



DEBATE PACK

Number CDP-2018-0254, 16 November 2018

Proposals to allow self-identification of gender

Westminster Hall, Wednesday 21 November 2018, 9.30am

A Westminster Hall debate on Proposals to allow self-identification of gender is scheduled for Wednesday 21 November 2018 at 9.30am. The Member leading the debate is David T C Davies MP.

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Subject specialists:
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(Gender recognition),
Douglas Pyper (Equality)

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1. Background

1.1 Introduction

Trans identity

In its first report of session 2015-16 on [Transgender Equality](#), the House of Commons Women and Equalities Committee gave this explanation of trans-identity:

Each of us is at birth assigned a sex (male or female), based on our physical characteristics. Most people's gender identity (the gender with which they associate themselves) and gender presentation (how they outwardly show their gender) will not differ from that typically associated with their assigned sex. Trans people, however, have a gender identity which differs from that of their (assigned) birth sex. Trans identities take a wide diversity of forms.

Number of trans people

While acknowledging that it does not know exactly how many trans people there are in the UK, the UK Government has estimated that between 200,000 and 500,000 people identify in this way. Annex E of the consultation paper, [Reform of the Gender Recognition Act – Government Consultation](#), discusses estimates of trans population size.

Difficulties experienced by trans people

The consultation paper also outlines some of the difficulties experienced by trans people (p12):

Being trans is not a mental illness. Despite this, and despite the progress that we have made in recent years, trans people continue to face significant barriers to full participation in society. Rates of suicide and self-harm, particularly amongst young trans people, are too high. Trans people continue to face discrimination and harassment in the workplace, in school and on the street. Ultimately this can prevent many from fulfilling their potential, and finding the dignity and respect that they deserve.

1.2 Gender Recognition Act

The [Gender Recognition Act 2004](#) (GRA) provides a procedure for a person to apply for a gender recognition certificate (GRC). The consequence of receiving a GRC is that the applicant is treated in the eyes of the law as being of their acquired gender.

The Gov.UK website provides information about [applying for a Gender Recognition Certificate](#). More detailed information is provided in an HM Courts and Tribunals publication, [The General Guide for all Users Gender Recognition Act 2004](#) (2018).

A transgender person can make some changes in their life without obtaining a GRC (e.g. changing the gender in their passport or driver's licence). The Government's factsheet, [Trans people in the UK](#) (2018), provides an overview.

Application tracks

There are three different application routes. Each route one has different evidential criteria but all applicants for a GRC must be aged 18 or over and must pay a fee of up to £140. Other evidential requirements include:

- in the standard track, used by about 95% of applicants, the applicant must:
 - provide two medical reports confirming that the applicant has been diagnosed with gender dysphoria,¹ and including details of any treatment the applicant has had to modify their body (eg hormone treatment or surgery);
 - prove they have lived in their acquired gender for at least two years;
 - provide a statutory declaration that they intend to live permanently in their acquired gender until death.

There are additional requirements for married applicants and applicants in a civil partnership;

- in the alternative track, used by around 1% of applicants, (for people who have socially and medically transitioned some time ago):
 - only one medical report is needed confirming either that the applicant has been diagnosed with gender dysphoria or that they have had surgery to change their sexual characteristics;
 - the applicant must live in England, Wales or Scotland most of the time;
 - the applicant must provide evidence that they had lived in their acquired gender for at least 6 years before 10 December 2014 and continue to do so;

¹ [The General Guide for all Users Gender Recognition Act 2004](#) (2018) states that gender dysphoria is "a recognised medical condition variously also described as gender identity disorder and transsexualism. It is an overwhelming desire to live in the opposite gender to that which a person has been registered at birth";

- the applicant must be in (or have been in) a protected marriage or protected civil partnership;²
- in the overseas track, used by about 4% of applicants, evidence is required that the applicant has been legally recognised in their acquired gender by a country or territory listed in legislation.³

No requirement for gender reassignment surgery

It is not a requirement for an applicant to have undergone gender reassignment surgery or hormone treatment, although many applicants do so. HM Courts and Tribunals Service guidance, [Guidelines for registered medical practitioners and registered psychologists To facilitate completion of the Medical Report Proforma for Gender Recognition](#) states "If the patient has not had surgery then the report must explain why".

