



Gender Recognition Act reform briefing note: International Best Practice

Key points

- The Scottish Government has cited alignment with ‘international best practice’ as a rationale for reforming the Gender Recognition Act to allow for the statutory self-declaration of sex as a matter of law [or statutory self-declaration of gender] (“self-declaration”).
- The Scottish Government cites the Yogyakarta Principles and Resolution 2048 of the Parliamentary Assembly of the Council of Europe as setting the standard for international best practice. Both derive their recommendations from a particular understanding of the nature of sex and identity.
- The Yogyakarta Principles do not have any official standing in international law and have not been adopted in any treaty, while Resolution 2048 creates no legally binding obligations on member states.
- Neither the Yogyakarta document nor the explanatory memorandum on Resolution 2048 contain any discussion of the implications of adopting the principles for any other protected characteristic, including sex.
- Relatively few countries have taken up statutory self-declaration since 2007. Where this has been done, exactly what detailed rights this grants in any particular state will vary, depending on how the policy has been implemented in detail and its broader approach to equalities legislation.
- The Scottish Government is bound to observe findings of the European Court of Human Rights. ECtHR law does not require states to introduce self-declaration either for documentary or legal status change. UK law appears to be fully compliant with current ECtHR rulings in this area.
- In 2017 the ECtHR upheld the right of states to require a diagnosis of gender dysphoria as a condition of granting documentary or legal status change. The Scottish Government de facto position is therefore that the European Convention on Human Rights as recently interpreted falls below international best practice.

Background

1. The Government's [Programme for Scotland 2019/20](#) states that the Scottish Government will 'consult on the detail of a draft Gender Recognition Bill by the end of this year, setting out our proposals to reform the current process of obtaining a Gender Recognition Certificate and how we will bring Scotland into line with international best practice' (2019: 18). The Scottish Government consultation document on GRA reform also cites alignment with 'international best practice' as a rationale for reform:

'...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 would align Scotland with the best international practice demonstrated in countries who have already successfully adopted self-declaration systems.'
([Scottish Government, 2017: 3.26](#))

2. In September 2019 the Scottish Government was asked in a written parliamentary question which countries demonstrated international best practice, and if it would provide details of the research and analysis it had undertaken that informed its view. The Scottish Government responded that:

'A number of jurisdictions - including Denmark and Ireland - have legal gender recognition systems in place which do not require the applicant to provide medical evidence. The Yogyakarta Principles contain recommendations on gender recognition: <https://yogyakartaprinciples.org/principles-en/>. Resolution 2048 of the Parliamentary Assembly of the Council of Europe contains provisions on gender recognition: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>. The international position on gender recognition was considered in the Scottish Government's consultation on general principles: <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>: please see in particular Part 3 and Annex D.'
([Shirley-Anne Somerville](#) 17 September 2019)

3. The consultation document identifies seven countries worldwide (Argentina, Belgium, Colombia, Denmark, Ireland, Malta and Norway) with systems of self-declaration. The consultation document describes the process for a change of documentation and status in each case. It does not however, discuss in detail the practical implications for individuals of the change, in terms of exactly what wider legal rights are conferred, and whether these are limited in any context. Nor does it assess how these systems have functioned in practice. The consultation describes the arrangements in a further seven countries and two sub-national jurisdictions which use alternatives to self-declaration. Why these specific cases were chosen to illustrate alternative approaches is not discussed.
4. This briefing note concentrates on the international legal context, particularly the status of the different international instruments quoted by the Scottish Government, and what law above the UK level appears to require. First, the briefing considers the Yogyakarta Principles and Resolution 2048 of the Parliamentary Assembly of the Council of Europe, both of which are cited by the Scottish Government as setting the

standard for international best practice on the recognition of sex in law. The briefing then considers European Court of Human Rights rulings, the Convention on the Elimination of all Forms of Discrimination Against Women, and wider United Nations activity in this area.¹

Yogyakarta Principles

5. The Yogyakarta Principles (2007) cover a broad range of rights related to sexual orientation and gender identity. ‘Gender identity’ is defined as:

‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth², including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.’³

6. This is a position based on a belief which some people hold strongly, that everyone has an inner gender identity (or sometimes a “brain sex”) which is separate from physical sex, and superior to it for social, political and legal (and, in some interpretations, even physical) purposes.
7. The Principles have no official standing in international law and have not been adopted in any treaty. As an advocacy document, Yogyakarta creates no obligations on the Scottish Government, which described the principles in its consultation paper as “non-binding”. What weight is placed on it therefore remains a matter of local judgement and accountability.
8. Professor Rosa Freedman, a specialist in international human rights law, has described how the Principles:

“were created by a self-selecting group of human rights experts, which is how many human rights initiatives begin, but have hardly been discussed by UN member states and hardly gained any traction, thus leaving them somewhat dead in the water. While there have been some occasions when they are referred to by academics, or even very rarely by a court, they are not discussed even as soft law, but rather as a set of principles developed by a small group of human rights experts.”⁴

¹ There is further discussion of the Scottish Government’s presentation of the international context, including Council of Europe and EU activity not mentioned in the consultation, available on the blog of independent researcher Susan Sinclair at <https://scottish-women.com/2018/09/13/hoodwinked-by-the-government/>

² The phrase “sex assigned at birth” reflects a belief that a prediction is being made at birth about the inner gender identity a person will later manifest, rather than an observation being made of whether they are female or male in reproductive terms. The phrase originates with the treatment of the very small number of people whose physical sex is ambiguous at birth, estimated to be around 7 or 8 cases in the UK per year. See: https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf. However, in the context of Yogyakarta, and the wider advocacy for self-declaration, sex is assumed to be assigned at birth for the whole population, including all those whose reproductive physical sex is unambiguous.

³ [Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity: Preamble](#) (March 2007).

⁴ [Speech to ForWomenScotland](#) event, Edinburgh, January 2019.

9. In over a decade, the Yogyakarta Principles have never been relied on in the multiple rulings in this area by the European Court of Human Rights (ECtHR).
10. Nevertheless, the ideas in Yogyakarta have been influential in the wider political debate, and, as set out in the Scottish Government consultation paper, a small number of countries have legislated for self-declaration systems which have no requirements for medical⁵ or other evidence.
11. The Scottish Government appears to take it as axiomatic from the framing of the Yogyakarta Principles that self-declaration is international best practice. However, the Yogyakarta document contains no discussion of the implications of adopting the principles for any other protected characteristic. It would be difficult for it to do so in relation to sex, as it is based on a belief that physical sex is overtaken by gender identity. The Scottish Government consultation paper takes the same approach and does not discuss the potential for any impact beyond those for people seeking to obtain a gender recognition certificate.

Resolution 2048 of the Parliamentary Assembly of the Council of Europe

12. Resolution 2048 includes self-identification among a large number of policies intended to reduce discrimination against transgender people. It was passed in 2015.
13. Like the Yogyakarta Principles, the resolution adopts a strongly held belief in the existence of gender identity as a ‘deeply felt internal and individual experience’, and rests on the belief that sex is ‘assigned at birth’ (Schembri 2015: para. 6).⁶
14. Resolutions of the Parliamentary Assembly of the Council of Europe are entirely political or symbolic in status. They create no legally binding obligations on member states, although the Scottish Government consultation paper refers to “ensuring our compliance” with the resolution.
15. Resolution 2048 appears to have been promoted principally by members from Ireland and Malta, with support from national and cross-national groups advocating for self-declaration.
16. As with Yogyakarta, the explanatory memorandum contains no assessment of the impact of the proposals on those with other protected characteristics, including sex.

European Court of Human Rights (ECtHR)

17. The Scottish Government is bound to observe findings of the ECtHR. This appears to be the only source of external legal imperative relevant to GRA reform.
18. The Court has ruled that states must have arrangements to protect the privacy of certain people seeking to be recognised as the opposite sex from that observed at birth, including provision to change a birth certificate. **However, the current body of ECtHR law does not require states to introduce self-identification either for**

⁵ The existing GRA 2004 requires evidence of a diagnosis of gender dysphoria but no specific medical treatment.

