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Date: 1 March 2018 – Scottish Government

Consultation: *Review of the Gender Recognition Act 2004*

Consultation response on behalf of the Scottish Council on Human Bioethics:

The **Scottish Council on Human Bioethics** (SCHB) is an independent registered Scottish charity composed of doctors, lawyers, biomedical scientists, ethicists and other professionals from disciplines associated with medical ethics.

The principles to which the Scottish Council on Human Bioethics subscribe are set out in the ***United Nations Universal Declaration of Human Rights*** which was adopted and proclaimed by the UN General Assembly resolution 217A (III) on the 10th of December 1948.

The SCHB's response can be shared internally with other Scottish Parliament policy teams who may be addressing the issues discussed. They may contact the SCHB again in the future and the SCHB gives permission to do so.

The SCHB is very grateful to the Scottish Government for this opportunity to respond to the consultation on the ***Review of the Gender Recognition Act 2004***. It welcomes the Government's intention to promote public consultation, understanding and discussion on this topic.

Glossary of terms

Sex: refers to whether a person is considered biologically male or female. This includes biological aspects relating to the body and whether an individual has:

- Male (XY) or female (XX) sex chromosomes in all their cells. However, in some rare cases, an abnormal number of sex chromosomes may exist in all the cells of an individual. This happens with Turner's syndrome where a single X chromosome is present and Klinefelter's syndrome where XXY chromosomes are present in all the cells.¹ Some individuals even have a mixture of XX and XY cells in their bodies.
- Male or female anatomical and physiological aspects though for some rare individuals this may be very difficult to determine at birth.
- Male or female brains which are biologically different from a cellular (since all the neurons will have their sex chromosomes), hormonal, structural or functional perspective.² This is one of the reasons why, for example, men and women are usually instinctively sexually attracted to the opposite sex.

¹ Other rare chromosomal arrangements include: XXX, XXXX, XXXXX, XYY, XXY, XYYY and XXYY sex chromosomes in all the cells of the individual.

² Cahill L., Why sex matters for neuroscience, *Nature Reviews. Neuroscience*. 2006, 7 (6): 477–84;
Ingalhalikar M. et al. Sex differences in the structural connectome of the human brain, *Proc Natl Acad Sci USA*. 2014, 111(2): 823-8;
Ruigrok, A.N., Salimi-Khorshidi, G., Lai, M.C., Baron-Cohen, S., Lombardo, M.V., Tait, R.J. and Suckling, J. A meta-analysis of sex differences in human brain structure. *Neurosci Biobehav Rev*, 2014, 39, 34-50;
Daphna J. et al. Sex beyond the genitalia: The human brain mosaic, *Proc Natl Acad Sci USA*. 2015, 112 (50): 15468–15473.
Rippon G, Jordan-Young R, Kaiser A, Joel D, Fine C. Journal of neuroscience research policy on addressing sex as a biological variable: Comments, clarifications, and elaborations. *Journal of Neuroscience Research*. 2017; 95(7):1357-9.

In relation thereto, Eric M Prager, in an Editorial in the “**Journal of Neuroscience Research**”, says that, “sex plays a role, not only at macroscopic level, where it has been found that the brains of men and women differ not only in size, but also at microscopic level”.⁽³⁾³ Similarly, in another study published in the same journal, the authors highlighted the sexual differences in the brain at all levels, from genetic and epigenetic differences to synaptic, cellular and system differences, differences that are maintained throughout life.⁽⁴⁾⁴

All human beings begin embryonic life in a similar manner and for the first 5-6 weeks of gestation only the X gene is expressed. This means that until the sex-determination process begins, a developing human embryo has no anatomic or hormonal sex. After 6 weeks, however, the Y gene begins to be expressed (in genetic XY-males). This represses some X gene manifestations, expresses specific Y genes characteristics and releases male hormones such as testosterone which also begins to affect the brain causing neurological differences in men and women. This process is called biological sexual differentiation and leads to the difference between male and female.⁵

Generally, a person has a clear biological sex with all the corresponding biological attributes for one particular sex. But, as human beings develop, a wide spectrum of influences and dysfunctions may sometimes affect the biological sexual development of the foetus including its brain. As a result, in rare cases, a permutation of some of the biological sex attributes may take place. For example, some individuals may have sex chromosomes that are contrary to the observable biological sex characteristics of their bodies with individuals with male physiological characteristics having XX sex chromosomes and persons with female physiological characteristics having XY chromosomes.⁶

“It is believed that during the intrauterine period the fetal brain develops in the male direction through a direct action of testosterone on the developing nerve cells, or in the female direction through the absence of this hormone surge.

According to this concept, our gender identity (the conviction of belonging to the male or female gender) and sexual orientation should be programmed into our brain structures when we are still in the womb. However, since sexual differentiation of the genitals takes place in the first two months of pregnancy and sexual differentiation of the brain starts in the second half of pregnancy, these two processes can be influenced independently, which may result in transsexuality. This also means that in the event of ambiguous sex at birth, the degree of masculinization of the genitals may not reflect the degree of masculinization of the brain.

There is no proof that social environment after birth has an effect on gender identity or sexual orientation. Data on genetic and hormone independent influence on gender identity are presently divergent and do not provide convincing information about the underlying etiology. To what extent fetal programming may determine sexual orientation is also a matter of discussion.

A number of studies show patterns of sex atypical cerebral dimorphism in homosexual subjects. Although the crucial question, namely how such complex functions as sexual orientation and identity are processed in the brain remains unanswered, emerging data point at a key role of specific neuronal circuits involving the hypothalamus.”⁷

³ Prager E. Addressing Sex as a Biological Variable. Journal of Neuroscience Research. 2017; 95(1-2):11.

⁴ Rippon G, Jordan-Young R, Kaiser A, Joel D, Fine C. Journal of neuroscience research policy on addressing sex as a biological variable: Comments, clarifications, and elaborations. Journal of Neuroscience Research. 2017; 95(7):1357-9.

⁵ <http://www.soc.ucsb.edu/sexinfo/article/sex-determination-and-differentiation>; <http://genderedinnovations.stanford.edu/case-studies/genetics.html#tabs-3>

⁶ For example, with ‘XX male syndrome’ the person has a male phenotype but XX sex chromosomes; with ‘Androgen insensitivity syndrome’ the person has a female phenotype and XY sex chromosomes. Galani A, Kitsiou-Tzeli S, Sofokleous C, Kanavakis E, Kalpini-Mavrou A. "Androgen insensitivity syndrome: clinical features and molecular defects". Hormones (Athens). 2008. 7 (3): 217–29.

⁷ **Savic I, Garcia-Falgueras A, Swaab DF, Sexual differentiation of the human brain in relation to gender identity and sexual orientation. Prog Brain Res. 2010; 186:41-62.**

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EDITORIAL

30 OCTOBER 2018

US proposal for defining gender has no basis in science

A move to classify people on the basis of anatomy or genetics should be abandoned.
<https://www.nature.com/articles/d41586-018-07238-8>

<https://www.bbc.co.uk/news/health-47456938>

<https://www.telegraph.co.uk/news/2019/03/07/nhs-transgender-clinic-accused-covering-negative-impacts-puberty/>

<https://www.bioedge.org/bioethics/is-the-use-of-puberty-blockers-an-experimental-treatment/13028>

<https://www.scotsman.com/trans-gender-politics-puts-very-basis-of-feminism-at-risk-susan-dalgety-1-4911698>

<https://www.bioedge.org/bioethics/does-transgender-medicine-for-kids-need-more-bioethical-scrutiny/13035>

Gennatas ED, *et al.* (2017) Age-related effects and sex differences in gray matter density, volume, mass, and cortical thickness from childhood to young adulthood. *J Neurosci* **37**:5065–5073.

<https://newsroom.heart.org/news/hormone-therapy-may-increase-cardiovascular-risk-during-gender-transition?preview=c4e3>

Dr Enrique Burguete, anthropologist and delegate member of the Bioethics Observatory also warned that the transhumanist drift has its turning point in the gender perspective, which calls for the “self” to be redefined by emancipating the feeling of the sexed body itself and its functionality.