In a Grand Committee debate on the Bill which became the GRA, Lord Filkin, who was then a junior Minister at the Department for Constitutional Affairs (now the Ministry of Justice), confirmed the then Government's position about why surgery would not be a requirement for gender recognition:

We could have included the further test, which some European Union countries impose, of requiring surgery. We have not done so for a number of reasons. In some cases, there will be medical reasons why the person cannot or should not have surgery. It therefore did not seem to us right to deny them, if every other factor seemed to indicate that they are genuinely showing clear evidence of an intent to live in that gender for ever. As we know that most transsexuals do seek surgery, in cases where the person has not had surgery we would expect the panel not to treat that as *prima facie* evidence that there was doubt, but at least to question why surgery had not taken place. It might, just possibly might, have a bearing on the seriousness of the intent.⁴

² As set out in [Reform of the Gender Recognition Act – Government Consultation, p18 footnote 6](#), a marriage or civil partnership is protected if it is one of the following:

- registered under the law of England and Wales
- a marriage solemnised in Scotland
- a civil partnership registered in Scotland
- a marriage registered under the law of a country or territory outside the UK
- a marriage on UK consular premises or in an armed forces base, if the applicant elected England, Wales or Scotland as the relevant part of the UK

³ [Reform of the Gender Recognition Act – Government Consultation, pp18-19](#)

⁴ [HL Deb 13 January 2004 c10GC](#)

1.3 Transgender persons and gender-segregated spaces

The [*Equality Act 2010*](#) prohibits discrimination on the basis of protected characteristics (listed in [section 4](#)). One of the protected characteristics is gender reassignment, defined in [section 7](#):

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.

This protection applies irrespective of a GRC.

However, a GRC does make a difference in relation to the Act's protection from sex discrimination. The Act protects individuals against sex discrimination on the basis of their legal sex. The Equality and Human Rights Commission [explains](#) the law as follows:

The Equality Act 2010 protects individuals sharing a protected characteristic from discrimination and harassment. Protected characteristics include sex (being a man or a woman) and gender reassignment (an individual who is 'proposing to undergo, is undergoing or has undergone a process or part of a process to reassign their sex). There is no requirement for a trans person to have any kind of medical supervision or intervention in order to be protected from gender reassignment discrimination.

Certain exceptions in the Act set out circumstances in which it is permissible to treat someone differently because of their sex or gender reassignment, for reasons of public policy or to protect the rights of others. The use of such exceptions generally needs to be justified as being a proportionate way to achieve a legitimate objective. This will often require a case-by-case approach to determine what is legitimate and proportionate in any given circumstance.

Under the Act, the protection from gender reassignment discrimination applies to all trans people who are proposing to go, are undergoing or have undergone (part of) a process of gender reassignment. At the same time, a trans person is protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC.⁵

The prohibition of discrimination based on gender reassignment is not, therefore, absolute; the *Equality Act 2010* recognises several

⁵ EHRC, Our statement on sex and gender reassignment: legal protections and language, July 2018

circumstances in which discrimination is permissible. These are described in Annex C to the UK Government's consultation paper, *Reform of the Gender Recognition Act – Government Consultation*. For example, in relation to single and separate sex services, the paper summarises the law as follows:

A service provider can deliver separate services for men and women where providing a combined service would not be as effective. In each case, such provision has to be justified. So, for instance, it would not be unlawful for a charity to set up separate hostels, one for homeless men and one for homeless women, where the hostels provide the same level of service to men and women because the level of need is the same but a unisex hostel would not be as effective.

Single sex services are permitted where:

- only people of that sex require it;
- there is joint provision for both sexes but that is not sufficient on its own;
- if the service were provided for men and women jointly, it would not be as effective and it is not reasonably practicable to provide separate services for each sex;
- they are provided in a hospital or other place where users need special attention (or in parts of such an establishment);
- they may be used by more than one person and a woman might object to the presence of a man (or vice versa); or
- they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex. In each case, the separate provision has to be objectively justified.

These exceptions would allow, for instance:

- a cervical cancer screening service to be provided to women only, as only women need the service;
- a fathers' support group to be set up by a private nursery as there is insufficient attendance by men at the parents' group;
- a domestic violence support unit to be set up by a local authority for women only but there is no men-only unit because of insufficient demand;
- separate male and female wards to be provided in a hospital;
- separate male and female changing rooms to be provided in a department store;
- a massage service to be provided to women only by a female massage therapist with her own business operating in her clients' homes because she would feel uncomfortable massaging men in that environment.⁶

⁶ Government Equalities Office, *Reform of the Gender Recognition Act – Government Consultation*, July 2018, pp72-73

1.4 Women and Equalities Committee recommendation

On 14 January 2016, the Women and Equalities Committee published a report on [Transgender Equality](#). The report criticised the GRA for its dated “medicalised approach” and recommended reform in line with the principles of gender self-identification:

44. While we recognise the importance of the Gender Recognition Act as pioneering legislation when it was passed, it is clear that the Act is now dated. The medicalised approach regarding mental-health diagnosis pathologises trans identities; as such, it runs contrary to the dignity and personal autonomy of applicants.

