

Gender Recognition Act Consultation Response CLGS

Question 3 Do you think there should be a requirement in the future for a diagnosis of gender dysphoria? Yes ☒ No

Please explain the reasons for your answer.

Historically the identification with a gender identity that does not match a person's sex as assigned at birth, and the consequent diagnosis of 'gender dysphoria' has been treated as a medical problem in need of psychiatric intervention. This mirrors the way in which homosexuality has historically been treated as a mental illness and has similarly contributed to the stigmatisation of trans people as mentally ill (see, e.g. Ault, Amber, and Brzuzy. "Removing Gender Identity Disorder from the" Diagnostic and Statistical Manual of Mental Disorders": A Call for Action." *Social Work* 54.2 (2009): pp.187-189). Therefore, retaining the requirement for a medical diagnosis in the context of a legal process contributes to the pathologisation of gender identity and of trans people and should be abandoned. This requirement is now also significantly out of step with similar legal frameworks in countries like Ireland and Malta that allow for a legal change of gender without the need to provide any type of medical evidence.

Question 4 Do you also think there should be a requirement for a report detailing treatment received? Yes ☒ No

Please explain the reasons for your answer.

Asking individuals to disclose confidential medical reports is not a requirement for any other type of legal process and constitutes a significant violation of applicants' privacy, which has been explicitly highlighted by Amnesty International (Amnesty International (2018) 'We support reforming the Gender Recognition Act', Available at: <https://www.amnesty.org.uk/we-support-reforming-gender-recognition-act>). It contributes to further stigmatising trans people as it suggests that their own statements regarding their gender identity cannot be trusted and therefore need to be verified through medical documents. People who have applied or considering applying for a GRC described this part of the process as "intrusive" and as "hoops" to jump through (see, Renz (2017) [The Gender Recognition Act 2004 and Transgender People's Legal Consciousness](#). Doctor of Philosophy (PhD) thesis, University of Kent, p.43). This requirement has also been abandoned or was never introduced in other comparable jurisdictions (see, e.g. Gender Recognition Act 2015 (Ireland); Gender Identity, Gender Expression And Sex Characteristics Act (Malta)). It also creates a significant burden for applicants who will have to pay for these medical reports to be produced.

Question 5 Under the current gender recognition system, an applicant has to provide evidence to show that they have lived in their acquired gender for at least two years.

(A) Do you agree that an applicant should have to provide evidence that they have lived in their acquired gender for a period of time before applying? Yes No

Please explain the reasons for your answer.

Having this requirement implies that trans people cannot be trusted to know their own gender identity or be truthful about their gender identity and therefore need to provide further evidence that supports their genuine claims. Similar waiting periods and evidence requirements are not used for individuals seeking other types of legal status changes, e.g. marriage or a change of name. For instance, the waiting period imposed by the requirement to give public notice of one's marriage is only 14 days. It is also out of line with comparable legal frameworks as it effectively imposes a two year waiting period for applicants wishing to change their legal gender, which does not exist in comparable jurisdictions (see, e.g. Gender Recognition Act 2015 (Ireland); Gender Identity, Gender Expression And Sex Characteristics Act (Malta)). Further, it can be difficult for applicants to provide relevant documents as some documents, such as HMRC records, can only be changed with a GRC. This requirement can create serious difficulties for applicants who do not have access to the necessary documentation because they do not have relevant documents such as utility bills in their name (see, Renz (2017) [*The Gender Recognition Act 2004 and Transgender People's Legal Consciousness*](#). Doctor of Philosophy (PhD) thesis, University of Kent, p.50).

(B) If you answered yes to (A), do you think the current evidential options are appropriate, or could they be amended?

(C) If you answered yes to (A), what length of time should an applicant have to provide evidence for? Two years or more; Between one year and two years; Between six months and one year; Six months or less.

(D) If you answered no to (A), should there be a period of reflection between making the application and being awarded a Gender Recognition Certificate?

There should be no requirement for a reflection period between making an application and being awarded a GRC. Comparable legal frameworks (see, e.g. Gender Recognition Act 2015 (Ireland); Gender Identity, Gender Expression And Sex Characteristics Act (Malta)) do not impose this type of waiting period in other jurisdictions as it creates the suggestion that trans people are unsure of their gender identity. Both Malta and Ireland introduced their new legal frameworks for gender recognition some time ago and there is no evidence to date that the lack of a waiting period has created any issues. If someone did genuinely reconsider their change of gender there is also nothing preventing them from applying for a new GRC at a later date, thereby making this waiting period unnecessary, as the existing requirement to remain in the "new" gender for life does not seem to be enforceable (see, Grabham (2010) *Governing Permanence: Trans Subjects, Time, And The Gender Recognition Act*. *Social & Legal Studies* 19(1): pp.107-126). Further, in the UK all available evidence indicates that people only apply for a GRC after already having socially and medically

transitioned, with the medical process imposing significant waiting periods as well, thereby making the waiting period at this stage entirely unnecessary.