<https://www.bioedge.org/bioethics/uk-high-court-defines-motherhood-in-controversial-transgender-case/13236>

Sex is seen as defining which of the two biological categories (deriving from the original feminine-masculine dyad) one belonged to. Gender, on the other hand, would be the way in which the differences between the sexes are lived in each culture. The problem here does not lie in the distinction between the two terms, which can be interpreted correctly, but in *the separation of sex from gender*. This separation is at the root of the distinctions proposed between various “sexual orientations” which are no longer defined by the sexual difference between male and female, and can then assume other forms, determined solely by the individual, who is seen as radically autonomous. Further, the concept of gender is seen as dependent upon the subjective mindset of each person, who can choose a gender not corresponding to his or her biological sex, and therefore with the way others see that person (*transgenderism*).⁸

⁸ Vatican Document

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A normal XY embryo might fuse with an XX embryos, resulting a chimeric child with a percentage of normal XY cells and a percentage of Normal XX cells (Jager 1990).⁹ The SRY gene may translocate (move) to an X chromosome in a gamete so that the child has two XX chromosomes but can code for the protein that initiates the gene cascade for a male phenotype (Strain 1998).¹⁰

Finally, as noted above, in some cases intersex individuals might be XX-XY mosaics/chimeras (Fausto-Sterlin, 1993,¹¹

<https://www.nature.com/news/sex-redefined-1.16943>

external sexual genitalia are proper accidents, not the essence, of sex (they could for example be cut off in a war etc...).

Sex Differences in the Adult Human Brain: Evidence from 5216 UK Biobank Participants.

See: <https://www.ncbi.nlm.nih.gov/pubmed/29771288>

<https://bioethicsobservatory.org/2020/07/sex-biological-variable-in-human-cognition/36359/>

See German Ethics Council report: **Intersexuality**

See Article: Sex differences in visuomotor tracking, In Nature-Scientific Reports.

That sexual attraction is generally to the opposite sex (and not just 50-50) also reflects a wiring of the brain.

Intersex: a general term used to describe a person who may have the biological attributes of both sexes or whose biological attributes do not fit with societal assumptions about what constitutes male or female sex. Intersex people may identify as male, female, or non-binary.

Non-binary: an umbrella term for people who do not identify as male or female.

Gender: refers to those roles and behaviours typically associated with masculinity and femininity.¹²

Gender identity: relates to how persons see themselves in terms of being male, female or somewhere in between or beyond these categories.

Acquired gender: the gender in which an applicant is living and seeking recognition.

⁹ <https://www.ncbi.nlm.nih.gov/pubmed/2247151>

¹⁰ <https://www.ncbi.nlm.nih.gov/pubmed/9428825>

¹¹

https://www.researchgate.net/publication/239657377_The_Five_Sexes_Why_Male_and_Female_are_not_Enough

¹² WHO defines 'gender' as "Refers to the socially constructed characteristics of women and men", <http://www.who.int/gender-equity-rights/knowledge/glossary/en/>

Gender Dysphoria: describes a person's experience of discomfort or distress because there is a mismatch between the biological sex they were assigned at birth and their gender identity.

Cisgender or Cis: someone whose gender identity is the same as the biological sex they were assigned at birth.

Transgender or Trans: umbrella terms used to describe a diverse range of people who believe that their gender does not fully correspond with the biological sex they were assigned at birth. Non-binary people can be included under the trans umbrella, although some may not consider themselves as trans. Transgender people can also identify themselves as heterosexual, homosexual, bisexual¹³, pansexual¹⁴, polysexual¹⁵, or asexual.

Transsexual: someone who transitioned to live in the opposite biological sex to the one assigned at birth.¹⁶

Genderfluid: term used by persons who wish to convey that their experience of gender is not fixed as male or female but may fluctuate along a continuum and/or encompass aspects of both gender identities.

Gender bending: intentionally crossing or 'bending' gender roles.

Transvestism: dressing or adopting the presentation of the other biological sex. Not generally associated with gender dysphoria and may not identify as transgender.

Gender reassignment: legal intervention and changes reassigning gender to what is believed it should be.

Transitioning: the steps transgender persons take to live in the gender with which they identify.

2004 Act: the UK *Gender Recognition Act 2004*.

Gender Recognition Certificate (GRC): Under the 2004 Act, a full GRC provides legal recognition of an applicant's acquired gender. When a GRC is issued under the 2004 Act, the applicant's legal sex also changes to male or female.

Gender Recognition Panel: deals with applications for legal gender recognition made under the *Gender Recognition Act 2004*.

Background (presented by the SCHB):

Most people experience congruence between their biological sex and their sense of gender identity, but for some people this is lacking, sometimes from an early age, and they experience a degree of distress, or 'dysphoria', as a result.

Prevalence studies indicate that fewer than 1 in 10,000 adult natal males and 1 in 30,000 adult natal females meet the criteria for gender dysphoria, but such estimates vary widely.¹⁷

¹³ A literal dictionary definition of bisexuality, due to the prefix bi-, is sexual or romantic attraction to two sexes (males and females), or to two genders (men and women).

¹⁴ Pansexuality, composed with the prefix pan-, is the sexual attraction to a person of any sex or gender.

¹⁵ People who refer to themselves as polysexual may be attracted to transgender people, third gender people, two-spirit people, genderqueer people, plus people who are intersex. However, polysexuality does not have to be the exclusive attraction towards non-binary genders or sexes, though it can be.

¹⁶ <http://www.medicaldaily.com/what-difference-between-transsexual-and-transgender-facebooks-new-version-its-complicated-271389>

¹⁷ Zucker KJ et al. Gender Dysphoria in Adults, *Annu Rev Clin Psychol.* 2016;12: 217-47.

Given the breadth of the transgender umbrella, one unifying theory accounting for gender development seems unlikely. Moreover, the cause and mechanism may be multifactorial with contributions from both nature and nurture including genetic, neurodevelopmental, and psychosocial factors. The ways in which brain structure directs towards male or female dispositions or behaviours is not well understood and requires further research.^{18,19,20}

What does seem to emerge, however, from clinical experience is that true gender dysphoria is not chosen.

Transgender people were first given legal recognition in their new gender under the terms of the UK *Gender Recognition Act 2004*. To acquire Gender Recognition Certificates they have to be medically diagnosed with significant dysphoria (discomfort or distress as a result of a mismatch between their biological sex and gender identity) and to have lived successfully for at least two years whilst presenting themselves in their acquired gender.

It is important to note that gender nonconformity is no longer considered, by many, as a mental disorder in itself. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.²¹

Moreover, gender is now increasingly being seen as a social construct, even a matter of choice²² though why this is the case needs further research.

Research on the outcome of biological sex reassignment surgery indicates that, for the majority (about 75 per cent) of those who undergo this process, the outcome is positive.²³ Predictors of a good outcome include good pre-reassignment psychological adjustment, family support, at least one year of living in the desired role, consistent use of hormones and previous psychological treatment.

A 2014 review of over 300 people who completed biological sex reassignment treatment in Sweden over a 50 year period reported high levels of satisfaction and low levels (2.2 per cent) of regret,²⁴ but also considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population.²⁵ For example, the long term study reveals that there is an association between reassignment surgery and increased suicide risk in later life but it does not prove causation.

Thus, a significant minority of transsexuals express regret after irreversible surgery and some choose to revert to living in their original biological sex.²⁶

Risk factors for regret are the presence of psychiatric problems, dissatisfaction with the results of surgery and poor socializing. Three patients in Belgium, who have undergone biological sex reassignment interventions have already asked for their lives to be ended through euthanasia since they believe their situation is one of constant and unbearable mental or physical suffering.²⁷ In this way, a 44 year old

¹⁸ Zhou JN et al. A sex difference in the human brain and its relation to transsexuality. *Nature*.1995; 378:68-70.

¹⁹ Savic I et al. Sexual differentiation of the human brain in relation to gender identity and sexual orientation. *Prog Brain Res*. 2010;186:41-62.

