.pdf> [↑](#footnote-ref-94)
95. Supra 2 [↑](#footnote-ref-95)
96. Supra 48, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para 16 [↑](#footnote-ref-96)
97. Opinion of Advocate General Sharpston, delivered on 11 July 2013 (1) in Joined Cases C‑199/12 to C‑201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139426&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2045098> [↑](#footnote-ref-97)
98. Inter American Court of Human Rights, 24th November 2017, Opinión Consultiva OC-24/17 Solicitada Por La República De Costa Rica, Identidad De Género, E Igualdad Y No Discriminación A Parejas Del Mismo Sexo Obligaciones Estatales En Relación Con El Cambio De Nombre, La Identidad De Género, Y Los Derechos Derivados De Un Vínculo Entre Parejas Del Mismo Sexo (Interpretación Y Alcance De Los Artículos 1.1, 3, 7, 11.2, 13, 17, 18 Y 24, En Relación Con El Artículo 1 De La Convención Americana Sobre Derechos Humanos)

    <http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf>, see particularly paragraphs 112, 129, 155 and 192 [↑](#footnote-ref-98)
99. Supra 41, para 93 [↑](#footnote-ref-99)
100. Supra 42 [↑](#footnote-ref-100)
101. The Parliamentary Assembly of the Council of Europe is made up of 324 delegates from each of the Council of Europe members states. Each state is represented by a delegation of between 2 and 18 representatives reflecting the party political balance of the national parliament, the number being dependent on population of the country. [↑](#footnote-ref-101)
102. Scottish Government, December 2019, ‘Gender Recognition Reform (Scotland) Bill’: A consultation by the Scottish Government, para 3.26 [↑](#footnote-ref-102)
103. Ibid, para 3.30 [↑](#footnote-ref-103)
104. Supra 102 para 3.23-3.33, see also Scottish Government, 2018, ‘Review of the Gender Recognition Act 2004: Analysis of responses to the public consultation’ [↑](#footnote-ref-104)
105. Council of Europe, November 2015, ‘Protecting Human Rights of Transgender Persons: A short guide to legal recognition,’ page 19 [↑](#footnote-ref-105)
106. *Schlumpf v Switzerland*, 2009, Application Number 29002/06 [↑](#footnote-ref-106)
107. Supra 105, page 20 [↑](#footnote-ref-107)
108. *Hämäläinen v Finland*, July 2014, (Application no. 37359/09) para 62 [↑](#footnote-ref-108)
109. Meeting of the Scottish Parliament, Session 5, Thursday 20th June 2019, Cols 90-107, available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&mode=pdf> [↑](#footnote-ref-109)
110. Supra 41, paragraph 81 [↑](#footnote-ref-110)
111. See supra 41 and 42 [↑](#footnote-ref-111)
112. 2018, ‘Review of the Gender Recognition Act 2015: Report to the Minister for Employment Affairs and Social Protection’ [↑](#footnote-ref-112)
113. Supra 105, page 20 [↑](#footnote-ref-113)
114. Fundamental Rights Agency, 2014 EU LGBT survey European Union lesbian, gay, bisexual and transgender survey: Main results <https://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf> [↑](#footnote-ref-114)
115. *Rees v UK*, Application no. [9532/81](https://hudoc.echr.coe.int/eng#{"appno":["9532/81"]})., ECHR 1986, paragraph 47 [↑](#footnote-ref-115)
116. *Rees v UK*, Application no. [9532/81](https://hudoc.echr.coe.int/eng#{"appno":["9532/81"]}), ECHR 1986, paragraph 47 [↑](#footnote-ref-116)
117. Scottish Parliament, Session 5: Official Report, 20th November 2019, Col 1-2, available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=pdf> [↑](#footnote-ref-117)
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120. Committee on the Rights of the Child, ‘General comment No. 20 (2016) on the implementation of the rights of the child during adolescence,’ CRC/C/GC/20, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f20&Lang=en> [↑](#footnote-ref-120)
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123. Fundamental Rights Agency, 2017, ‘Mapping minimum age requirements concerning the rights of the child in the EU: Background Information, available at <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/background-information> [↑](#footnote-ref-123)
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126. Supra 120 [↑](#footnote-ref-126)
127. Age of Legal Capacity (Scotland) Act 1991, s1 [↑](#footnote-ref-127)
128. Ibid s9 [↑](#footnote-ref-128)
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130. Supra 127, s2(4) [↑](#footnote-ref-130)
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