Question 6 Currently, applicants for a gender recognition certificate must make a statutory declaration as part of the process.

(A) Do you think this requirement should be retained, regardless of what other changes are made to the gender recognition system? Yes No

Please explain the reasons for your answer.

From a legal perspective the statutory declaration serves no purpose in this context as it is not clear by whom it would be enforced if it contained false information and it is further only used until a person receives their GRC. One of the statements in the existing statutory declaration, which states that applicants will live in their gender for the rest of their life (para. 3), seems legally unenforceable as it requires a person to swear an oath about their future state of mind. This requirement also imposes a further burden on applicants as someone with the relevant legal authority (a practising solicitor, a commissioner for oaths, a notary public, a legal executive, a licensed conveyancer, an authorised advocate, an authorised litigator or a Justice of the Peace or a magistrate) will be needed to certify the statutory declaration. In contrast legal name changes do not require a witness acting in an official capacity and can instead be witnessed by anybody. This imposes a further logistic burden as applicants need to find an appropriate witness and also requires them to disclose their change of gender identity to a third party in order to obtain this signature and imposes additional costs on applicants as qualified solicitors on average charge at least £50 to witness a statutory declaration.

(B) If you answered yes to (A), do you think that the statutory declaration should state that the applicant intends to 'live permanently in the acquired gender until death'? Yes No

(C) If you answered no to (A), do you think there should be any other type of safeguard to show seriousness of intent?

There is no reason to assume that someone wishing to change their gender is not serious about their intent. If the statutory declaration were to be retained, it would at the very least need to be modified to remove the requirement in para. 3, which currently does not serve any legal function.

Question 7

The Government is keen to understand more about the spousal consent provisions for married persons in the Gender Recognition Act. Do you agree with the current provisions? Yes No

Please explain the reasons for your answer. If you think the provisions should change, how do you think they should be altered?

The spousal consent provision has been widely condemned as it suggests direct prejudice against trans people. Trans people and academics working in this field have highlighted that it opens up the risk of blackmail, as married trans people cannot legally change their gender without the consent of their spouse (see, e.g. Scottish Trans (2014) 'Our successful Spousal Veto removal – amendments 68, 70 & 72' Available at: <https://www.scottishtrans.org/our-work/completed-work/equal-marriage/spousal-veto-amendment/>; Renz (2015) Consenting to gender? Trans spouses after same-sex marriage. In: Barker N and Monk D (eds) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections*. Routledge: pp.79-94). This means consent can be used as a bargaining tool in divorce proceedings and custody arrangements. In no other context are married people required to obtain their spouses consent for an individual decision, making this particular unfair. Further, the debate around the spousal consent provision in the House of Lords suggested that this requirement was needed to:

- a) provide a notification for the spouses of trans people who might not be aware of their partner's transition and
- b) give the same spouses additional protection. Regarding issue a) it seems factually extremely unlikely that a person would be unaware of their partner's transition and even if they were it is unclear why legal intervention is needed in a personal matter.

Regarding point b) it is unclear why the spouses of trans people need additional legal "protection" as they are able to divorce their spouse if they are unhappy about their spouse's transition. For these reasons the spousal consent requirement was not included in the Scottish version of the GRA. This creates a serious inconsistency between legal provisions in Scotland and England & Wales and should therefore be amended as a matter of urgency.

Question 8 Currently applicants must pay £140 to apply for a Gender Recognition Certificate. (A) Do you think the fee should be removed from the process of applying for legal gender recognition? ☒ Yes ☐ No

(B) If you answered no to (A), do you think the fee should be reduced? ☐ Yes ☐ No

The Government is keen to understand more about the financial cost of achieving legal gender recognition, beyond the £140 application fee. (C) What other financial costs do trans individuals face when applying for a gender recognition certificate and what is the impact of these costs?