²⁰ Shawna Williams, The Scientist, Are the Brains of Transgender People Different from Those of Cisgender People? 1 March 2018, <https://www.the-scientist.com/?articles.view/articleNo/51914/title/Are-the-Brains-of-Transgender-People-Different-from-Those-of-Cisgender-People-/>

²¹ Gender Dysphoria Fact Sheet. American Psychiatric Association, 2013

²² Butler J. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge; 1990:7

²³ Carroll R. Outcomes of Treatment for Gender Dysphoria. *Journal of Sex Education and Therapy*, 1999; 24(3):128-136

²⁴ Dhejne C et al. An analysis of all applications for sex reassignment surgery in Sweden, 1960-2010: Prevalence, incidence and regrets. *Archives of Sexual Behaviour* 2014; 43,8:1535-45

²⁵ Dhejne C et al. Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden. *PLoS One* 2011; 6(2): e16885

²⁶ See for example, *Sex Change Regret*, <http://www.sexchangeregret.com/>

²⁷ Heylens G, Elaut E, Verschelden G, Cuypere GD, Transgender Persons Applying for Euthanasia in Belgium: A Case Report and Implications for Assessment and Treatment. *J Psychiatry*, 2016, 19:347

person, who was a transsexual identified to be a girl at birth, was given voluntary euthanasia in 2013 by doctors in Belgium after a series of failed sex-change operations resulting in permanent depression.²⁸

The most notorious instance was the now infamous experiment that Money conducted on Canadian boy David Reimer. Reimer underwent a botched circumcision operation at eight months of age, and Money persuaded his parents to rear him as a girl instead, subjecting Reimer to sex-reassignment surgery and 'psychological conditioning' – in other words, brainwashing.⁵²⁹ Reimer however later reported that he never considered himself a girl, was told that he was really a boy by his parents in his early teens and reverted to living as a boy at fifteen. Reimer also revealed that John Money had forced him and his twin brother to enact sexual experiments on each other, allegedly to prove the idea that sexual 'games' in childhood was good for healthy human development. Predictably, Reimer suffered psychologically throughout his life despite returning to live as a male, and committed suicide at the age of 38. John Money is now dead, but has become notorious due to these experiments on children's sex and sexuality.⁶

<https://www.bioedge.org/bioethics/transgender-treatment-for-kids-finally-under-ethical-scrutiny/13152>

Response from the Scottish Council on Human Bioethics (SCHB)

Since some of the issues in the consultation do not related to medical ethics, not all consultation questions will be answered by the SCHB.

Initial Remarks:

Because of the importance of the subject matter, the Scottish Parliament should not build its positions on the emotions and subjective inclinations of each and every person but should, instead, establish them on informed evidence based research.

The SCHB notes that the definitions of sex and gender in this consultation are very confusing which may reflect the associated reasons why persons may want to change gender.³⁰ For example, different elements about gender need to be clarified, including:

- **Whether the gender of a person is just the result of a subjective choice of this individual with respect to socially constructed characteristics of masculinity and femininity? If this is the case then any person could conceivably just choose to have any gender they want and be able to change this gender any number of times. This would then, to some extent, reduce the biological body to just a support for a person's gender decisions. In this case the concept of the biological sex of a person would become unimportant. Science would then have nothing to say about gender since it is all about choice and societal constructs.**

²⁸ BBC News, 2 October 2013, Belgian helped to die after three sex change operations, <http://www.bbc.co.uk/news/world-europe-24373107>

²⁹ 5 John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl*. New York: Harper, 1997

³⁰ Unfortunately, the terms are also not clearly defined in both the UK *Gender Recognition Act 2004* and *Equality Act 2010* (especially since the biological brain can be considered as part of the biological sex of a person).

The UK *Gender Recognition Act 2004* indicates in Section 25 that: "*gender dysphoria' means the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism*".

The UK *Equality Act 2010* indicates in Part 2, Chapter 1, Section 7 under "*Gender reassignment*":

(1) *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 purpose of reassigning the person's sex by changing physiological or other attributes of sex.*

(2) *A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment."*

- Or do the ways individuals consider their gender have a biological component? This would include genetic, anatomical, physiological and neurological aspects and all the permutations that may occur. In this case a physical body becomes an important part of who the person really is in their very identity.

Thus because of the lack of clarity in the consultation document between gender and sex, the SCHB found it very difficult to answer the questions of this questionnaire.

The SCHB would also like to question the authority and the legal relevance of some of the documents being mentioned by the Scottish Government Consultation including:

- The *Yogyakarta Principles*³¹ which was only drafted by a number of individuals and representatives of non-governmental organisations interested in sexual orientation and gender identity. These Principles have not been generally endorsed by academic experts working in the field and have been shown to be contentious as well as controversial. Indeed, they have never been accepted by the UN's General Assembly.
- The 2015 *Resolution 2048* of the Parliamentary Assembly of the Council of Europe that has not been ratified by the Committee of Ministers of the Council of Europe which is the main body enacting European Human Rights legislation. Resolutions of the Parliamentary Assembly have never had the authority of human rights legislation since they are often drafted during the course of only a few months, and are certainly not legally binding.

The Scottish Government indicated that the proposals would “*align Scotland with the best international practice demonstrated in countries who have already successfully adopted self-declaration systems. The Scottish Government would be ensuring its compliance with Resolution 2048.*”

In this regard, however, the Scottish Government reflects a degree of unprofessionalism and even gullibility in giving so much authority to the above documents.

Finally, the SCHB would like to question the authority given by the Scottish Government to the UK Parliament's Women and Equality Select Committee. Indeed, such a committee does not sufficiently reflect the required biomedical and psychological expertise necessary to address all the significant and complex elements relating to gender dysphoria.

Part 3. Reforming the legal gender recognition system in Scotland

The Westminster Women and Equalities Select Committee's Report on Transgender Equality,³² published in 2016, recommended that: “*In place of the present medicalised, quasi-judicial application process, an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers*”.

In particular, the Committee heard concerns expressed about the requirement on applicants using the standard or alternative tracks to produce medical evidence and evidence to satisfy the Gender Recognition Panel that they have lived in their acquired gender throughout the period required.

The period is two years if the applicant is applying using the standard track (2004 Act section 2(1)(b)) or under the alternative track a period of six years before 15 December 2014 (where the applicant is in a

³¹ See <http://www.yogyakartaprinciples.org/>.

³² At <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>.

Scottish marriage or civil partnership) and has continued to live in the acquired gender until the date the application was made (2004 Act section 3C(4)(a) and (b)).

Under the standard track, an applicant must include two medical reports with their application. One report must be from a practitioner in the field of gender dysphoria who is either a registered medical practitioner or a registered psychologist. This report must include details of the applicant's diagnosis of gender dysphoria. The second report must be provided by a registered medical practitioner who may, but need not, practise in the field of gender dysphoria.

Moreover, the minimum age at which a person may make an application at the moment under the 2004 Act is 18.

Where an applicant has undergone or is undergoing treatment for the purpose of modifying their sexual characteristics or such treatment has been prescribed or planned for them, then one of the reports must also include details of that treatment. Guidance issued by the Gender Recognition Panel advises that if an applicant has not had surgery that the second report must explain why.³³

Since the 2004 Act came into effect, there have been some significant international developments. An increased emphasis is now placed on the rights of transgender people to self-determination, privacy and dignity including the process by which they may obtain legal gender recognition.

In 2006, the non-binding *Yogyakarta Principles* were agreed by a wide-ranging group of human rights law experts, representatives of non-governmental organisations and others. They set out existing international human rights law and principles, as the authors believe they should be applied to the treatment of lesbian, gay, bisexual and transgender people.³⁴

Principle 3 asks countries to:

"take all necessary ... measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex including birth certificates ... reflect the person's profound self-defined gender identity" and to "ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned".

In 2015, *Resolution 2048* of the Parliamentary Assembly of the Council of Europe³⁵ expressed concerns that requiring someone seeking legal recognition of their acquired gender to have been medically treated or diagnosed is a breach of their right to respect for their private life under Article 8 of the ECHR. The resolution calls on all Member States to:

"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 ... and other similar documents".

The view of the Scottish Government is that the 2004 Act requirements are unnecessarily intrusive and do not reflect the best practice now embodied in the *Yogyakarta Principles* and *Resolution 2048*. It has identified the systems of legal gender recognition currently being used in 16 other countries or territories and compared those systems with the best practice principles embodied in *Yogyakarta* and *Resolution 2048*. Three broad models are in use: the treatment model, the assessment model, and the self-declaration model.

Treatment model

The 'treatment model' requires an applicant to have had hormone treatment or to have been sterilised or had surgery. The 2004 Act did not adopt this model; it is entirely at odds with best practice.

³³ At <http://formfinder.hmctsformfinder.justice.gov.uk/t452-eng.pdf>.

