



Government
Equalities Office

Kemi Badenoch MP
Exchequer Secretary to the Treasury & Minister for Equalities
Government Equalities Office
c/o Sanctuary Building
Great Smith Street
London
SW1P 3BT

Caroline Nokes MP
House of Commons
London
SW1A 0AA
caroline.nokes.mp@parliament.uk

Our reference:

14th July 2021

Dear Caroline,

Re: Inquiry into the Reform of the Gender Recognition Act 2004

Thank you for your letter of 29th June detailing questions you have in relation to the Gender Recognition Act 2004 (GRA), as part of your Committee's inquiry; I am happy to provide information in response.

This Government is committed to ensuring that transgender people are able to live freely and prosper in modern Britain. Ensuring there is an appropriate way for someone to change their legal sex is part of that commitment. Several of the points you raise have the same underlying premise - querying why the Government decided not to make any legislative changes to the 2004 Act despite strong support for doing so in consultation responses; specifically about removing the requirement for a diagnosis of gender dysphoria, the term 'acquired gender' and the spousal consent arrangements.

As set out in the Government response to the GRA consultation, we closely considered the evidence provided, the views expressed and concerns raised on all the issues, including the aspects you have highlighted. We consider that changing one's legal sex is not a decision to take lightly and appropriate safeguards are needed to support this process. After fully considering the evidence provided, it was the Government's view that the balance in the current legislation is correct - it provides checks and balances but also support for people who want to change their legal sex. The requirements set out in the legislation are fundamental safeguards to ensuring a robust gender recognition system which is fit for purpose. The consultation was just that, a consultation to gain further insight, and not a referendum on what changes should be made. As you know, as part of the same announcement, we committed to making the Gender Recognition Certificate (GRC) application process fairer and kinder to those who use it. We have already reduced the fee, and are working on digitising the process. Both of these actions were initiated after consideration of feedback provided by the



Government Equalities Office

consultation. The digitisation work is progressing steadily, following Government Digital Service principles, including those around accessibility. I am monitoring the process closely and will share more information when it is available in due course.

As to the alleged delay in responding to the consultation; firstly, the consultation was extensive - we received over 100,000 responses and officials met with 140 representative organisations during and after the consultation, including LGBT and women's organisations. It is a complex area and we wanted to fully assess the evidence to make sure that our response was right. More widely, you will understand that the general election in December 2019 and the COVID-19 pandemic, in which a substantial number of GEO staff were re-deployed to other Government departments, caused some delay.

On the declassification of 'gender identity disorder' as a mental illness, I would like to make clear that the Government does not consider being trans to be a mental illness. The NHS also makes this very clear in its guidelines and service specification¹. The Committee may be aware that the High Court in Northern Ireland recently considered whether the requirement for people applying for a GRC to have a diagnosis of gender dysphoria - defined at section 25 of the GRA as a 'disorder' - was a breach of an applicant's human rights. The Court held that requiring a medical report and a diagnosis of gender dysphoria was lawful, but that the description of gender dysphoria as a 'disorder' was a breach of human rights. The Court made a Declaration of Incompatibility under section 4 of the Human Rights Act 1998. The decision on appeal is still outstanding and the Government will carefully consider next steps following that decision.

As a point of clarity, available here (www.gov.uk/government/publications/gender-dysphoria-list-of-specialists-t493) is a list of specialists in gender dysphoria, which I understand was raised in your recent evidence session. This document provides details of who can assist GRC applicants by writing letters of support. It is maintained by HM Courts and Tribunals Service as the body that supports the administration of the Gender Recognition Panel (GRP), and not by the Government Equalities Office. The GRP encourages practitioners in the field who wish to join the list to write to them with a CV and a letter of recommendation from a colleague; then, where appropriate and on the advice of the Chief Medical Member, the President arranges to have them placed on the list. The GRP maintain this list as part of their support to potential applicants and do not claim that the list is exhaustive.

You asked about the need for the GRP and its transparency. The Panel is a fundamental part of the statutory GRC process. It oversees the gender recognition system and assesses applications against the requirements set out in the GRA 2004. The Panel recruitment process, and requirements, are set out in the schedules to the 2004 Act. The members of the Panel are appointed by the Lord Chancellor with the agreement of the Presidents of the Courts for England and Wales, Scotland, and Northern Ireland. Only judges, medical practitioners or psychologists may be appointed to the Panel. The judges and medical members appointed to the Panel to date have been existing Tribunal Judges and Medical Members (i.e. they have to

¹<https://www.england.nhs.uk/wp-content/uploads/2019/07/service-specification-gender-dysphoria-services-non-surgical-june-2019.pdf>



Government Equalities Office

be registered medical practitioners or registered psychologists). The current membership comprises six judges and four doctors.

