



Law Society  
of Scotland

# Consultation Response

## Review of the Gender Recognition Act 2004

March 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Equalities Law and Family Law Sub-committees welcome the opportunity to consider and respond to the Scottish Government's consultation: Review of the Gender Recognition Act 2004. The Sub-committees have the following comments to put forward for consideration.

## Specific Responses

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**Q1 – 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-declaration system for legal gender recognition instead.**

We agree with this proposal.

The current process could be considered too medicalised, and does not properly take account of the emotional consequences of the procedure on the individual.

Self-declaration may also be of benefit to a person who is transitioning by removing time requirements, thereby speeding up the process for legal recognition of their acquired gender. Anecdotal evidence suggests that transgender people feel that insufficient resources are allocated within the health service resulting in waiting periods of over a year for initial consultations.<sup>1</sup> Further research reports that 62% of

<sup>1</sup> Equality Network, *The Scottish LGBT Report*, (2016)

transgender people who have undergone, or are undergoing, medical intervention for their transition are unsatisfied with the time that it took to get an appointment.<sup>2</sup>

It is noted that a balance is struck in the Equality Act 2010 for persons who provide single sex services such as refuges, hospital wards, toilets and gyms, where there may be discrimination in respect of persons who have undergone gender reassignment, provided this is a proportionate means of achieving a legitimate aim.

It is also noted that some aspects of identity, such as driving licences and passports, are reserved matters. If a person is to have a consistent gender identity these aspects will require to be addressed.

## **Q2 – 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?**

We broadly agree with this proposal.

There should be a high degree of formality to the process and a person self-declaring in this manner should be in no doubt that if they do so lightly or for spurious reasons, there will be consequences for them. Consideration should be given to creating a criminal offence of making a false statement, and to building in a period of reflection between perhaps an interim certificate and finalisation of the process.

## **Q3 – Should there be a limit on the number of times a person can get legal gender recognition?**

We agree with this proposal.

The process should have a high degree of formality and recognise that this is a life changing decision which should only be taken after full consideration of the consequences. While consideration should be given to allow a person to make such a declaration and then reverse it, in very limited circumstances, having done so, there should not generally be any further opportunity to seek a further declaration.

Consideration may need to be given to how a self-declaration model may affect an individual who genuinely does not identify with either gender.

<sup>2</sup> Stonewall, *Trans Report* (2018)

**Q4 – 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?**

**(B) To everyone?**

**(C) Don't know**

We prefer proposal A.

Extending the right more widely may encourage people from outwith the jurisdiction to travel to Scotland for the specific purpose of seeking such recognition, when the process itself is presumably intended to be a Scottish legal and policy issue relating to the people of Scotland.

Extending the process to everyone would also allow people from other parts of the UK to apply to have their acquired gender legally recognised through self-declaration in Scotland. If the same self-declaration process is adopted throughout the UK, this would likely not be an issue (and should remove the need for non-Scottish residents to apply in Scotland), but if different systems are adopted throughout the UK, or at different times, then there is a potential for legal problems to arise.

**Q5 – (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 and obtain legal recognition of their acquired gender.**

We agree with this proposal.

If 16 is considered an age at which people can marry or vote in some circumstances, then it must follow that those who have attained that age are deemed to have sufficient maturity to make such decisions.

However, the law does provide additional protection for 16 and 17 year olds. For example, the Age of Legal Capacity (Scotland) Act 1991 permits persons under the age of 21 to apply to set aside transactions entered into when they were 16 or 17. There is an argument for making reversal of gender change undertaken when 16 or 17 easier than for a person who was 18 or over at the time of making a declaration.

An additional factor for consideration is that a person can remain a looked after child under the Children's Hearings (Scotland) Act 2001 until they attain the age of 18, meaning that restrictions can be placed on their private life (for example, where they live), beyond the age of 16. This is presumably in recognition of the additional vulnerabilities of and complexities in the lives of such young adults. Consideration may be needed as to whether there should be additional notification requirements in relation to looked after young

adults, in order to ensure additional support and time for reflection to make an informed decision but with care to ensure that the ultimate decision remains with the individual young adult concerned.

## **Q6 –Which of the identified options for children under 16 do you most favour?**

We do not most favour any of the identified options.