³⁴ See <http://www.yogyakartaprinciples.org/>.

³⁵ At <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en>.

That the treatment model is also legally unacceptable has been affirmed in a recent decision of the European Court of Human Rights.

The court confirmed that a requirement to demonstrate the irreversible nature of a change of appearance (such as a requirement for sterilisation or surgery) was a breach of Article 8 of the European Convention of Human Rights.³⁶

Assessment model

The arrangements under the 2004 Act are a variation on the 'assessment model'. Under this model an applicant's evidence about their gender identity is supported by third party evidence from a doctor or psychologist and is considered by either a court or an administrative body.

An example of a territory using an assessment model different from the 2004 Act arrangements – and where a medical diagnosis is not required – is the Canadian province of British Columbia. From 2014, British Columbia allowed a person whose birth was registered there to submit an application to the Vital Statistics Agency. The applicant can request a change in their birth certificate from female to male or male to female. The applicant must submit:

- an application form containing a personal statement that they have assumed, identify with and intend to maintain the gender identity corresponding with their requested change; and
- a statement from a doctor or psychologist confirming the applicant's gender identity.

Another example of a variation on the assessment model is the legal gender recognition process adopted in France in 2017. This is court based. The applicant must provide supporting evidence such as evidence that they appear publicly to belong to the sex in which they want to be legally recognised.

These assessment models may not require applicants to demonstrate a medical diagnosis, but access to legal recognition in British Columbia and France does require applicants to demonstrate that their gender identity conforms to the sex in which they wish to appear in their birth records.

Self-declaration model

Under the 'self-declaration model' the decision on whether an applicant can be recognised is entirely based on a declaration or statement of the applicant, sometimes with a period of reflection before full recognition is given and/or limitations on the number of occasions on which recognition can be obtained. Countries that have adopted the self-declaration model include Norway, Denmark, Malta, Colombia, Argentina, and the Republic of Ireland.

The Republic of Ireland implemented its self-declaration system in 2015. A person whose birth or adoption was registered there, or who is ordinarily resident there, can have their preferred gender as a man or woman recognised and consequently change their legal sex.³⁷ They must submit an application form incorporating a statutory declaration to the Department of Social Protection. The applicant must declare that they:

- have a settled and solemn intention of living in the preferred gender for the rest of their life;
- understand the consequences of the application; and
- make the application of their own free will.

In the Republic of Ireland, the applicant's acquired gender is known as their "preferred gender". The statutory declaration must be witnessed by a person authorised to take statutory declarations in the Republic of Ireland, such as a notary public or commissioner for oaths.

Denmark has a slight variation on this arrangement. A Danish transgender person may change their sex as recorded in the Danish Central Persons' Register on the basis of their written statement of 'a sense of belonging to the other sex'. This statement does not require any additional witnessing or other

³⁶ The case is AP, Garçon and Nicot v France [2017] ECHR 338 (06 April 2017).

³⁷ The effect of recognition of their gender is to change their legal sex, per the Gender Recognition Act 2015, section 18(1).

authentication. However, their new legal sex is not recognised until they have re-confirmed their application after a reflection period of six months.

Initial view of the Scottish Government

The Scottish Government considers that, subject to views expressed during this consultation, Scotland should adopt a self-declaration system for legal gender recognition. This would mean that applicants under a Scottish system would not have to demonstrate a diagnosis of gender dysphoria or that they had lived for a period in their acquired gender. This, it is suggested, would align Scotland with the best international practice demonstrated in countries who have already successfully adopted self-declaration systems. The Scottish Government would be ensuring its compliance with Resolution 2048. And the arrangements would be less intrusive and onerous from the perspective of applicants.

In one aspect, the Scottish Government believes that Scotland could build on the existing arrangements in the 2004 Act. All applications made under the 2004 Act must be accompanied by a statutory declaration,³⁸ witnessed by a person authorised to administer oaths and which includes a statement that the applicant intends to live in their acquired gender until death. In Scotland, oaths may be administered by a notary public or a justice of the peace. It is also proposed to retain the requirement for a statutory declaration under the proposed self-declaration system.

Streamlining the existing processes would also allow for applications to be considered by an administrative body, rather than by a tribunal such as the Gender Recognition Panel. The proposed self-declaration system could be administered by officials based in the Scottish Government or by officials at National Records of Scotland. The Registrar General for Scotland (the Registrar General) who heads National Records of Scotland is responsible for the Register of Births and the Gender Recognition Register under the 2004 Act.

Question 1

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead.

Do you agree or disagree with this proposal?

Response from the Scottish Council on Human Bioethics

Disagree

Gender dysphoria in adults is associated with an elevated prevalence of psychopathology, especially mood disorders, anxiety disorders, and suicidality.³⁹

Of those adults who undergo psychological treatment towards resolution in favour of their birth sex, a majority do not report resolution. Instead, the most frequent outcome is to engage in cross-gender behaviours intermittently, often privately or in distant places, as a coping strategy to reduce the felt tension within.⁴⁰

Risk factors for regret concerning gender reassignment are well-known, meaning that a thorough assessment is required at the start of the reassignment with follow-up counseling during and after the process.⁴¹

³⁸ The required statutory declarations under the 2004 Act arrangements take different forms are in depending on whether an applicant is married, in a civil partnership or is single. They can be seen within the guidance at the URL below.
<https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>.

³⁹ Zucker KJ et al. Gender Dysphoria in Adults, *Annu Rev Clin Psychol*. 2016;12: 217-47.

⁴⁰ Carroll R. Gender dysphoria and transgender experiences, in *Principles and Practice of Sex Therapy*, 4th edn, ed. Leiblum SR. New York: Guilford; 2007: p491

⁴¹ Coleman E, et al. Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version. *Int J Transgenderism*. 2012. 13(4): 165-232;
Kuiper AJ, Cohen-Kettenis PT. Gender role reversal among postoperative transsexuals. *Int J Transgenderism*. 1998. 23(2).

The SCHB notes that appropriate informed consent is the basis of all responsible and proper decision making in medicine which includes:

1. **Competence:** A person's capacity for decision making.
2. **Disclosure:** The content of what a person is told during the consent negotiation.
3. **Comprehension:** How much given information the person understands.
4. **Voluntariness:** The ability for a person to make a choice without being unduly pressured or influenced to make a particular choice.

The very fact that evidence exists demonstrating that some adult transsexual persons have undergone biological sex reassignment treatments which they have regretted indicates that the principle of informed consent may not always be followed properly. Biological sex changes are very serious and momentous interventions and should never be undertaken without sufficient information being provided to persons who are competent and able to make an informed decision.

Even for 18-25 year olds, understanding all the different aspects of gender reassignment may be challenging. This is because development psychologists consider identity development as a process that continues long after adolescence. It has even been suggested that the term 'emerging adulthood' can designate an important and distinct period from a demographic perspective where 18-25 year olds take part in a significant exploration of their own identity.⁴² This is because their brains continue to develop until their mid-twenties. For example, brain regions can actually be identified which are involved in processing risks and rewards in young adults.⁴³ Amongst other reasons, it is because of such risk factors that car insurance for young adults is so expensive.

As indicated by the Australian expert on adolescent health, Prof Susan Sawyer, in 2018:

"An expanded and more inclusive definition of adolescence is essential for developmentally appropriate framing of laws, social policies, and service systems. Rather than age 10–19 years, a definition of 10–24 years corresponds more closely to adolescent growth and popular understandings of this life phase and would facilitate extended investments across a broader range of settings."⁴⁴

The SCHB is of the opinion that appropriate informed consent should always be given by a person wanting to change gender in order to protect the important concept of autonomy and voluntarism. This is in order to inform the individual of the possible consequences of the procedure while ensuring that this person is capable of understanding the nature of a change in gender.

Therefore, to ensure that informed consent is obtained, and to protect individuals from any rash or ill-informed decisions, medical evidence should be produced to satisfy a Gender Recognition Panel that they have lived in their acquired gender throughout the period required. In addition, a report must always be obtained from a practitioner in the field of gender dysphoria who is either a registered medical practitioner or a registered psychologist. This report must include details of the applicant's diagnosis of gender dysphoria. A second report must also be provided by a registered medical practitioner who may, but need not, practise in the field of gender dysphoria.

