

Submission to Equalities, Human Rights and Civil Justice Committee: Gender Recognition Reform (Scotland) Bill

May 2022

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“All persons have some form of gender identity. Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other gender expressions, including dress, speech and mannerisms.”

United Nations, Independent Expert on Sexual Orientation and Gender Identity, 2018¹

Introduction

The Commission submitted a detailed response to the Scottish Government’s consultation on GRA reform in 2020. Our analysis and position have not changed. This submission should be read alongside [our previous submission](#), which contains more detail on a number of points. In this submission we supplement what we said in 2020, noting relevant developments in case law and international best practice.

It remains our position that we welcome proposals to shorten the process for obtaining legal recognition, remove the requirement for a diagnosis of gender dysphoria and abolish the Gender Recognition Panel. These three steps will move legal gender recognition in Scotland closer to the standards set out in international and regional human rights law and guidance on the realisation of human rights in this area. The Commission therefore welcomes the introduction of the Gender Recognition Reform (Scotland) Bill to the Scottish Parliament.

The Commission set out in detail the human rights relevant to gender recognition in [our 2020 submission](#). **Fundamentally, obtaining legal recognition of the “deeply felt internal and individual experience of gender”² is a matter of human dignity, freedom and personal autonomy.** Legal recognition of gender identity affects key elements of personal life, including marital status and death. In turn, to be excluded from such legal recognition has a severe impact on the personal lives of

trans people³. The Commission's submission is limited to detailed consideration of the law, guidance and best practice, rather than being informed through a participatory process. In the Commission's view it will be essential for the Committee to hear directly from trans people and their representative groups, what it means to them to secure legal recognition of their personal identity.

The Commission's statutory duty is "to promote human rights and, in particular, to encourage best practice in relation to human rights."⁴ For the reasons set out in more detail in [our 2020 submission](#), it is the Commission's analysis that international standards and best practice require that the Gender Recognition Act 2004 be reformed to remove unnecessary barriers to the enjoyment of human rights for transgender people.

As Scotland's National Human Rights Institution (NHRI), the Commission also has responsibilities under the United Nations 1993 Paris Principles relating to the Status of National Institutions (the Paris Principles).⁵ NHRIs act as a bridge between the international human rights law system and the national system. A core function of an NHRI at the national level is advising on compliance with international and regional human rights standards and best practice. The Paris Principles also encourage NHRIs to operate in a way that reflects the need to protect the rights of groups particularly at risk.⁶ Trans people are one such group.⁷

The rights of trans persons

The Bill comes at a time when the UK has been criticised by the Council of Europe⁸ for "extensive and often virulent attacks on the rights of LGBTI people that have been occurring for several years", citing anti-trans rhetoric which further penalises and harms already marginalised trans people and communities, and a rise in transphobic hate crime.⁹

The Council of Europe has urged States to: "act urgently, through legislation, policy, awareness-raising and other measures, in order to prevent further backsliding, promote the full equality of LGBTI people, and foster full respect for their rights at home and abroad," and to "tackle

hatred and discrimination against LGBTI people with renewed energy and urgency.”¹⁰

The United Nations (UN) Independent Expert on Sexual Orientation and Gender Identity (UNIE) was established by the UN Human Rights Council in 2016, in recognition of the violence and discrimination faced by LGBT+ people in all regions of the world.¹¹ The UNIE has made a similar call for urgent state action.¹² Reporting to the UN Human Rights Council in 2021, the UNIE highlighted:

“a steep rise in ultraconservative political leaders and religious groups using their platforms to promote bigotry, dehumanize persons on the basis of sexual orientation, gender identity, and gender expression, and foster stigma and intolerance among their constituencies”

and

“the emergence of demands to separate human rights-based approaches on sexual orientation from those on gender identity, ultimately seeking to exclude trans and gender-diverse persons from the protection of international human rights norms and standards, and to challenge legal recognition of gender identity based on self-identification.”¹³

It is therefore positive that a Bill has been introduced to the Scottish Parliament which, if passed, will represent a significant step forward in removing barriers to the exercise of human rights for trans people in Scotland.