45. Within the current Parliament, the Government must bring forward proposals to update the Gender Recognition Act, in line with the principles of gender self-declaration that have been developed in other jurisdictions. 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 its [Response](#) to the report, published on 7 July 2016, the Government committed to review the Gender Recognition Act 2004 to explore possible changes to streamline and de-medicalise the gender recognition process.⁷

1.5 Consultations on reform of GRA England and Wales

In July 2018, the UK Government published a consultation document on reforms to the GRA: [Reform of the Gender Recognition Act – Government Consultation](#). The consultation ended on 22 October 2018.

[Gov.UK](#) has this summary of the purpose of the consultation:

Trans people are able to receive legal recognition of their acquired gender through a process set out in the Gender Recognition Act (GRA) 2004. Since the GRA came into force, only 4,910 people have legally changed their gender. This is fewer than the number of trans respondents to the government’s LGBT survey, who were clear that they wanted legal recognition but had not applied because they found the current process too bureaucratic, expensive and intrusive. The government therefore seeks your views on how to reform the legal recognition process.

The consultation focuses on the Gender Recognition Act 2004. We are not proposing any amendments to the Equality Act 2010.

⁷ [Government Equalities Office, Government Response to the Women and Equalities Committee Report on Transgender Equality, July 2016, p11](#)

This consultation does not consider the question of whether trans people exist, whether they have the right to legally change their gender, or whether it is right for a person of any age to identify with another gender, or with no gender. Trans and non-binary people are members of our society and should be treated with respect. Trans people already have the right to legally change their gender, and there is no suggestion of this right being removed. This consultation simply asks how best government might make the existing process under the Gender Recognition Act a better service for those trans and non-binary people who wish to use it.

The Ministerial Foreword to the consultation outlined the nature of the consultation, indicating that removal of the requirement for a medical diagnosis in order to achieve legal recognition was only one option being considered, and that no firm decision had been taken yet:

This consultation seeks views on how the Government might make it easier for trans people to achieve legal recognition. The way this has been achieved in some other countries around the world is to remove the requirement for a medical diagnosis and to streamline other parts of the process. This is one option that the Government wishes to ask for views on but no firm decisions on our eventual approach have been taken. The legal recognition process is separate from the pathway that trans people follow to obtain medical treatment that they may wish to have, such as hormones or surgery. The questions about any removal of a requirement for a medical diagnosis in the context of this consultation is only with regard to the legal recognition process.

We also want to be clear that this is an explorative consultation and we do not have all the answers. That is why, as we consult, we are mindful of the need to engage with all perspectives. We particularly want to hear from women's groups who we know have expressed some concerns about the implications of our proposals. To be clear – this consultation focuses on the Gender Recognition Act; we are not proposing to amend the Equality Act 2010 and the protections contained within it. We do realise, however, that there are concerns about interactions between the two Acts and we want to use this consultation as a way of gathering these views.

The consultation paper included specific questions about the evidence requirements for legal gender recognition (pp30-34), and about single and separate sex services (pp45-6).

The Government has stated that it will carefully consider all of the views expressed in response to the consultation and will publish a response that sets out how it intends to proceed.

Scotland

The GRA extends across the United Kingdom. However, gender recognition is a devolved matter meaning that legislation in this area is within the competence of the Scottish Parliament.

In the [Fairer Scotland Action Plan](#) (2016), the Scottish Government committed to 'review and reform gender recognition law so it is in line with international best practice for people who are transgender or intersex'.

The Scottish Government's separate consultation, [Review of the Gender Recognition Act 2004](#), ran from 9 November 2017 to 1 March 2018.

This sought views on whether and how the GRA should be amended in relation to the law in Scotland. It covered establishing new arrangements for dealing with applications for legal gender recognition, the minimum age at which applications for gender recognition could be made, and related matters.

[Part 3](#) of the consultation paper covered reforming the legal gender recognition system in Scotland, and set out the Scottish Government's initial view that, subject to views expressed during the 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 would align Scotland with the best international practice demonstrated in countries who have already successfully adopted self-declaration systems. We would be ensuring our compliance with Resolution 2048.^[8] And the arrangements would be less intrusive and onerous from the perspective of applicants.