See: <https://www.theguardian.com/society/2018/nov/03/tavistock-centre-gender-identity-clinic-accused-fast-tracking-young-adults>

<https://www.theguardian.com/society/2019/feb/23/child-transgender-service-governor-quits-chaos>

De Cuypere G, Vercruyssen H. Eligibility and readiness criteria for SRS: Recommendations for Revision of the WPATH Standards of Care. *Int J Transgenderism*. 2009. 11:194-205.

⁴² Arnett JJ., Emerging adulthood. A theory of development from the late teens through the twenties. *Am Psychol*. 2000. 55(5): 469-80.

⁴³ Steinberg, L. A dual systems model of adolescent risk-taking. *Developmental Psychobiology*. 2010., 52, 216-224.

⁴⁴ Susan Sawyer S. et al. The age of adolescence, *The Lancet – Child and Adolescent Health*, 2018, 2(3), p223–228.

Statutory declaration

For a person to choose to apply for legal recognition of his or her acquired gender is an important life decision. This needs to be reflected in any new self-declaration system for obtaining legal gender recognition.

A requirement to submit a statutory declaration would demonstrate that applicants intend to permanently live in their acquired gender. Therefore, the Scottish Government considers that applicants under the proposed system of legal gender recognition should have to provide a statutory declaration stating that they:

- are applying of their own free will;
- understand the consequences of obtaining legal gender recognition; and
- intend to live in their acquired gender until death.

The Scottish Government's research into countries using self-declaration systems of legal gender recognition has not identified evidence of false or frivolous statements being made by applicants. However, under the proposed self-declaration system for legal gender recognition, if an applicant were to make a statement in a statutory declaration that is false in a material particular, this would be an offence.⁴⁵

Another option would be a period of reflection, as used in Denmark and Belgium. Under this applicants would apply under a self-declaration system but would also be required to confirm their application again after a defined period of time. A full GRC would then be granted.

In Denmark, although a false statement is also a criminal offence, their reflection period is 6 months. In Belgium, the applicant must re-confirm their application after a minimum of three months. In both countries, an applicant is provided with information about the consequences of legal gender recognition during the reflection period. The purpose of a reflection period appears to be to reduce the risk that an applicant might change their mind after getting legal recognition in their acquired gender.

Question 2:

Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Response from the Scottish Council on Human Bioethics

Yes

The SCHB opposes the introduction of a self-declaratory system for legal gender recognition. This is because such a system will never be sufficient to address the momentous medical and psychological aspects involved in a change in gender identity. Instead appropriate informed consent must be obtained which means accessing the required medical and psychological expertise.

In other words, the only way applicants can demonstrate that they:

- **have a settled and solemn intention of living in the preferred gender for the rest of their lives;**
- **understand the consequences of the application; and**
- **make the application of their own free will;**

is for a statutory declaration to be provided from a Gender Recognition Panel.

⁴⁵ Criminal Law (Consolidation) (Scotland) Act 1995, section 44(2) at: <http://www.legislation.gov.uk/ukpga/1995/39/section/44>.

This will confirm that persons wanting to change their gender know what they are doing. The declaration must also include a report from a practitioner in the field of gender dysphoria who is either a registered medical practitioner or a registered psychologist and the details of the applicant's diagnosis of gender dysphoria. A second report must also be provided by a registered medical practitioner who may, but need not, practise in the field of gender dysphoria. Individuals wanting to change their gender must also satisfy a Gender Recognition Panel that they have lived in their acquired gender throughout a relevant period.

Number of times a person can seek legal recognition

The 2004 Act does not restrict the number of times that a person can apply for legal recognition of their acquired gender.

Countries with self-declaration systems for legal gender recognition have different approaches to limiting the number of times that a person can seek to change their legal sex.

Colombia permits a person to change their sex in the Civil Registry of Birth on a total of two occasions, and their requests to do so must be more than 10 years apart. In Malta, subsequent requests to amend the Civil Registry of Birth must be considered by a court, unless on the prior application the applicant was a minor.

It is possible to change your name in Scotland without changing the content of the Register of Births. However, if you wish your birth certificate to reflect your name change, you can only do so on a limited number of occasions. A person aged 16 or over is permitted to record a change of forename on one occasion and their surname on three occasions in the Register of Births. In respect of a surname change, five years must elapse after one change is recorded before another may be recorded.⁴⁶ There are different rules for people under 16.

Notwithstanding the proposed requirement for applicants to submit a statutory declaration, there may be concerns that applications might be submitted frivolously. Limiting the number of times that a person may apply for recognition of their acquired gender may reduce that risk.

Question 3

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

Response from the Scottish Council on Human Bioethics

Yes.

The SCHB is of the opinion that persons should not be entitled to just change their gender based on their feelings without further medical and psychological advice and support.

For a person to change their gender is a momentous decision and should never be taken lightly.

If, however, a change in gender is seen as just a simple decision which persons can make without medical and psychological advice then there is no real reason why such individuals should not be able to change their gender as many times as they want.

Requirements in relation to an applicant's place of birth or residence

In general, applicants need not have been born in the UK or be ordinarily resident in the UK to use the standard or overseas tracks. However, only people ordinarily resident in Scotland, England and Wales can use the alternative track to apply for legal recognition under the 2004 Act. The Scottish Government's intention is that under the proposed new self-declaration system, there would just be one way of applying, although, as discussed elsewhere in this consultation, distinct arrangements may be needed in respect of people under 16.

⁴⁶ Registration of Births, Deaths and Marriages (Scotland) 1965, section 43(5) at <http://www.legislation.gov.uk/ukpga/1965/49/section/43>.

The question arises whether the proposed self-declaration system should:

- be open only to people whose birth or adoption was registered in Scotland and to people who are resident in Scotland; or
- be open to anybody in the world.

A key benefit of a full Gender Recognition Certificate (GRC) for an applicant whose birth was registered in the United Kingdom is that they will be issued with a new birth certificate. If their birth was registered elsewhere, whether they can obtain a new birth certificate upon issue of a full GRC will depend on the laws of that country or territory.

Other countries restrict who may apply for recognition under their systems. In the Republic of Ireland, an applicant's birth or adoption must have been registered there or they must be ordinarily resident there.

In Denmark, legal recognition is obtained by an applicant applying for an amendment to their sex shown in the Danish Central Person's Register. Only people legally resident in Denmark can have an entry in the Central Person's Register.

One option for the proposed self-declaration system would be to limit access to people whose birth or adoption was registered here as well as to people who are resident in Scotland at the time of their application. However, this could exclude some people who might wish their acquired gender to be recognised here. An example might be someone who plans to move to Scotland.

At the moment, a person who has obtained legal gender recognition in another country or territory outwith the UK can apply to the UK Gender Recognition Panel for a UK GRC. The applicant must have obtained this legal gender recognition in an "approved country or territory". This means a country or territory prescribed by order made by the Secretary of State after consulting the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland.⁴⁷ In 2016-2017, the Gender Recognition Panel received 25 applications submitted using the overseas track out of a total of 364 applications using all tracks.⁴⁸

In future, the Scottish Government would intend that automatic recognition should be granted in Scotland where a person has been recognised in their acquired gender in another country or elsewhere in the UK. On that basis, the Scottish Government's initial view is that, subject to the views expressed during this consultation, applications to the Scottish self-declaration system should be restricted to those whose birth or adoption was registered in Scotland and to people who are resident here.

Question 4

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

- (A) only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?
or
(B) to everyone?
or
(C) Don't know

Response from the Scottish Council on Human Bioethics

The SCHB is opposed to any change in legislation towards a self-declaration system for legal gender recognition.

Part 4. Age of applicants

⁴⁷ See The Gender Recognition (Approved Countries and Territories) Order 2011 at <http://www.legislation.gov.uk/uksi/2011/1630/contents/made>.

⁴⁸ Source is Table 2 at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017>.

The minimum age at which a person may make an application at the moment under the 2004 Act is 18. There is no consistent approach amongst countries with self-declaration systems of legal gender recognition in relation to people under 18.

When considering the options in this area, the Scottish Government has had regard to the United Nations Convention on the Rights of the Child (UNCRC).⁴⁹

16 and 17 year olds

The Scottish Government considers that people aged 16 or older should be able to apply for legal recognition of their acquired gender using the proposed self-declaration process.