The Parliamentary process should enable full and proper scrutiny of the Bill, ensuring any concerns are aired and given due consideration. A number of concerns have been raised, during the previous consultations and since, and further detailed consideration will no doubt be given to these concerns during the Bill process. The Commission welcomes the Scottish Parliament’s commitment to respectful discussion throughout the process. Hearing the lived experience of those affected by gender recognition processes will be crucial to informed scrutiny of the human rights impacts of the Bill.

Interdependence of human rights

Human rights are universal, indivisible, interdependent and interrelated, This is reflected in the approach taken internationally and regionally, where it is made clear that the rights of women and LGBT+ people go hand in hand.

Sex and gender are both protected categories under international and regional human rights law. This has been recognised, for example, by the UN Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴ and is reflected in the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).¹⁵

In 2021 the UNIE reported on extensive research into gender identity and international human rights law on behalf of the UN Human Rights Council.¹⁶ The research included consideration of over 500 submissions, in response to a call for evidence, covering 88 UN Member States across all regions of the world. The UNIE concluded that:

“The work to address and ultimately eradicate violence and discrimination based on sexual orientation and gender identity is not in opposition to the human rights of women; on the contrary, these areas of concern are largely overlapping and conceptually, socioeconomically, politically and legally reinforce each other.”¹⁷

The UNIE drew on evidence submitted from various countries in setting out in some detail the ways in which rigid gender norms harm women and LGBTI+ persons, and the importance of applying an intersectional analysis to discrimination, including in relation to addressing violence:

“For the very few, gendered identities will contribute to the creation of experiences of privilege; for many, they will lead to experiences of discrimination and violence. That is often the case for women and for persons whose gender identity and/or expression does not fit squarely within the preconceptions attached to the sex assigned at birth; for these reasons, gender-based analysis has been an

indispensable tool in the development of doctrine related to cases of violence and discrimination.”¹⁸

While human rights are interdependent and generally mutually reinforcing, there are instances where tension can arise in terms of steps taken to better fulfil different rights. Where this arises, human rights law provides a mechanism through which to resolve that in a balanced way. The ‘fair balance’ test is one mechanism employed by the European Court of Human Rights where such situations arise. If the manner of the exercise or fulfilment of one or more persons’ rights creates a real and concrete prospect of harm to others, a balancing exercise will be applied to reach a fair outcome. For a state to lawfully restrict rights on this basis it will have to demonstrate a real and concrete prospect of harm to others, or to the general interest of the community as a whole. It will also have to show that the restrictions constitute a proportionate interference, restricting rights no more than is necessary to address that real risk of harm to others. If the general interest or the rights of others are not shown to be at real and concrete risk of detriment, the balance tilts towards protecting the rights of the individual or group in question.¹⁹

A similar balancing exercise is applied in UK equality law. Regulation of equality law lies within the mandate of our sister NHRI, the Equality and Human Rights Commission and we will not comment in detail on equality law. However, existing legal protections are a relevant consideration in applying the fair balance test under human rights law, and so it is important to note that UK equality law allows a person’s trans status to be taken into account, whether they have a GRC or not, where there is an objective justification for doing so and where that is a proportionate means of achieving the aim.²⁰ That position will not be altered by this Bill. For example, in relation to concerns that the Bill will lead to the removal of single-sex services or women-only spaces, in our view, obtaining a GRC should not have any effect on these protected spaces, as the exceptions provided by the Equality Act 2010 will continue to apply. We set out more detail in the table at p.19 below.

Update to previous submission

Legal standards and best practice guidance

In our [2020 submission](#) the Commission set out the main human rights engaged by the process for obtaining legal gender recognition - civil, political, economic, social and cultural. We set out the relevant rights under international human rights law and the European Convention on Human Rights (ECHR), and highlighted best practice guidance. Our conclusion then, and now, is that international standards and guidance require that the Gender Recognition Act 2004 be reformed to remove unnecessary barriers to the enjoyment of human rights for transgender people.