⁶ Schembri, D. (2015) [Discrimination against transgender people in Europe](#)

documentary or legal status change, and UK law as it stands appears to be fully compliant with current ECtHR rulings in this area.

19. Most immediately relevant here is *A.C., Garçon and Nicot v France* (2017),⁷ where the Court concluded that it was reasonable for a jurisdiction to require a diagnosis of gender dysphoria in order for a person to have access to a change of status. It follows that the Scottish Government de facto position is that the European Convention on Human Rights, as interpreted as recently as 2017 by the ECtHR, does not represent international best practice.
20. A useful summary of relevant rulings by the ECtHR is [here](#). ECtHR rulings have developed from cases first successfully brought by post-operative transsexuals seeking the ability to change all their documents and be treated wholly as the opposite to their birth sex, which have then been built on by others arguing successfully against requirements for surgery. However, the court still allows states to set other criteria. Successful cases have largely relied on privacy rights under Article 8 suggesting the extent of social and/or physical transition as a likely consideration in ECHR cases.
21. The ECtHR position therefore starts from the position of accepting that there are some people who, for whatever reason, have a great need to live as though they were the opposite sex from that they were born as. It interprets the ECHR as requiring states to enable people who have this need to meet it as far as possible, including protecting their privacy. It allows that in assessing a person's need to change official records, states can reasonably require medical confirmation of psychological distress (but not genital surgery). The Gender Recognition Act 2004 follows this. Not all countries covered by the ECHR have yet made equivalent provision.
22. By taking Yogyakarta and Resolution 2048 to be international best practice, the Scottish Government is departing from this thinking. It accepts instead, an argument that the law should be based on a particular (non-falsifiable) belief in the existence of a free-standing inner gender identity/brain sex, which should be given primacy over physical sex for the purpose of official status; and that the only valid witness to this is the person themselves. The Scottish Government position appears to be that the promotion of this view in Yogyakarta, Resolution 2048, and its adoption in a few countries, is sufficient to make it international best practice, compared to the more pragmatic, less belief-dependent approach established under the ECHR.
23. There do not appear yet to have been any cases brought to the ECtHR challenging the impact on women or other protected groups of the implementation of laws or policies which elevate self-declared identity over observed sex. A tribunal case is currently being brought in the UK under the Human Rights Act 1998, based on Article 9 of the ECHR, which alleges employment discrimination based on beliefs about the nature of sex and gender identity.⁸

⁷ See: [CASE OF A.P., GARÇON AND NICOT v. FRANCE](#)

⁸ Further information on this case is available here <https://www.crowdjustice.com/case/lost-job-speaking-out/>

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

24. The Scottish Government has obligations under CEDAW. This is an international treaty adopted in 1979 by the United Nations General Assembly and ratified by the UK in 1986. Article 1 states (emphasis added):

‘For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’⁹

25. Sex is not further defined. Some states have chosen to interpret their obligations under CEDAW as including transgender people who identify as women. However, the Convention itself does not require this: in some nations which have ratified it expressing a transgender identity remains illegal.

United Nations

26. At the international level, the UN focus remains on achieving the most fundamental human rights for LGBT people, often referred to at this level as SOGI (sexual orientation and gender identity) minorities. In 77 out of 193 countries, LGBT people face fundamental human rights abuses, and are either criminalised, or lack proper protection from abuse, suffering torture and execution in some countries.

27. It took over a decade, and substantial lobbying activity, to get narrow agreement in 2016 to [a resolution by the UN Human Rights Council \(A/HRC/RES/32/2\)](#) asserting that LGBT people should have the right to live free from discrimination by the state, and to appoint a special rapporteur. The resolution does not discuss self-declaration. Further lobbying was required to renew the rapporteur’s mandate in 2019.

⁹ [Convention on the Elimination of All Forms of Discrimination against Women \(1979\)](#)