There is clear evidence that people aged 16 do live full time in their acquired gender and want this to be legally recognised. For example, the Women and Equalities Select Committee heard evidence from LGBT Youth Scotland to this effect. In the Republic of Ireland, 8 people aged 16 and 17 have received a GRC⁵⁰ after obtaining a court order permitting them to apply under their self-declaration system. The court in the Republic of Ireland is required to consider evidence about the young person's transition to their acquired gender.

This proposed change would also be consistent with the age at which young people can exercise other rights under the law in Scotland. 16 and 17 year olds are able to make a number of important life decisions without parental involvement or consent. These include:

- getting married or entering a civil partnership;
- recording a change of name; and
- voting in Scottish elections.

Question 5

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16.)

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

Response from the Scottish Council on Human Bioethics

Disagree

Questions about whether and how to treat children affected by gender dysphoria are particularly contentious. Some seem to go through a natural and temporary phase of wanting to be the other gender and dress in other clothes, but appear to naturally 'grow out of it' to develop a congruent gender identity.⁵¹

Rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary. In those identified to be male at birth, persistence has ranged from 2 to 30 percent. In individuals identified as female at birth, persistence has ranged from 12 to 50 percent.⁵²

It is clear that, for the majority of gender-confused children, gender dysphoria desists over time as they enter adolescence,⁵³ though a significant proportion of them go on to identify as bi-sexual or same-sex attracted.⁵⁴

⁴⁹ The Scottish Ministers are also under a duty to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements in terms of section 1 of the Children and Young People (Scotland) Act 2014.

⁵⁰ Source is the Department of Social Protection.

⁵¹ Drummond K.D. et al. A follow-up study of girls with gender identity disorder. *Dev Psychol.* 2008;44(1):34-45.

⁵² DSM-5. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 5th edn. Washington DC: American Psychiatric Publishing, 2013, 302.85:455

⁵³ Zucker KJ. Measurement of psychosexual differentiation. *Arch Sex Behav.* 2005;34(4):375-388

⁵⁴ DSM-5. 2013:302.85:455

Adolescence is characterized by pronounced changes in motivated behaviour. This includes an emphasis on potential rewards which may result in an increased tendency to approach novel experiences bringing potential for positive reinforcement but which may also result in risky behaviour.

Again, brain regions can actually be identified which are involved in processing rewards in adolescents and functional changes in reward-related brain activity can be examined. As a result, adolescents have been found to be less averse to risk than more mature adults and have different cognitive control.⁵⁵

Two important neurodevelopmental mechanisms are thought to play a role in the genesis of risk-taking behaviours in adolescence: the brutal secretion of sex hormones (affecting also the brain) at the beginning of puberty and the delayed maturation of cognitive control.⁵⁶

Because the brains of adolescents are continuing to develop with the associated behavioural changes, it is unlikely that they will have the same capacity for decision making, voluntariness and the ability to make balanced decisions as more mature adults. This means that they may not be able to give appropriate informed consent for certain momentous decisions requiring mature reflection such as with a change of gender.

That adolescents have not reached full maturity is also reflected in that individuals under 18 years of age cannot, for example:

- buy cigarettes,
- buy alcohol in licensed premises, or
- stand as candidates in parliamentary elections.

As a result, the SCHB does not agree that persons aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender.

Their social development, while at a very important formative phase, can be affected by the many experiences of getting on with peers, self-confidence and academic achievement. The way others react to them at this age can be very important.

People aged under 16

The Scottish Government's view is that there is a careful balance to be struck in relation to people under 16. On the one hand, we should treat children with dignity and respect, giving weight to their views and wishes in line with their individual capacity. On the other hand, we should ensure that children have the right protection and care.

People who are under 16 years of age can act on their own behalf in relation to a range of matters.

The Scottish Government considers that there are five broad options in relation to people under 16 being able to apply for legal gender recognition.

Under 16s – option 1 – nothing for those under 16

Under this option, applicants would have to be at least 16 to apply for legal recognition of their acquired gender. This would be straightforward, but would stop those under 16 with a clear view of their gender identity from obtaining legal gender recognition.

Under 16s – option 2 – court process

Option 2 would be for Scotland to adopt a court based process. The courts in Scotland deal regularly with decisions involving children. In keeping with Article 3 of the UNCRC, court decisions in Scotland relating

⁵⁵ van Duijvenvoorde AC et al. What motivates adolescents? Neural responses to rewards and their influence on adolescents' risk taking, learning, and cognitive control, *Neurosci Biobehav Rev.* 2016; 70: 135-147.

⁵⁶ Barbalat G et al., Risk-taking in adolescence: A neuroeconomics approach, *Encephale.* 2010; 36(2):147-54.

to matters such as Parental Responsibilities and Rights (PRRs) are child-centred. In reaching a decision, the court must regard the welfare of the child concerns as its paramount consideration.⁵⁷

Any court based process, whether instigated by a child's parents or by the child, would focus on the assessment of the child's welfare. The Scottish Government would also consider specifying the matters the court would have to have regard to in determining what was in the child's best interests.

Under this option, a court action could be raised by the child if they had sufficient capacity to do so, or if they did not, by a person or persons who had PRRs for them acting on their behalf.⁵⁸

In civil matters, such as applying for a court order in relation to PRRs, a person under 16 has legal capacity to instruct a solicitor where the person has a general understanding of what it means to do so. A person of 12 and over is presumed to be of sufficient age and maturity to be capable of instructing a solicitor on their own behalf.⁵⁹

Where the action was raised by a person with PRRs for the child, the child's views would require to be considered. Under the current law, where a court has been asked to make an order in relation to PRRs, the court must, taking into account the child's age and maturity, and so far as practicable:

- give the child an opportunity to indicate whether they wish to express a view;
- If the child does so wish, give the child an opportunity to express them; and
- have regard to such views as the child may express.

At age 12 and over, a child is presumed to be old and mature enough to form such a view.⁶⁰

In the Republic of Ireland, applications cannot be made by those aged under 16. However, applications by 16 and 17 year olds require to be accompanied by a court order permitting the application to be made. The court may only grant the order if the child's parents, surviving parent or guardian consents. Two medical certificates must also be produced to the court. The medical certificates must confirm that:

- the child has a sufficient degree of maturity to decide to apply for gender recognition;
- the child is aware of, has considered and fully understands, the consequences of that decision;
- the child's decision is freely and independently made; and
- the child has transitioned, or is transitioning to, their preferred gender.

Under option 2, a child who may not have reached puberty might apply to the court or a person with PRRs for such a child might apply.

Under 16s – option 3 – parental application

Option 3 would be to permit an application to be made on behalf of a person under 16 by someone with PRRs for them. Typically, this would be the child's parents.

Usually, where more than one person has parental rights in relation to a child, each can exercise their rights without the consent of the other or any of the others.⁶¹

Where a person with PRRs is reaching a major decision regarding the fulfilling or exercise of PRRs, the person is under a duty to have regard to any views the child expresses, taking account of the child's age and maturity. The person making the decision must also have regard to any views expressed by any other person with PRRs for the child concerned.⁶² The Scottish Government considers that seeking legal recognition in an acquired gender is an example of a major decision.

One possibility under this option would be to require the application to be made by all parents with PRRs for a child. This would mean that a person who had PRRs for the child but was not their parent would not require to be involved. However, the Scottish Government would still expect the person(s) applying on the child's behalf to have regard to the views of such a person.

⁵⁷ Children (Scotland) Act 1995, section 11(7).

⁵⁸ Where a child has capacity, they can choose to allow their parents to act on their behalf.

⁵⁹ Age of Legal Capacity (Scotland) Act 1991, section 2(4A).

⁶⁰ Children (Scotland) Act 1995, section 11(10).

⁶¹ Children (Scotland) Act 1995, section 2(2).

⁶² Children (Scotland) Act 1995, section 6

Another possibility under this option would be to require all people with PRRs to apply, not just a parent or parents with PRRs. This may mean that a local authority that had PRRs for a child would need to be involved in the application process.

If all the people who required to be involved in the application did not agree⁶³, then a court order could be sought under existing arrangements. Section 11(1) of the *Children (Scotland) Act 1995* allows the Sheriff Court or the Court of Session to make an order in relation to PRRs. The court could then make a decision based on the child's welfare.