European Convention on Human Rights

In terms of the ECHR, gender identity and gender expression are primarily protected under **the right to respect for private and family life** (Article 8). The European Court of Human Rights (the ECtHR) 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."²¹

The ECtHR has found that gender identity and personal development are "a fundamental aspect of [the] right to respect for private life."²² These protections apply whether or not someone has chosen to undergo medical and/or surgical treatment in relation to their gender identity²³. The ECtHR has viewed the issue of State processes for gender recognition through the lens of a State's 'positive obligations' towards human rights i.e. necessary actions a State should take to enable enjoyment of the rights in question.²⁴ There has been no significant shift in the ECtHR's analysis in this area since our 2020 submission.

In a series of cases²⁵ dealing with gender recognition processes since *AP Garçon and Nicot v France*²⁶, the ECtHR has referred to international guidance requiring procedures that allow persons to have their name and gender changed on official documents to be **quick, transparent and accessible**. However, it has continued to allow States wide

discretion in determining the appropriateness of imposing requirements such as a medical diagnosis in gender recognition processes, where there remains a lack of clear consensus across European States.²⁷ While the margin of appreciation, or discretion afforded to States in determining how to ensure that rights are respected, is generally more narrow in areas that concern personal identity, it is also wider where there is no consensus.

It would be possible to take a narrow view, aimed at minimum human rights compliance with the existing case law of the ECtHR, culminating in the 2017 case of *AP Garçon and Nicot*. In the ECtHR's judgment at that time, a requirement for a medical diagnosis did not fall below the permitted standard of human rights protection. The ECtHR acknowledged that there were differing views on this matter, including the views of the Commissioner for Human Rights of the Council of Europe, who has stressed that the requirement to obtain a psychiatric diagnosis may hinder the exercise of individuals' fundamental rights. It also noted that some European States had chosen to abandon diagnostic criteria and instead employ a system based on self-identification. However, at that time the majority of States retained this requirement and the consensus was not sufficiently clear to remove States' discretion to impose the requirement. On this view, it may remain permissible under the ECHR for States to employ diagnostic criteria as part of their gender recognition process and the Gender Recognition Act 2004 may, in that respect, remain compliant with the minimum standard set by the ECtHR.

However, as outlined in our 2020 submission, the ECHR provides a floor, not a ceiling, of human rights protection. The ECtHR takes care to leave States to determine the precise requirements which suit their social, political and legal context; it confines itself to determining the limits required to protect human rights. It is within State legislatures' discretion to take an approach beyond that goes beyond minimum compliance with the ECHR, taking into account international human rights standards and best practice. In line with our statutory duty to encourage best practice, and with the Paris Principle requirements, the

Commission supports the Bill going beyond minimum compliance with the ECHR.

In addition, it can reasonably be anticipated that the margin of appreciation afforded by the ECtHR in this area may shift, as increasing numbers of States move away from diagnostic models.²⁸ We note that there has been a shift in domestic case law in terms of the compatibility of elements of the Gender Recognition Act 2004 with the ECHR. For example, a recent decision the High Court in Northern Ireland found that the requirement for a diagnosis of gender dysphoria breached the right to private and family life.

Developments on the requirement of diagnosis of gender dysphoria

The issue of medical diagnosis was the subject of a Judicial Review in Northern Ireland in 2021 which, while not binding in the Scottish context, provides a recent analysis of the 2004 Act's compatibility with the ECHR. In **JR111's Application for Judicial Review**²⁹, the High Court found that the requirement under the Gender Recognition Act 2004 that an applicant for a gender recognition certificate prove they were suffering from, or had had, a mental "disorder" (gender dysphoria), breached the applicant's Article 8 right to private and family life. The requirement to be diagnosed with a "disorder" was found to fail to strike a fair balance between the interests of trans persons and those of the community generally. The requirement was found to be unnecessary and unjustified. An important factor in reaching this decision was recognition that there have been developments since *AP Garçon and Nicot*, in particular the adoption of new standards by the World Health Organisation in the ICD-11 and by the American Psychiatric Association in the DSM-5, which no longer treat the relevant diagnoses as mental disorders³⁰. The Northern Ireland High Court considered that diagnosis of a "disorder" "is now an unnecessary affront to the dignity of a person applying for gender recognition through the legal process set out for that purpose by Parliament."³¹

This decision supports the need for reform of the 2004 Act, at least on the question of mental disorder.³² The High Court confined itself to

questions of lawfulness and recognised the primary role of the legislature in determining the desirability of other requirements, such as a more general medical diagnosis, which, following ECtHR case law, it found to be within the permitted range of requirements a State could impose.