This is a difficult question and a number of considerations must be taken into account. There are strong arguments that children may require additional support and protection in the context of making the very significant decision to self-declare. It is noted that existing law allows children who, in the opinion of a qualified medical practitioner, are capable of understanding the nature and possible consequences of the procedure or treatment to consent to that procedure or treatment, in general terms.<sup>3</sup> It would seem inconsistent to have a capable child able to consent to the medical procedures that may relate to a gender transition, but not to the legal procedure for recognition. That may however place a considerable burden on the attending medical practitioner.

It is acknowledged that gender dysphoria can be strongly experienced by children under the age of 16, and it may be necessary to ensure that they are able to make a self-declaration is capable of doing so.

There is an argument for making gender change for a child under the age of 16 subject to court process, to protect children who may be at risk of being pressured into gender transition without adequate medical or psychological support and evidence.<sup>4</sup>

It may be possible to develop a hybrid approach allowing an application with parental consent with a requirement for a supportive opinion from an expert such as a psychologist or other relevant medical practitioner, and an alternative court based process where the supported parental consent route is not an option.

## **Q7 – Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?**

Yes, we agree with this proposal.

The decision to obtain legal gender recognition should be made by the individual. However, it must also be open to a spouse who does not wish to remain in a marriage following a change in gender of the other spouse, to end the marriage.

<sup>3</sup> Age of Legal Capacity (Scotland) Act 1991, s 2(4)

<sup>4</sup> See, for example in *Re J* [2016] EWHC 2430 (Fam). This may be an isolated case, but it illustrates a potential need for external scrutiny in such cases.

**Q8 – Civil partnership is only available to same sex couples. This means that civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate. Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.**

The answer to this question will depend on whether civil partnership is open to opposite sex couples. The non-availability of civil partnership to opposite sex couples is to be considered by the Supreme Court in *Steinfeld and Keidan v Secretary of State*.<sup>5</sup> In the meantime, the UK government has indicated it proposes to consult on extending civil partnership to opposite sex couples, or to abolish civil partnership altogether. The approach in Scotland remains to be seen.

**Q9 – Should legal gender recognition stop being a ground of divorce or dissolution?**

No, we do not agree with this proposal.

A fundamental change in a relationship such as gender change by one party should allow for dissolution of that relationship on a no fault basis. It may be possible for this to be considered as an additional reason for deciding that the marriage has broken down irretrievably, rather than to set it out as a separate ground. This would require a change to the Divorce (Scotland) Act 1976. However, as stated in Q7 above, it is important for each party to a marriage or civil partnership to be able to make their own independent decision on the issues surrounding the gender change of a party to the relationship. This should be acknowledged in both directions.

**Q10 – Are any changes to section 22 (prohibition on disclosure of information) necessary?**

Data protection issues are reserved to Westminster. The current Data Protection Bill is likely to be the most appropriate instrument to cover this point.

We are not aware of any issues with the existing set of exemptions.

**Q11 – Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?**

Yes, we agree with this proposal.

<sup>5</sup> *Steinfeld and Keidan v Secretary of State* [2017] EWCA Civ 81

However, the approach should be subject to the general private law exception based on public policy, which would act as a safeguard in cases where, for example, an acquired gender were inappropriately attributed to a person.

A list of recognised authorised authorities may be helpful to ensure that the process in other jurisdictions is considered appropriate to recognise in Scotland.

## **Q12 – Should Scotland take action to recognise non-binary people?**

This is an issue of social policy, and we have no direct comment to make. Some of the legal implications of such recognition are discussed in our answer to Q13 below.

## **Q 13 – If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support?**

There are a wide range of legal implications that would need to be carefully considered if non-binary became a formally recognised gender.

Options 1 and 2 appear to be of very limited legal impact and effectiveness. This may also be the case for Option 5, at least initially.

Option 3 relates to reserved matters, only allowing the Scottish Government to seek changes, rather than having the power to implement changes. Careful consideration would have to be given to what would happen in a situation where the recognition of non-binary people was different in different parts of the UK.

## **Q14 – At paragraph 7.26 and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system. Are you aware of other impacts we have not identified?**

No.

We have not identified any additional areas of impact at this stage, but would suggest further detailed consideration of the potential impacts if this proposal is taken forward.

## **Q15– Do you have any comments about, or evidence relevant to:**

**(a) the partial Business and Regulatory Impact Assessment;**

**(b) the partial Equality Impact Assessment;**

**(c) partial Child Rights and Wellbeing Impact Assessment; or**

**(d) the partial Privacy Impact Assessment?**

No.



**Q16– Do you have any further comments about the review of the Gender Recognition Act 2004?**

No.



**For further information, please contact:**

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