There are some children for whom no one has PRRs. One option might be for a person who has an interest to obtain PRRs from the court and then apply for legal gender recognition on behalf of the child. Other matters will require careful consideration:

- how best to ensure the child's views have been sought and considered before an application is made;
- if those with PRRs require to make a statutory declaration, the wording of that declaration;
- whether a person who has limited PRRs should be involved in the process or whether the person must have all PRRs for the child; and
- how the process would work if a local authority had PRRs for the child.

In summary, therefore, under this option all parents with PRRs (or, perhaps, everybody with PRRs) would have to apply, having had regard to the child's views. If there is a dispute amongst those with PRRs, an application could be made to the court to resolve the matter. There may be restrictions on the role of a person with limited PRRs.

Under this option, applications could be made on behalf of very young children, including both those who lack legal capacity and who have not reached puberty.

Under 16s – option 4 – minimum age of 12

Option 4 would permit children aged 12 and above to apply in the same way as those aged 16 or above. This option would offer a clear test of who could apply for legal gender recognition.

However, this option would take no account of a child's capacity to take decisions nor their physical maturity.

In addition, this option would also allow a child or young person aged 12 to 15 to take an important life decision without any assistance or support from their family or others. People aged 12 to 15 should be adequately supported to make a decision about this aspect of their life.

The Scottish Government does not favour this option as it would allow a child to apply irrespective of their capacity to understand the nature and consequences of their decision.

Under 16s – option 5 – application by capable child

Option 5 would permit a person under 16 to apply in the same manner as an adult, provided they had capacity to understand the consequences of recognition in their acquired gender.

Under this option, someone would have to test the child's capacity. This could potentially be done, for example, by a registered medical practitioner, or by a practising solicitor.

A person under 16 is considered to have the capacity to consent to any surgical, medical or dental procedure or treatment if, in the opinion of a qualified medical practitioner attending them, they are capable of understanding the nature and possible consequences of the procedure or treatment.⁶⁴

A person under 16 has legal capacity to instruct a solicitor, in connection with any civil matter, where the person has a general understanding of what it means to do so. Someone aged 12 or more is presumed to be old and mature enough to have such understanding.⁶⁵

⁶³ Or where they could not be found

⁶⁴ Age of Legal Capacity (Scotland) Act 1991, section 2(4).

⁶⁵ Age of Legal Capacity (Scotland) Act 1991, section 2(4A).

Arrangements based on individual capacity would allow a sufficiently old and mature child to apply, even if their parents or other people with PRRs did not support their decision. This option would allow children who have sufficient legal capacity, but who may not have reached puberty, to apply.

Question 6

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

Option 1 – do nothing for children under 16

Option 2 – court process

Option 3 – parental application

Option 4 – minimum age of 12

Option 5 – applications by capable children

Response from the Scottish Council on Human Bioethics

None of these options

For children whose gender dysphoria does not desist naturally, several treatment options exist that have been recommended by various therapists:

1. 'Watchful waiting' approach in which cross-gender behaviour is permitted but not encouraged.⁶⁶ This approach allows children to explore various gender activities without the imposition of rigid gender stereotypes and allows them to gravitate towards their own interests.

2. Intervention to decrease cross-gender identification using behavioural therapy approaches. This may also include coaching parents to ignore cross-sex behaviour and to encourage gender-appropriate activities and play. Furthermore, psychotherapeutic approaches aimed at intervening more 'within' the child can be considered. In this way, assistance can be provided to the majority of children affected by gender dysphoria.⁶⁷

3. Facilitating social transition to the other gender by using affirmative approaches with, for example, the adoption of a new name, preferred gender hairstyle, clothing and play.⁶⁸

4. Puberty Suppression. Children between the ages of 10 and 13 may be given monthly injections of hypothalamic hormone blockers. This would then prevent the gonads from making oestrogen and testosterone in order to delay puberty and allow time for the gender-conflicted child to enter adolescence and make a more considered decision (at around the age of 16) whether to affirm either their birth sex or their cross-gender identity. If they decide to then change their gender identity, they begin taking the hormones of the opposite biological sex.

Given that gender dysphoria will desist naturally without active intervention in the majority of children as puberty progresses, there should be no rush to facilitate early social transition or puberty suppression.

There are additional concerns with puberty suppression about brain development, bone growth and sub-fertility, as well as the possibility that the gender dysphoria might naturally have abated at the age of 12 or 13, but by which time treatment would have commenced.⁶⁹

⁶⁶ De Vries ALC and Cohen-Ketennis PT Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach, 2012:309

⁶⁷ Meyer-Bahlburg HF. Gender Identity Disorder in young boys: a parent- and peer-based treatment protocol. *Clinical Child Psychology and Psychiatry*, 2002; 7(3):pp360-76

⁶⁸ Olson J et al. Management of the transgender adolescent. *Archives of Paediatrics and Adolescent Medicine*. 2011;165 (2):173

Sometimes, the natural development of puberty hormones in a person affected by gender dysphoria may actually be part of the solution, as this is when the greatest differentiation takes place.

Follow-up studies indicate that, overall, the distress experienced by 85.2% of the children affected by gender dysphoria is discontinued either before or early in puberty.⁷⁰ However, the rates in the individual studies varied widely.⁷¹

In conclusion, the SCHB is of the opinion that changing the legal gender of a child should not generally take place. This is because it is impossible to be certain that the child is capable of understanding the momentous consequences of such a change. In other words, in the case of changing gender, because of the child's lack of maturity it is impossible for all the protective elements included in the principle of informed consent to be followed.

Part 6. Other aspects of the 2004 Act

Privacy issues

Section 22 of the 2004 Act is intended to protect the privacy of people who have applied for or who have obtained a GRC.

The provision makes it an offence for a person who has acquired "protected information" in an official capacity to disclose that information. Protected information is information about a person's application for recognition in their acquired gender under the 2004 Act or about a successful applicant's gender before it became the acquired gender.

There are exceptions, for example where disclosure of protected information is made for the purposes of crime prevention or detection, the social security system or pensions, or for the purpose of instituting court proceedings or otherwise for the purposes of court proceedings.

Scottish Ministers have made an order under section 22 for additional exceptions in relation to devolved matters.⁷² The *Gender Recognition (Disclosure of Information) (Scotland) Order 2005* provides that disclosure is not an offence where it is:

- for the purpose of obtaining legal advice;
- for the purpose of enabling a person to decide on the admission or appointment of the subject as a minister of religion;
- made to any one of a specified group of health professionals for medical purposes;
- made by or on behalf of a credit reference agency and is of information contained in an order of a court or tribunal; or
- made in relation to one of a specified group of bankruptcy or insolvency officeholders in order for them to perform their functions.

When the UK Parliament's Women and Equality Committee took evidence on transgender equality, it was argued that the exemption for protected information to be disclosed in court proceedings was being

⁶⁹ Kreukels BP and Cohen-Kettenis PT. Puberty Suppression in Gender Identity Disorder: The Amsterdam Experience, *National Review of Endocrinology*, 2011; 17(7):466-72.

⁷⁰ Ristori, J and Steensma T.D "Gender dysphoria in childhood" in *International Review of Psychiatry*, Gender dysphoria and gender incongruence, 2016, Vol 28, Issue 1.

⁷¹ For instance, a 2008 study indicated that in 39% of children the feelings did continue beyond the onset of puberty whereas older studies from before 2000 had very much lower rates for children continuing to experience distress after the onset of puberty. It is thought that pre-2000 studies have included children who would not now be considered to be experiencing gender dysphoria. The studies may also be affected by the small clinical population of children with gender dysphoria – studies looking at whether gender dysphoric feelings persisted had a total population of 317 people. Wallien and Cohen-Kettenis. Psychosexual outcome of gender-dysphoric children. *Journal of the American Academy of Child and Adolescent Psychiatry*, 2008. 47, 1413–1423.

⁷² 2004 Act, section 22(5), (6) and (7).

misused⁷³ and that exemptions in secondary legislation allowing disclosure to certain medical professionals required extension to psychologists too.⁷⁴ Data protection is reserved, so changes in the effect of section 22 are matters that the Scottish Government may need to discuss with the UK Government.

Question 10

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

Response from the Scottish Council on Human Bioethics

No! Section 22 should not be changed. In other words, the disclosure of protected information should remain possible in certain circumstances.