In addition, the UK Government Select Committee on Women and Equalities, in its recent inquiry on Reform of the Gender Recognition Act, also recommended de-medicalisation of the process and a removal of the requirement for diagnosis of gender dysphoria.³³

International guidance and best practice

As outlined in our introduction, we consider that promoting human rights means reforming the Gender Recognition Act 2004 in line with international guidance and best practice.

A range of international standards outline best practice and provide balanced guidance on this matter:

- UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: in his Law of Inclusion Report, presented in 2021, recommends that States:

“... provide access to legal recognition of gender identity in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression, and adopt all necessary measures so that such recognition:

(a) Is based on self-determination by the applicant.

(b) Is a simple administrative process.

(c) Is not connected with abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce.

(d) Includes the acknowledgement and recognition of non-binary identities in their full diversity and specificity.

(e) Ensures that minors have access to recognition of their gender identity.”³⁴

- Council of Europe, Parliamentary Resolution 2048, 2015, ‘Discrimination against transgender people in Europe’³⁵: States should adopt gender recognition processes that are ‘quick, transparent and accessible’ and ‘based on self-determination.’
- Yogyakarta Principle 3³⁶ on the right to recognition before the law: “Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.”
- Yogyakarta+10 Principles: Principle 31 on the right to legal recognition:
 - “Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person”; and
 - “Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender.”
- UN Special Rapporteur for Health: “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.”³⁷

Cumulatively, these standards support the 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.

The process proposed

The Commission reiterates here its analysis of specific aspects of the proposed process, detailed reasoning for which is to be found in our [2020 submission](#).

Period lived in the acquired gender (3 months plus 3 months reflection period)

Shortening the timescales associated with obtaining a Gender Recognition Certificate is in line with regional and international guiding standards.

- The Commission welcomes the significant reduction in the period required, which advances the Council of Europe’s requirement of having ‘quick’ processes. The Commission is of the view, on the basis of the available case law brought before ECtHR, that the proposed 6 month period is likely to fall within the margin of appreciation available to the Scottish Parliament in legislating in compliance with the ECHR. As we said in our 2020 submission, 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”, 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.³⁸
- 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. It will be

important for the Committee to hear evidence from trans people regarding any difficulties they may experience as a result of this requirement. It would also be appropriate to consider how this requirement is likely to reinforce socially constructed gender norms, with particular reference to general comments and recommendations from the Committee on the Elimination of Discrimination against Women, and other UN committees, regarding the harm caused by gender roles.³⁹ Both the Council of Europe and the UN Independent Expert on Sexual Orientation and Gender Identity have noted the interrelationship between the rights of women and LGBT+ people and the importance of effectively tackling socially constructed gender norms in order to advance their rights.⁴⁰

- The Commission also recommends that consideration should be given to building some flexibility into the timescales in the event of exceptional circumstances, such as ill-health.

Application for revocation of a certificate

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. It may be necessary to specify that applications must be made in good faith and subject to a test of reasonableness, to prevent intrusive or vexatious applications. Similarly, the rights of an applicant to challenge or contest an application for revocation should be clearly articulated.

Section 11 removal of power of the Registrar to charge a fee

The Commission supports the removal of the power of the Registrar General to charge a fee in respect of applications. This improves the accessibility of the system in line with Council of Europe and international principles.

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 welcomes the change from requiring a person to state their intention to live in the acquired gender “until death” to “permanently”, also recommended by the UK Parliament Select Committee on Women and Equalities.⁴¹ For the avoidance of doubt, guidance should confirm that someone who intends to live permanently in their acquired gender identity when they make the declaration will not be found to have committed an offence simply by virtue of having later decided to detransition.