The current fee is out of line with other changes of documents, such as name changes (£36 - Gov.uk Available at: <https://www.gov.uk/change-name-deed-poll/enrol-a-deed-poll-with-the-courts>) or applications for a new passport (£75.50 – Gov.uk Available at: <https://www.gov.uk/passport-fees>). It is therefore not clear how this fee can be justified. It

also imposes an unnecessary burden on trans people. This is particularly worrisome as all existing research indicates that trans people, and particularly trans women of colour, are significantly more likely to be economically marginalised (see, .e.g Spade (2015) *Normal life: Administrative violence, critical trans politics, and the limits of law*. Duke University Press) due to widespread discrimination. The application process at the moment also imposes additional costs on applicants due to the requirement for two medical reports. NHS doctors generally charge at least £50 for producing each report and these costs can further increase for applicants who used private practitioners.

Therefore an estimate of the total costs, without including fees related to accessing medical treatment, would be:

Application fee: £140

Two medical reports: £100

Witness for statutory declaration: £50

Deed poll fee for change of name: £36

New passport to reflect change of name: £75.50

Total: £401.50

Question 9 Do you think the privacy and disclosure of information provisions in section 22 of the Gender Recognition Act are adequate? ☒ Yes ☐ No If no, how do you think it should be changed?

Question 11 Is there anything you want to tell us about how the current process of applying for a GRC affects those who have a protected characteristic?

Question 12 Do you think that the participation of trans people in sport, as governed by the Equality Act 2010, will be affected by changing the Gender Recognition Act? Yes ☒ No

Please give reasons for your answer.

The Equality Act 2010 currently gives significant discretion to sports bodies/organisations in terms of their decision to include or exclude trans people. Unless simultaneous changes are made to the Equality Act 2010 changing the GRA would have no effect on this area. At a professional level many sports bodies already rely on characteristics other than a person's legal sex/gender to determine eligibility, for instance through the use of hormone testing (Buzuvis "Hormone Check: Critique of Olympic Rules on Sex and Gender." *Wis. JL Gender, & Soc'y* 31 (2016): pp.29-56). Therefore we do not see any reason why changing the existing rules of the GRA would affect this area.

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Question 13 (A) Do you think that the operation of the single-sex and separate-sex service exceptions in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Yes ☐ No ☒

Please give reasons for your answer.

The Equality Act 2010 currently gives significant discretion to organisations providing single sex services in terms of their decision to include or exclude trans people. There are a number of exemptions to the Equality Act 2010 that clearly specify that trans people, regardless of whether they have a GRC, can be excluded from single-sex services and accommodation as long as this is done to meet a legitimate aim. Unless simultaneous changes are made to the Equality Act 2010 there is no reason to assume that changing the GRA would have any effect on this area.

Recently, concerns have been raised by some groups and academics about the inclusion of trans people particularly in the context of single-sex accommodation (see, e.g. Freedman, Rosa and Auchmuty, Rosemary (2018) *Women's Rights and the Proposed Changes to the Gender Recognition Act*, Available at: <http://ohrh.law.ox.ac.uk/womens-rights-and-the-proposed-changes-to-the-gender-recognition-act/>). These concerns focus on the argument that trans women and men posing as trans women could pose a danger to cis women if they are included in women-only spaces and that removing the existing evidence requirements in the GRA could exacerbate this risk. However, this concern does not seem to be supported by facts. Even if the GRA evidence requirements were to be removed, this does not change the existing provisions within the Equality Act that allow for the exclusion of trans people from single-sex spaces (see Sch.3 Para.28 Equality Act 2010). Further, existing policies, for instance in the contexts of prisons (para 4.3 *Care and Management of Transsexual Prisoners* (PSI 07/2011)) also allow for the exclusion of trans people from single-sex spaces like women's prisons on the basis of a risk assessment (see also, Sharpe (2017) *Taking to Task Left Liberal Opposition to Greening's Gender Recognition Reforms*, Available at: <https://inherentlyhuman.wordpress.com/2017/08/01/taking-to-task-left-liberal-opposition-to-greenings-gender-recognition-reforms/>). Both the Equality Act and prison guidance apply regardless of whether a person has obtained a GRC. Therefore making it easier for people to obtain a GRC will not impact these existing provisions.

Question 14

Do you think that the operation of the occupational requirement exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Yes ☐ No ☒ Please give reasons for your answer

The current definition of gender reassignment is far wider than the Gender Recognition Act and will likely continue to be wider even if the GRA is reformed. This is because the Equality Act as it stands covers anyone even wishing to undergo gender reassignment and does not require a person to actually take any steps toward that end, i.e. it does not require a person

to medically transition or obtain a GRC (s.7 Equality Act 2010). Therefore, whether a person has obtained a GRC or not is effectively irrelevant to the gender reassignment based protected characteristic under the Equality Act. The Equality Act also sets out multiple exemptions that clearly allow for the exclusion of persons who have this protected characteristic and who may have obtained a GRC in limited circumstances. Again, there is no reason to assume that this would be affected by changes to the GRA.