The Panel has a user group, where the President and other senior members of the Panel, along with members of the administrative team, can meet users to discuss aspects of the gender recognition process, and receive feedback on how to improve it. Before the pandemic, the user group met annually in London and in Scotland or in the north of England. Individual applications cannot be discussed - indeed Panel members are bound by s.22 of the GRA 2004, which could lead to criminal penalties if GRC applicants were identified. It is therefore not possible to publish case decisions like tribunal or court cases.

I understand the Panel President submitted two pieces of written evidence to the Committee which covered some of the questions raised regarding the Panel. I'd suggest further information can be found from that evidence and any outstanding issues would most appropriately be addressed to the Panel as an independent entity to the Government.

Regarding how the exemptions in the Equality Act are regulated in relation to those with the protected characteristic of gender reassignment; this protected characteristic, and the exceptions in the Act which relate to it, are subject to the same regulatory, compliance and enforcement regime as applies to each of the other protected characteristics. As you know, the Equality Act is civil law, and so enforcement is principally by individuals bringing legal action against employers, service providers or public authorities as appropriate, where they think they have been unlawfully discriminated against or subject to other unlawful behaviour, e.g. harassment or victimisation. Individuals who think they may have been subject to unlawful treatment, including discrimination on grounds of gender reassignment, can seek advice from the Equality Advisory and Support Service (www.equalityadvisoryservice.com).

Furthermore, the Equality and Human Rights Commission (EHRC) holds regulatory and enforcement powers relating to the Equality Act, indeed is the body to hold such powers; it can assist an individual who is or may become party to legal proceedings under the Act. Limited resources mean that it only generally supports, intervenes in or brings cases likely to be of strategic significance or where it thinks there is evidence of systemic discrimination. There was a brief discussion of this at the EHRC's evidence session to the Committee on 16 June.

As to the use of "A proportionate means of achieving a legitimate aim", this is the standard objective justification test of an action in the Equality Act, for example in relation to indirect discrimination. The EHRC's website² explains that:

"To prove objective justification:

- the aim must be a real, objective consideration, and not in itself discriminatory (for example, ensuring the health and safety of others would be a legitimate aim)*

² www.equalityhumanrights.com/en/advice-and-guidance/commonly-used-terms-equal-rights



Government Equalities Office

- *if the aim is simply to reduce costs because it is cheaper to discriminate, this will not be legitimate*
- *working out whether the means is 'proportionate' is a balancing exercise: does the importance of the aim outweigh any discriminatory effects of the unfavourable treatment?*
- *there must be no alternative measures available that would meet the aim without too much difficulty and would avoid such a discriminatory effect: if proportionate alternative steps could have been taken, there is unlikely to be a good reason for the policy or ... rule."*

There is no clear, hard and fast guidance that can be laid down, as a generic justification of this sort will be highly dependent on the facts of the situation concerned. Service providers and others wishing to use exceptions in the Act to provide single-sex services need to assess that situation in reaching a decision on whether to rely on the exception to do so. This is in line with the use of exceptions relating to other protected characteristics and is appropriate for situations where service providers and others wish to except themselves from the general prohibitions of discriminatory behaviour in the Act.

The Committee may be aware that the guidance on transgender rights in the EHRC's Statutory Code of Practice for Services, Public Functions and Associations³ has recently been the subject of legal challenge on the basis of alleged misstatements of the law. The case was not given permission to proceed. Within Government, the Equality Hub is able to provide advice on trans issues where Government Departments specifically seek it. However, as Melanie Field noted to the Committee in the EHRC's evidence session:

"If someone feels they have been discriminated against and takes the case to a court or tribunal, that is for the court or tribunal to judge. As I said in my previous answer, we are giving guidance in the context that there is not very much case law that enables us to be very definite about specific situations and what would or would not be lawful in this particular circumstance."

Given this background, there are no current plans to issue further guidance on the circumstances in which it is lawful to use the single-sex service exception in the Equality Act 2010.

More widely, improving the gender recognition process is just one way in which the Government is seeking to improve the experience of LGBT people. We know from our research that improving healthcare support is a priority for transgender people. As Minister Churchill set out when giving evidence to the Committee, that is why we opened three new gender identity clinics between July 2020 and January 2021, which should see waiting lists cut by around 1,600 people by 2022. This will lead to greater patient choice, shorter waiting times, better geographical coverage and easier access.

³ www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice



Government Equalities Office

We are also spearheading global progress by hosting the Government's first ever Global LGBT Conference, 'Safe to be Me: A Global Equality Conference', in June 2022, to ensure LGBT people are free to be themselves. The Prime Minister also recently appointed Lord Herbert of South Downs as the UK's Special Envoy on LGBT rights to drive progress, working with myself and the Minister for Women and Equalities, in the lead up to the Conference.

I hope this provides some further detail to support your inquiry.

Yours sincerely,

Kemi Badenoch MP
Exchequer Secretary to the Treasury &
Minister for Equalities