The rights of non-binary persons

The Commission notes that the human rights issues which have been set out in our analysis in relation to legal gender recognition of transgender people are also relevant to non-binary people.⁴² 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.’⁴³

The Commission looks forward to the outcome of the Non-Binary Working Group on non-binary issues and its recommendations on gender recognition processes.

Review of the operation of the legislation

The Commission welcomes s.15 of the Bill, which introduces a requirement for the Registrar General to report annually on the number of applications for gender recognition certificates (of all types) made and granted.

The Commission previously made a strong recommendation 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 consider issues such as whether the requirement for the period lived in the acquired gender presents a disproportionate barrier to attaining legal gender recognition. This is in line with the recommendation of the ECtHR to keep a watching brief on this issue.⁴⁴

We consider that commitment to a review remains necessary, in tandem with annual reporting by the Registrar.

On children and young people

Our previous submission outlined domestic and international legal standards in relation to children's rights. They highlight:

- the need to carry out a careful weighing of the rights of children and young people to identity, autonomy and participation, with the need to provide protections;
- 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 rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy;
- 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, in terms of which a person of or over the age of 16 years has legal capacity to enter into any transaction.

We concluded that reducing the minimum age at which a person can apply for legal gender recognition from 18 to 16, is in line with the Age of Legal Capacity (Scotland) Act 1991 and the approach of the Convention on the Rights of the Child. We also suggested that 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 Children and Young Person's Commissioner has detailed its analysis of the considerations to be taken into account in assessing capacity and the safeguards required.

Fair balance test

As explained above, while human rights are interdependent and generally mutually reinforcing, there are instances where tension can arise in terms of steps taken to better fulfil different rights. Where this arises, human rights law provides a mechanism through which to resolve that in a balanced way. The 'fair balance' test, explained earlier, means States must demonstrate that there is a real and concrete prospect of harm to others, or to the general interest of the community as a whole, in order to justify interferences with the Article 8 rights of transgender people. If it is not shown that proposals that advance the fulfilment of the rights of trans people would create a real and concrete risk of detriment to others, to the community in general, the fair balance will tilt towards the better fulfilment of those rights.⁴⁵

If it were to be established that reformed gender recognition processes presented a real or concrete prospect of substantial detriment to others the 'fair balance' would tilt⁴⁶ and it would then be necessary to consider the range of options for addressing the risk. The least restrictive option in terms of the right to private life of trans people would have to be adopted. In considering this, it would be necessary to take into account existing laws and policy that already provide a mechanism for ensuring protection in relation to real or concrete risks.

National law and policy

Regulation of equality law lies within the mandate of our sister NHRI, the Equality and Human Rights Commission and we will not comment in detail on equality law. However, existing legal protections are a relevant consideration in applying the fair balance test under human rights law. The Equality Act 2010 (EA) allows a person's trans status to be taken into account, whether they have a GRC or not, where there is an objective justification for doing so and where that is a proportionate means of achieving the aim.⁴⁷ This exception to the general rule

precluding discrimination against trans people is available in relation to: accessing single-sex spaces; information held by employers (which may be relevant to the provision of intimate medical care); and participation in sport. These exceptions are available in appropriate circumstances whether or not someone has a GRC. The proposed reforms would not alter the EA:

Issue	Provision	Impact of GRC
Provision of women-only spaces	Single-sex and separate-sex services exception: Schedule 3, paragraphs 26 – 28 of the Equality Act 2010	None
Jobs where women's rights require services by someone of their chosen sex e.g. intimate medical care	Genuine occupational requirement exception: Schedule 9 Equality Act 2010	None
Sport	Section 195 Equality Act 2010 permits restrictions on the whole category of those with the protected characteristic of gender reassignment in order to secure fair competition or the safety of competitors	None
Prison accommodation	SPS policy requires case by case risk assessment, regardless of whether a	None

	gender recognition certificate is held	
Criminal justice – preventing and investigating crimes	s.22(4)(f) Gender Recognition Act 2004 stipulates that information can be disclosed of a person’s former gender for the purpose of preventing or investigating crimes	Holding a GRC does not prevent disclosure of information
Criminal justice – gender specific offences	s.20 Gender recognition Act 2004: a person can still be charged with a gender specific offence in relation to their original gender	GRC does not prevent relevant criminal charge
Data	Guidance by the Chief Statistician on ‘Sex, gender identity, trans status - data collection and publication’	Details where distinctions between biological and legal sex can be made