Question 15 Do you think that the operation of the communal accommodation exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Yes ☒ No Please give reasons for your answer

The exception to the Equality Act allows for the exclusion of trans people who have the protected characteristic of gender reassignment and who may also have obtained a GRC. Therefore as above there is no reason to assume that this would be affected by changes to the GRA unless the Equality Act is also changed separately.

Question 17 Do you think that the operation of the marriage exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Yes ☒ No Please give reasons for your answer.

The explanatory note 724 to the Equality Act already clearly states that clergy are not required to facilitate marriages where they believe a person has changed their gender through the Gender Recognition Act. Therefore even if the Gender Recognition Act were changed to make it easier to obtain a GRC, this would not affect the existing exemption.

Question 18 Do you think that the operation of the insurance exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Yes ☐ No Please give reasons for your answer.

As it is currently already possible to change one's legal gender there is no reason to assume that simply making the process more straightforward would have any effect on other areas of law unless these were specifically changed as well.

Question 19

Do you think that changes to the Gender Recognition Act will impact on areas of law and public services other than the Equality Act 2010? Yes ☒ No Please give reasons for your answer.

As it is currently already possible to change one's legal gender there is no reason to assume that simply making the process more straightforward would have any effect on other areas of law unless these were specifically changed as well.

Question 20

Currently UK law does not recognise any gender other than male and female.

Do you think that there need to be changes to the Gender Recognition Act to accommodate individuals who identify as non-binary? **Yes** No If you would like to, please expand more upon your answer.

The government may wish to consider the recommendations coming out of the Scottish GRA consultation process that highlights the need to include non-binary people within a legal recognition framework. This is also supported by the recent judicial review brought by Christie Elan Cane (*R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)*), which highlighted people's wish to have an 'X' marker available on UK passports. Other jurisdictions like Australia (Australian Government: Department of Foreign Affairs and Trade. (N.D.) *Sex and gender diverse passport applicants*. Available at: <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>), parts of the US (see, e.g. Oregon Parks C. (10 June 2016) Oregon court allows person to change sex from 'female' to 'non-binary'. *The Oregonian*); Denmark (12/09/2014) Transgender Europe, Denmark: X in Passports and New Trans Law Works, Available at: <http://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/>) and Germany (1 BvR 2019/16) already offer or are in the process of offering some form of recognition for non-binary people and it would be important for the UK to also include non-binary people in any reformed version of the GRA.

Question 21

(A) Do you have a variation in your sex characteristics? Yes

☐ No

As outlined in question 3, the Government wants to understand whether there should be any requirement in the future for a report detailing a diagnosis of gender dysphoria and any requirement for a report detailing treatment received.

(B) Would removing these requirements be beneficial to you?

(C) What other changes do you think are necessary to the GRA in order to benefit intersex

people?

The GRA is phrased in such a way that it can be interpreted as excluding people with variations of sex characteristics or intersex people. Diagnoses such as gender dysphoria or gender identity disorder are only available where there is no concurrent physical intersex condition – thus *ipso facto* anyone with a variation of sex characteristics is excluded from the exercise of the rights contained in the GRA. Furthermore, linking alteration of legal gender of recognition to a particular diagnosis may encourage further medicalisation of intersex bodies.

Question 22

Do you have any further comments about the Gender Recognition Act 2004? ☒ Yes ☐ No

We understand the purpose of this consultation as making it easier for people to obtain a GRC without making changes to other areas of law, such as the Equality Act 2010. What this consultation currently does not address are the following points:

- 1) Whether it is necessary for all people to have a sex assigned at birth considering that most legal provisions are now gender-neutral.
- 2) How trans parents who have children after obtaining a GRC can be appropriately recognized as the parents of their children in a way that reflects their changed gender status (see, e.g. McCandless (2012) "Transgender parenting and the law: we must be creative with legislation to cater for parents who do not fit neatly with the traditional family model." *British Politics and Policy at LSE*; Gibb (2018) 'Trans man who gave birth denied child benefits' *The Times*, Available at: <https://www.thetimes.co.uk/article/trans-man-who-gave-birth-denied-childbenefits-Ind2lbjfy>)
- 3) If recognition for non-binary people is introduced after this consultation, it will need to be addressed how this will impact areas of law that are currently still based around a persons legal gender, such as for example pensions and parental leave.