3.27. In one aspect, we think 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, [21] 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. Paragraphs 3.30 to 3.34 discuss retaining the requirement for a statutory declaration under the proposed self-declaration system.

3.28. 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...

The Scottish Government has since published:

⁸ Resolution 2048 of the Parliamentary Assembly of the Council of Europe – information about this is provided in Part 3 of the Scottish Government consultation

- the [responses](#) from organisations which gave permission to publish; and
- a [circular](#) with an update on the Scottish Government's progress following the consultation.⁹ This referred to the Scottish Government's Programme for Scotland 2018-2019, [Delivering for Today, Investing for Tomorrow](#), which was published on 4 September 2018, which confirmed on page 16 that the Scottish Government:

"will continue work that will enable us to bring forward legislation on gender recognition in the next legislative programme."

1.6 Arguments for and against ‘self-identification’

There are strongly held views for and against self-identification for gender recognition.

- Arguments by those in favour of self-identification include that the current process is "overly intrusive, humiliating and administratively burdensome". Trans people have argued that the requirement for a diagnostic psychiatric report perpetuates "the outdated and false assumption" that being trans is a mental illness. The fee of £140 and associated costs are seen as expensive and there is no right of appeal against the decision unless on a point of law.¹⁰
- Those against self-identification are concerned, for example, about the potential for abuse, particularly where this abuse could negatively impact vulnerable women in safe single sex spaces.¹¹ Press articles have highlighted the recent case concerning a self-identifying prisoner who assaulted women in a women's prison.¹² Concerns have been raised that there has been intimidation of those organising and attending meetings to consider the Government's proposals, and that debate has been stifled.¹³

⁹ 12 September 2018

¹⁰ [Reform of the Gender Recognition Act – Government Consultation, p21](#)

¹¹ For example, David Batty, "[Transgender law reform has overlooked women's rights, say MPs](#)", Guardian, 17 October 2018

¹² For example, Nazia Parveen, "[Transgender prisoner who sexually assaulted inmates jailed for life](#)", Guardian, 11 October 2018

¹³ Jamie Doward, "[Women's groups claim 'silencing' on transgender concerns](#)", Observer, 14 October 2018

2. News and blogs

Christian Institute

[Making gender identity an issue creates confusion, says columnist](#)

2 November 2018

Rights Info

[This is what Gender Recognition Act reform means for our rights](#)

16 October 2018

Southall Black Sisters

[Pragna Patel signs letter supporting need for free and open debate on gender politics](#)

14 October 2018

Amnesty International

[Have your say on the Gender Recognition Act](#)

8 October 2018

Government Equalities Office

[Government announces plans to reform process of changing legal gender](#)

3 July 2018

Stonewall

[The time for trans equality is now](#)

3 July 2018

Women's Aid

[Women's Aid responds to the launch of the government's consultation, 'Reform of the Gender Recognition Act 2004'](#)

3 July 2018

2.1 Press

Observer

[Too young to decide? Questions dividing real-life Butterfly families](#)

3 November 2018

Mail on Sunday

[Making gender identity an issue creates confusion, self-doubt and worry in young people](#)

21 October 2018

Guardian

[Reforming the Gender Recognition Act would change my life](#)

21 October 2018

Guardian

['Shifting sands': six legal views on the transgender debate](#)

19 October 2018

Guardian

[Back the Gender Recognition Act reform. It's the feminist thing to do](#)

19 October 2018

Guardian

[David Gauke: priority must be protecting women when placing transgender prisoners](#)

19 October 2018

BBC News

[Gender Recognition Act: 'Why we want identity rules changed'](#)

17 October 2018

Guardian

[The Gender Recognition Act: where rights collide](#) (editorial)

17 October 2018

Telegraph

[Transgender prisoner born a male who sexually assaulted female inmates after being jailed for rape is sentenced to life](#)

11 October 2018

Scotsman

[Primary one children will be told 'your gender is what you decide'](#)

5 August 2018

Economist

[Gender identity needs to be based on objective evidence rather than feelings](#)

3 July 2018

BBC News

[The transgender arguments dividing society](#)

5 March 2018

BBC News

[Gender identity: what do legal changes have to do with women's rights?](#)

31 July 2017

3. Parliamentary Business

3.1 Debates

LGBT Action Plan: Gender Recognition

Question for short debate

HL Deb 12 July 2018 c1012-26

3.2 Parliamentary Questions

Topical Questions

Asked by: David T C Davies

What is the Ministry of Justice doing to ensure that female prisoners can never again be assaulted on the female estate by male prisoners who claim to be transgender?