The EA exceptions broadly mirror the balancing mechanism in human rights law, in terms of which limitations may lawfully be applied to certain rights, including the right to private and family life, provided the restriction is shown to be necessary to meet a pressing social need, and proportionate in the particular circumstances.

International research

In 2021 the UNIE on Sexual Orientation and Gender Identity reported on extensive research into gender identity and international human rights

law on behalf of the UN Human Rights Council.⁴⁸ The research included consideration of over 500 submissions, in response to a call for evidence, covering 88 UN Member States across all regions of the world. The UNIE concluded that:

“the claim that legal recognition of trans women per se threatens safe spaces ... appears to draw on stigma about predatory determinism” and recommended “a risk management approach that should include all objectively identified risks for safe spaces for all women (including lesbian, bisexual and trans women), which cannot promote, replicate or condone stigma or stereotypes.”

“Some submissions presented the claim that segregated spaces, particularly prisons, changing rooms and bathrooms, are threatened by the granting of access to trans women. The Independent Expert notes that submissions repeated (often verbatim) the same set of seven alleged incidents of trans women (or persons purporting to be trans women) causing harm to cisgender women in safe spaces. Even among the small set of cited cases, several of the incidents recounted in these submissions are factually contested.”⁴⁹

In relation to claims that trans inclusion in sport would have an adverse impact on women and girls in sport, UNIE pointed to decisions taken by the International Olympic Committee and World Athletics which ensure an inclusive approach with specific measures they have concluded are necessary to ensure fairness.

Recent Court of Session cases

We understand that concerns have been raised about the use of the terms “sex” and “gender” in law and whether there may be confusion in that area. The legislative process will provide a further opportunity for any such analysis to be shared and the Commission will review and continue to take into account any updated analysis.

Two recent cases in the Court of Session have considered the use of the terms “sex”, in the context of census questions, and “woman” in the context of legislation for gender representation on public boards.⁵⁰ We consider that these cases support our general position that, in areas where a person’s status as a trans individual is relevant, for example to protect the rights of others, the law provides a range of mechanisms of taking account of that fact. However, where it is not necessary to do so, as in the example of answering a census question, the law is also capable of accommodating this. We believe that any uncertainties in this area can be addressed by the proper implementation of appropriate guidance and policies. We do not consider that any uncertainty is sufficient to undermine the human rights case for reform of the gender recognition process.

Both Court of Session cases considered the application of the terms “sex” and “woman” in specific contexts. Both were very clear that they did not address the impact of the GRA. Neither provides a basis for analysing concerns about the impact of GRA reform. Rather, we consider that the effect of these cases is to demonstrate the nuance of which the law is capable – allowing for trans status to remain legally relevant where necessary, even once a GRC has been granted. For example, in the case of gender representation on public boards, the Court found that it was necessary to be able to define the protected characteristics of sex and gender reassignment separately, regardless of whether a GRC is held, in order to define the parameters of legally permissible positive action.

As the Inner House of the Court of Session said in the census case “There are other circumstances [besides marriage] in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term “sex”... Examples, include *R v Tan* [1983] QB 1053, where being a male was an essential pre-requisite for the commission of a particular criminal offence. Some of these limitations have been carried over to apply even where a person has successfully obtained a GRC under the GRA.” (para 21).

