



Law Society
of Scotland

Consultation Response

Reform of the Gender Recognition Act 2004

October 2018



Introduction

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.

Our Equalities Law and Family Law sub-committee welcome the opportunity to consider and respond to the UK Government's consultation: Reform of the Gender Recognition Act 2004. The sub-committees have the following comments to put forward for consideration.

Summary

Although this consultation is only considering changes to apply in England and Wales, as the current procedure under the Gender Recognition Act 2004 applies in Scotland, we have taken this opportunity to share our views on reform.

We welcome consideration of reform of the Gender Recognition Act 2004. There are a number of ways in which the Act could better serve the needs of individuals.

- We support self-declaration with a significant reduction in the evidence required to be presented in an application for gender recognition.
- We believe that the process for granting legal gender recognition should be highly formal and acknowledge this is a serious, life changing decision with consequences.
- Consideration should be given to providing for a period of reflection before finalisation of the process.
- The law relating to gender recognition for people under the age of 18 should be given careful consideration with a view to reform.

Consultation questions

We have not answered Questions 1, 2, 8, 10, 11, or 21 as these are targeted at individuals or best addressed by individuals and organisations directly affected by the gender recognition process.

Question 3. Do you think there should be a requirement in the future for a diagnosis of gender dysphoria?

No.

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.¹ Further research reports that 62% of 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.²

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.

Question 4. Do you also think there should be a requirement for a report detailing treatment received?

No.

As discussed in response to Question 3 above, we support self-declaration with the intention of reducing the need for evidence.

¹ Equality Network, *The Scottish LGBT Report*, (2016)

² Stonewall, *Trans Report* (2018)

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?

No.

As discussed in our response to Questions 3 and 4 above, we support self-declaration without the requirement of providing evidence.

(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?

Yes.

Although we support a reduction in the requirements for providing evidence, 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.

Consideration should be given to building in a period of reflection between perhaps an interim certificate and finalisation of the process.

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.

As noted in response to Question 5 above, although we support a reduction in the requirements for providing evidence, 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.

(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.

As noted in response to Questions 5 and 6 above, 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 (subject to our comments on under 18s in response to Question 22, below).

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

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?

No.

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.

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 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.

Question 9. Do you think the privacy and disclosure of information provisions in section 22 of the Gender Recognition Act are adequate?

We are not aware of any issues with this section, though note that it does only apply in limited circumstances. We would also note that protected information may in some situations be special category data under the General Data Protection Regulations, which would also impact on the processing and handling of such information by organisations. Care should be taken to ensure that all those, including volunteers, who may encounter such information in the course of their duties are aware of their responsibilities. This is particularly important for those who may be less familiar with obligations of confidentiality and privacy through the course of their work.

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?

We have no comment to make at this stage.

Question 13. (D) 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?

The Equality Act 2010 allows service providers to discriminate on grounds of transgender status in fairly narrow circumstances and only where they can show that refusing a single sex service to a transgender person would be a proportionate means of achieving a legitimate aim. The justification for this type of discrimination applies regardless of whether the trans person has a Gender Recognition Certificate or not. The fact that the person has a Gender Recognition Certificate is one factor that will be weighed in the balance when applying the justification test. The only impact that we can therefore foresee is that if more trans people are able to obtain Gender Recognition Certificates then the burden of proving justification may be slightly higher for service providers. It will not affect the test in the Equality Act 2010 itself and we cannot see the need for the wording of the test to be altered given that it follows well established principles for justifying discrimination that apply elsewhere in discrimination law.

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?

We refer to our response to Question 13 above. The Equality Act 2010 already allows employers to apply an occupational requirement for someone not to be transgender if they can objectively justify it. Again this applies regardless of whether the person has a Gender Recognition Certificate or not. The only change we can therefore foresee is that employers will have to take more care in considering whether they can justify such a requirement if more transgender people are able to obtain Gender Recognition Certificates as this will be a factor they will need to weigh in the balance when considering whether such a requirement is a proportionate means of achieving a legitimate aim.

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?

We have no comment to make at this stage.

Question 16. Do you think that the operation of the armed forces exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

We have no comment to make at this stage.

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?

We have no comment to make at this stage.

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?

We have no comment to make at this stage.

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?

We have no comment to make at this stage.

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?

This is an issue of social policy, and we have no direct comment to make. However, there are a wide range of legal implications that would need to be carefully considered if non-binary became a formally recognised gender.

Question 22. Do you have any further comments about the Gender Recognition Act 2004?

Children and young people

The consultation document notes the increase in demand for Gender Identity Development Services for under 18s. The issue of self-declaration for under 18s is an important one, and should be carefully considered.

We support reducing the minimum age of applicants to those aged 16 and over.

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.

For children under 16, 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.³ 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. In addition, consideration should be given to whether there should be a higher level of safeguard, including medical and psychological support, relating to the provision of irreversible medical intervention relating to gender transition for children and young people.

³ Age of Legal Capacity (Scotland) Act 1991, s 2(4)

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 if 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.⁴

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.

Devolution

Finally, we note that this consultation is only proposing changes in relation to England and Wales. Although much of the legal elements of gender recognition are devolved to Scotland, we note 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.

⁴ 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.



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