Answered by: Edward Argar | Ministry of Justice

My hon. Friend raises a very important issue. It is important that all prisoners are treated with respect, but it is also vital that the safety of all prisoners is prioritised. Detailed procedures are in place in Prison Service instruction 17/2016 to do that in respect of transgender prisoners. The offences at New Hall are very serious and we are looking at how those rules were applied in that case. In the light of that, I can confirm that I continue to look carefully at the content and application of PSI 17/2016.

HC Deb 13 November 2018 c176

Gender Recognition

Asked by: Sarah Champion

To ask the Minister for Women and Equalities, what plans she has to continue to consult with trans and non-binary people on reform of the Gender Recognition Act 2004.

Answered by: Victoria Atkins | Women and Equalities

From 3 July to 22 October the GEO received responses from a range of individuals and organisations as part of the public consultation on the Gender Recognition Act 2004. We asked how we might reform the Act to make it less bureaucratic and intrusive to change legal gender and we received many responses from trans and non-binary people.

The GEO met over 100 organisations in the run up to, and during this public consultation. We are now preparing to analyse the written submissions and evidence collected so far.

We are aware there are a range of views on reform and that this is a complex issue that we want to get right. That is why we will continue to meet with stakeholders as we develop the Government's response.

31 October 2018 | Written question | 182780

Engagements

Asked by: David T C Davies

Women who have concerns about proposals to change the Gender Recognition Act 2004 that would allow self-definition of gender have had their meeting venues cancelled, have been subject to intimidation and have even been dragged into courts as a result of private prosecutions. Will the Prime Minister agree to a short meeting with a victim of sexual violence who believes that these plans will needlessly put more women in danger?

Answered by: The Prime Minister (Mrs Theresa May)

My hon. Friend raises a very important subject. It is right that we are making these proposals on gender reform, but of course this is a very sensitive issue and we have to make sure that any changes take into account their potential impact on women. I am very sorry to hear of the experience of the individual whom he mentioned.

In the run-up to the consultation on the Gender Recognition Act and during it, officials met more than 90 different groups, including lesbian, gay, bisexual and transgender groups, women's groups, refuges and domestic abuse charities, but this is an important and sensitive issue, and we want voters to be heard. May I suggest to my hon. Friend that I will ask a Minister from the Government Equalities Office, which leads on this issue, to meet him and the individual concerned to hear directly about their experience?

HC Deb 24 October 2018 c274

Gender Recognition

Asked by: Tim Loughton

To ask the Minister for Women and Equalities, what steps she will take to assess the safeguarding implications of reforming the Gender Recognition Act 2004.

Answered by: Victoria Atkins | Women and Equalities

We are carefully considering safeguarding issues related to reforming the Gender Recognition Act 2004. We have been very clear that we are not going to be changing the existing safeguards in the Equality Act.

Safeguarding is always a priority and, in line with the usual obligations on Government, any proposed new gender recognition system will be rigorously assessed in terms of its potential effect on other groups in society, as well as its implications for safeguarding processes in specific contexts, such as prisons. As part of the Gender Recognition Act consultation, we are keen to hear from respondents on these points.

Any new system that is proposed in the Government's response to the Gender Recognition Act consultation will be subject to a full impact assessment.

17 October 2018 | Written question | 178211

4. Further reading

[Transgender prisoners](#), Commons Library Briefing Paper CBP-7420, 19 September 2018

[Transgender equality](#), Commons Library debate pack CDP-2016-0223, 29 November 2016

Women and Equalities Committee, [Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission](#), 31 October 2018, HC 1470, Q 4-9, 56

Government Equalities Office, [Reform of the Gender Recognition Act 2004: closed consultation](#), 19 October 2018

Government Equalities Office, [Facts about the Gender Recognition Act consultation](#), 14 October 2018

Government Equalities Office, [Reform of the Gender Recognition Act: Government consultation](#), July 2018

UK Government and Parliament, [Consult with women on proposals to enshrine 'gender identity' in law: closed petition](#), 12 September 2018

Including Government response, 5 June 2018

Government Equalities Office, [Trans people in the UK](#), 2018

Scottish Government, [Review of the Gender Recognition Act 2004: a consultation](#), November 2017

Scottish Government, [Understanding gender identity and reassignment](#)

Government Equalities Office, [Government response to the Women and Equalities Committee report on Transgender Equality](#), Cm 9301, July 2016

Women and Equalities Committee, [Transgender equality](#), HC 390, 14 January 2016

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