Conclusion

The Commission welcomes the introduction of the Gender Recognition Reform (Scotland) Bill to Parliament, after a lengthy period of consultation and debate. Legal gender recognition processes are central to the enjoyment of human rights for transgender people. We consider that an analysis of the human rights both of transgender people and the wider community support reform of the Gender Recognition Act. Careful assessment and balancing of the human rights implications demonstrates, in our view, that unnecessary barriers to legal recognition can be removed while upholding the rights of all.

The Commission welcomed the respectful tone of the debate in the Scottish Parliament on introduction of the Bill and looks forward to a similar approach as the Bill makes its way through the legislative process. We trust that views will be shared freely in an atmosphere of tolerance, dignity and respect consistent with human right principles throughout the Bill's scrutiny.

¹ https://www.ohchr.org/sites/default/files/GenderIdentityReport_SOI.pdf

² As above.

³ 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. Please see our Note on language and terminology in our 2020 submission at page 13. The term “trans” is also well-established in the United Nations and in regional human rights systems to refer to persons who identify with a different gender to the one assigned to them at birth. As noted in the Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN General Assembly document A/73/152, at para 5.

⁴ s.2(1) Scottish Commission for Human Rights Act 2006

⁵ UN General Assembly Resolution 48/134 ‘Principles relating to the Status of National Institutions’ (the Paris Principles) 20 December 1993: <https://ganhri.org/paris-principles/>

⁶ [file:///C:/Users/u322024/Downloads/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf%20\(7\).pdf](file:///C:/Users/u322024/Downloads/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf%20(7).pdf)

⁷ See note on language and terminology in our 2020 submission, at page 13. The term “trans” is also well-established in the United Nations and in regional human rights systems to refer to persons who identify with a different gender to the one assigned to them at birth. As noted in Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN General Assembly document A/73/152, at para 5.

⁸ An organisation set up to promote human rights in Europe. <https://www.coe.int/en/web/about-us/structure>

⁹ ‘Combating rising hate against LGBTI people in Europe’, Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe, 27 September 2021, at para 52, available at [*20210921-RisingHateLGBTI-EN.pdf \(coe.int\)](https://www.coe.int/t/DocLets/Documents/20210921-RisingHateLGBTI-EN.pdf) See also page 14, para 52.

¹⁰ See note on language and terminology in our 2020 submission, at page 13.

¹¹ <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity>

¹² “The mandate holder is convinced that it is the duty of the State to respect and protect every human being’s freedom to determine the confines of their existence. Gender identity and gender expression are an essential part of that determination, and backlash arising from the recognition of gender in international law is a significant ongoing challenge likely to lead to significant harms unless it is met with decisive State action.” Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, at para 78.

¹³ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, at paras 7 and 8.

¹⁴ See e.g. CEDAW Committee’s discussion of discrimination and gender based violence affecting women differently depending on other factors affecting their lives, including if they are trans:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/231/54/PDF/N1723154.pdf?OpenElement>
¹⁵ [CETS 210 - Council of Europe Convention on preventing and combating violence against women and domestic violence \(coe.int\)](https://www.coe.int/t/DocLets/Documents/20100921-CETS210-CouncilofEuropeConventiononpreventingandcombatingviolenceagainstwomenanddomesticviolence(coe.int).pdf)

¹⁶ The two reports from the UNIE on Sexual Orientation and Gender Identity, the first on The Law of Inclusion, June 2021 <https://daccess-ods.un.org/tmp/3853449.82147217.html> and the second on Practices of Exclusion, July 2021: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/192/14/PDF/N2119214.pdf?OpenElement>

¹⁷ Reports from the UNIE on Sexual Orientation and Gender Identity, The Law of Inclusion, A/HRC/47/27, June 2021, at p18 para 84 <https://daccess-ods.un.org/tmp/3853449.82147217.html>

¹⁸ Reports from the UNIE on Sexual Orientation and Gender Identity, The Law of Inclusion, A/HRC/47/27, June 2021, at p8 para 29 <https://daccess-ods.un.org/tmp/3853449.82147217.html>

¹⁹ For more detail on the ‘fair balance’ test, please see para 3.4 of our 2020 submission

²⁰ See Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>, and EHRC Statutory Code of Practice: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