Part 7. Non-binary people

A non-binary person's gender identity is not that of a man or woman. The Equality and Human Rights Commission Note on Measuring Gender Identity⁷⁵ reported that 0.4% of people who answered a question about their gender identity reported that they identified in another way from a man or woman.

Principle 3 of the Yogyakarta Principles emphasises that: "*Each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.*"

A survey of non-binary people has indicated that they believe that because their gender identities have no legal recognition, they are refused services and that their lack of inclusion and visibility has adverse impacts, for example on their self-esteem and mental health.⁷⁶ Taking action to ensure that non-binary people are not excluded could increase their acceptance and reduce the levels of discrimination experienced.

We are aware that increasingly employers and service providers⁷⁷ are recognising that their employees and customers may not identify as men or women.

Some countries recognise non-binary people to varying degrees, or offer alternatives to identifying as either a man or woman (or as male or female) for the purposes of official records.

The Scottish Government has identified six broad options to advance the recognition of non-binary people. It may be possible to pursue more than one of these options. Provisions to recognise non-binary people are radical and require careful thought.

Option 1 – changes to administrative forms

Under this option, the Scottish Government and Scottish public bodies would be required to review all administrative forms.

⁷³ Women and Equalities Select Committee Report on Transgender Equality at paragraph 76 onwards: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>.

⁷⁴ See evidence from the British Psychological Society and the British Association of Gender Identity Specialists at the links below. <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19471.html>
<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19532.html>

⁷⁵ At https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf.

⁷⁶ Source is a survey of 895 non-binary people in 2015, available at the URL below. <http://www.scottishtrans.org/non-binary/>.

⁷⁷ See our Partial Business and Regulatory Impact Assessment at Annex L for information about the policies of organisations interviewed.

Option 2 – the Book of Non-Binary Identity

Under Option 2, a Book of Non-Binary Identity could be established by National Records of Scotland, separately from the Register of Births.

Under this option, a non-binary person could apply to enter their name and their gender identity in the Book. Whilst a formal acknowledgement would be issued to the applicant, entry in the Book would have no legal effect on the gender in which the person was legally recognised in Scotland.

Option 3 – limited identity document and record changes

A further option would be for the Scottish Government to seek changes to identity documents, such as passports or driving licences.

For example, under new standards, a holder's sex can be recorded as 'M' for male, 'F' for female or 'X' for 'unspecified'. The current format of the UK passport allows for the holder only to be recorded as either 'M' or 'F'.

Both the UK passport and driving licence are reserved matters and the Scottish Government would have to discuss this with the UK Government.

Some Scottish records also contain information about a person's sex, such as the Community Health Index number (CHI number). A CHI number is allocated to every patient in NHS Scotland. The number can currently be changed to reflect the gender identity of trans men and women. But it cannot currently be changed to record the gender identity of a non-binary patient.

There would be costs in updating IT systems to accommodate changes. For example, if a non-binary person's gender was to be reflected in their Community Health Index record maintained by NHS Boards of all patients in Scotland there might be costs including to update breast and cancer screening IT systems that use CHI numbers.

Option 4 – recognition using proposed self-declaration system

Under this option, a person born in Scotland or resident in Scotland would be able to apply to the proposed Scottish self-declaration system for recognition of their non-binary gender identity. Where they were born in Scotland they would then be able to access an updated birth certificate reflecting their gender identity.

Under the existing 2004 Act arrangements, the effect of recognition is that the applicant is recognised as being of the opposite sex to the recorded sex in their entry in the Register of Births.

Recognition of a new legal sex in Scotland for people whose gender identity is non-binary would be a significant legal step.

There would be consequential changes require to other areas of devolved law in Scotland including:

- parentage law would need to clearly include non-binary people;
- marriage law would need a new category of marriage to include a marriage involving a non-binary person;
- registration law would require amendment to ensure that non-binary people were included;⁷⁸
- criminal law may require amendment to ensure that any remaining gender specific offences can be committed by people of all legal sexes.⁷⁹

If Scotland chose to move alone to recognise non-binary people in the same way that we recognise people who identify as men and women, this could affect the rights of non-binary people who leave Scotland. The other jurisdictions of the UK and other countries might choose not to recognise a non-binary person's gender. Scotland cannot require another country to recognise a gender status which that country does not confer to its own citizens, whether this is the gender identity of a non-binary person or the acquired gender of a person recognised under the existing 2004 Act.

⁷⁸ There would also be accompanying costs to carry out the necessary alterations to the related IT systems of the National Records of Scotland.

⁷⁹ Section 20 of the 2004 Act provides that the fact that a person's acquired gender has been legally recognised does not prevent a gender specific offence being committed or attempted, whether the offence may be committed only by a person of a specific gender or on a person of a specific gender.

Option 5 – an incremental approach towards legal recognition

Under Option 5, the Scottish Government would commit to increasing recognition of non-binary people gradually. We think that this approach would involve:

- the adoption of options 1, 2 and 3 discussed above;
- our commissioning detailed research into the impact the lack of recognition has for non-binary people, the discrimination they experience and the implications of full recognition of non-binary people;
- a duty on the Scottish Ministers to consider whether further action is appropriate to further increase recognition of non-binary people; and
- Scotland moving towards full recognition including the possibility of amending birth certificates of those born in Scotland.

Option 6 – seek amendment of the Equality Act 2010

The Scottish Government has already noted the evidence that non-binary people experience discrimination.

The 2010 Act makes provision for the protection of individuals from unfair treatment and the promotion of a more equal society. The 2010 Act defines a number of protected characteristics. It provides that subject to some exceptions, it is unlawful to discriminate, harass or victimise another person because they have, are perceived to have, or associate with someone who has, a protected characteristic.

One protected characteristic is gender reassignment. As a consequence, it is usually unlawful to discriminate against a person because they propose to undergo, are undergoing or have undergone a process or part of a process to reassign their sex by changing their physiological or other characteristics of sex.⁸⁰ This process need not include medical treatment.⁸¹

The Equality and Human Rights Commission have said that the gender reassignment protected characteristic must be broadened to include all people who face ill treatment as a result of their gender identity.⁸²

The Scottish Parliament has some powers to legislate in respect of equal opportunities. However, the Scottish Parliament cannot legislate to alter the existing protected characteristics.

This means that the Scottish Government would need to work with the UK Government on any amendments to the protected characteristic of gender reassignment.

Option 7 – no change

The final option is to do nothing. This is clear, but fails to address concerns about the lack of inclusion and recognition in society of non-binary people.

Question 12

Should Scotland take action to recognise non-binary people?

Response from the Scottish Council on Human Bioethics

Don't know

The SCHB agrees that there is insufficient evidence-based research available relating to the psychological situation of non-binary individuals to respond to this question.⁸³

⁸⁰ Equality Act 2010, section 7 defines the protected characteristic of gender reassignment.

⁸¹ See Equality Act 2010 Explanatory Notes at paragraphs 41 to 43:
<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4>.

⁸² Evidence of the Equality and Human Rights Commission to the Women and Equalities Select Committee at:
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19337.pdf>.

The SCHB would also like to obtain further evidence relating to the concerns about the lack of inclusion and recognition in society of non-binary people. It would, however, like to emphasise that each person is an individual who should be accepted, included and recognised for who they are.

Question 13

If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.

- Option 1: Changes to administrative forms
- Option 2: Book of Non-binary Identity
- Option 3: Limited document changes
- Option 4: Full recognition using proposed self-declaration system
- Option 5: Incremental approach
- Option 6: Amendment of the Equality Act 2010
- None of the above options

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.

Response from the Scottish Council on Human Bioethics

None of the above options.

It is indeed impossible for the SCHB to discuss the recognition of non-binary individuals based on the very limited peer-reviewed evidence relating to the psychology of such persons.

Part 8. Conclusion

Question 16

Do you have any further comments about the review of the Gender Recognition Act 2004?

Response from the Scottish Council on Human Bioethics

Yes.

The SCHB would like to support a greater acceptance and recognition of all peoples and sub-groups as citizens equally deserving of full human rights. Otherwise, people may rebel or feel inadequate. Society should be more tolerant towards differences.

⁸³ 2015 American Psychological Association, , Guidelines for Psychological Practice With Transgender and Gender Nonconforming People, *American Psychologist*, 2015. 70(9), 832–864.