²¹ *Van Kuck v Germany*, June 2003, Application No 35968/97, para 56

²² *Van Kück v Germany*, June 2003, (Application no. 35968/97), paragraph 75

²³ *A.P. Garçon and Nicot v France*, April 2017 (Application nos. 79885/12, 52471/13, 52596/13), paragraph 94-95

²⁴ *Hämäläinen v Finland*, July 2014, (Application no. 37359/09) and *AP Garçon and Nicot* *ibid*

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- ²⁵ *S.V. v. Italy*, 2018, (Application no. [55216/08](#)); *Y.T. v. Bulgaria*, 2020, (Application no. [41701/16](#)); *X and Y v. Romania*, 2021, (Applications no [2145/16](#) and [20607/16](#))
- ²⁶ April 2017 (Application nos. 79885/12, 52471/13, 52596/13)
- ²⁷ Not substantively considered since *AP Garçon and Nicot*
- ²⁸ We understand the table at Annex E of the Scottish Government's 2020 consultation paper to be an accurate statement of the current position globally. See also section 6.3 of the European Commission's report 'Legal gender recognition in the EU' (2020) for a full overview of gender recognition requirements across the EU [legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf \(europa.eu\)](#)
- ²⁹ [2021] NIQB 48
- ³⁰ *JR111's Application for Judicial Review* at paras 140-141
- ³¹ *JR111's Application for Judicial Review* at para 140
- ³² The UK Government has committed to "take steps to amend the specific reference to gender dysphoria as a "disorder" in the GRA via a remedial order in due course." [Reform of the Gender Recognition Act: Government response to the Committee's Report \(parliament.uk\)](#)
- ³³ [Reform of the Gender Recognition Act - Committees - UK Parliament](#)
- ³⁴ Paragraph 91 <https://undocs.org/A/HRC/47/27>
- ³⁵ Outlined in more detail in our 2020 submission
- ³⁶ The status of the Yogyakarta Principles is outlined in more detail in our 2020 submission
- ³⁷ UN Special Rapporteur on the Right to Health, 2017, A/HRC/35/21, para. 48
- ³⁸ For further discussion, see section 6.2 of our 2020 submission
- ³⁹ E.g. 2014 Joint General Recommendation No 31 from CEDAW and CRC Committees: <https://cypcs.org.uk/wpcypcs/wp-content/uploads/2021/02/General-Comment-18.pdf>
- ⁴⁰ 'Combating rising hate against LGBTI people in Europe', Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe, 27 September 2021, at page 7, para 11 & 12, available at [*20210921-RisingHateLGBTI-EN.pdf \(coe.int\)](#), and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, including at para 20, and [Summary-Bodily-Autonomy-Integrity.pdf \(ohchr.org\)](#).
- ⁴¹ [Reform of the Gender Recognition Act - Committees - UK Parliament](#) at para 110
- ⁴² See also *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department*, [2018] EWHC 1530 Admin, para 74 and 75 and *Elan-Cane, R (on the application of) v The Secretary of State for the Home Department & Anor* [2020] EWCA Civ 363
- ⁴³ *Supra* 41 para 90
- ⁴⁴ *Rees v UK*, Application no. [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.'
- ⁴⁵ For more detail on the 'fair balance' test, please see para 3.4 of our 2020 submission
- ⁴⁶ *Case of Christine Goodwin v UK, July 2002*, (Application no. 28957/95)
- ⁴⁷ See Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>, and EHRC Statutory Code of Practice: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>
- ⁴⁸ The two reports from the UNIE on Sexual Orientation and Gender Identity, the first on The Law of Inclusion, June 2021 <https://daccess-ods.un.org/tmp/3853449.82147217.html> and the second on Practices of Exclusion, July 2021: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/192/14/PDF/N2119214.pdf?OpenElement>
- ⁴⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, at par 63.
- ⁵⁰ *Fair Play For Women Limited v The Registrar General For Scotland and the Scottish Ministers* [2022] CSOH 20 and [2022] CSIH 7; and *For Women Scotland Ltd v Lord Advocate and Others* [2022] CSIH 4