

I am an associate lecturer at Aberystwyth University teaching law and criminology. My PhD (scheduled for submission in January 2021) is a comparative examination of gender recognition methods in a number of jurisdictions including the UK with a focus on the recognition of nonbinary genders and how this is practically implemented and interacts with other areas of law. I am also the co-chair of the Aberystwyth Interdisciplinary gender studies research group and have an LLM in international law, human rights and gender. As such I felt it would be useful for me to submit evidence on the topic due to the relevance of my expertise and research.

Due to the nature of this evidence my responses will have to be somewhat brief. Anyone who is interested in hearing more details is encouraged to simply ask, as I am happy to discuss my research.

## With regards to the proposed reforms:

### Health:

I welcome additional provision for transgender health. While this is not my field of expertise I am aware of the current length of the waiting lists, and a number of my transgender students have expressed despair when confronted with such long waits. I hope that the increase in provision is sufficient to bring transgender healthcare in line with NHS targets for the length of waiting lists.

### Requirements for a GRC:

I welcome the removal of the fee for gender recognition certificates. Gender recognition has been recognised as a right by the European Court of Human Rights (ECHR)<sup>1</sup>. Under our current system cisgender people obtain this right automatically, with the fact that transgender people must pay being a manifest injustice, as no one should have to pay a fee to access a human right.

In my view the requirement for a gender dysphoria diagnosis should be removed. Not only is it somewhat of a non-sequitur, as it is possible to be transgender and not experience dysphoria, it also forms a disproportionate administrative barrier to recognition. In the 2018 LGBT survey 18 percent of transgender respondents stated that they avoid medical care due to mistreatment or fear of mistreatment<sup>2</sup>. Additionally the task of gathering medical evidence takes a reasonable amount of time, both of the applicant and from the relevant medical practitioners, this means that medical evidence is disproportionately more difficult for the trans community to access in the first place. This uses NHS resources, and makes it practically harder to access a GRC for the applicant by requiring an additional time investment.

The requirement to “live as” the gender the applicant wishes to be recognised as should also be removed. This requirement is arguably impossible to enforce without resorting to gender stereotyping or placing a requirement on transgender people that does not exist for cisgender people, such as having a certain gendered name. Additionally having a gender recognition certificate can make a persons life easier in a number of ways, particularly by reducing the amount of administrative scrutiny a person must undergo when performing certain tasks such as seeking

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<sup>1</sup> Goodwin v U.K. [2011] ECHR 1666

<sup>2</sup> National LGBT Survey Report, GEO Research Report RR001, Government Equalities Office 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf), accessed 25/11/2020 page 162

## Written evidence submitted by Megan Talbot [GRA0839]

employment. As recognised by the ECHR gender recognition also reduces the risk that a person may face hostility or discrimination<sup>3</sup>. The requirement to “live as” their gender for two years therefore exposes a trans person to these harms. Cisgender people are not asked to live in any particular way to have their gender recognised, it therefore seems unreasonable that a transgender person is asked to do so prior to gender recognition, which exposes them to a number of risks and dangers in order to satisfy the law of their identity, which a cisgender person is never asked to do.

The spousal consent requirement should also be removed. The purpose of this measure was to allow a marriage to be “re examined”<sup>4</sup> if a person was not comfortable with their partners gender identity by allowing the marriage to be more easily ended. Not only was this measure ill-considered, as it withholds a persons legal right to gender recognition based on the will of their spouse, but it is currently irrelevant, as its purpose has been subsumed by other law. The Divorce, Dissolution and Separation Act 2020 removed the previous requirements for divorce and replaced them with a notice period. As a result rendering the marriage of the applicant void in-order to circumvent the onerous requirements<sup>5</sup> for divorce that existed previously is no longer necessary. Situations where a partner feels unable to continue their marriage to a person seeking gender recognition can now be dealt with using the normal divorce process without the onerous requirements of the previous law. As such there is no longer a reason for this requirement to exist.

Evidence suggest that children are capable of understanding their own gender identities at a young age. The most obvious concern is that a child should, within reason, be protected from making serious decisions that they are likely regret. However when the issue at hand is that of legal recognition, there are no obvious downsides to a child obtaining gender recognition, particularly if the process were to be de-medicalized and were made easier to reverse in the event that the child no longer wished to transition. This is because legal recognition exists only as an administrative process, and if the fee is removed, would not risk even financial harm to the person seeking it. The entire process could be made reversable which would further prevent the process from being possibly harmful. It appears that the greater harm is in exposing a child to the risks mentioned by the ECHR<sup>6</sup> of being transgender without a gender recognition certificate.

The proposed measures may have some impact, particularly if the increase in resources is sufficient to bring down waiting lists for transgender healthcare, however the impact on legal gender recognition is likely to be minimal. While the current process is certainly problematic, and the proposal to bring the process online may make it easier for some, it has concerning implications for those who do not have sufficient resources to access such a system. While the removal of the fee may make gender recognition more accessible it may be the case that this inaccessibility is simply replaced by the difficulty some people may face in accessing an online system. While the internet is an increasingly important part of many peoples lives, it is important to remember that it is not equally accessible to all, particularly those with limited financial means or those who are geographically isolated. The proposed changes do not address many of the flaws in the process that render it inaccessible, particularly to those with nonbinary gender identities or who face difficulty in accessing the medical evidence necessary.

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<sup>3</sup> As discussed in Goodwin v U.K. [2011] ECHR 1666

<sup>4</sup> House of commons Women and Equalities Committee, Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016 located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 56

<sup>5</sup> IE the requirement for either 2 years separation (with consent), 5 years separation, desertion, unreasonable behaviour or adultery.

<sup>6</sup> Goodwin v U.K. [2011] ECHR 1666

## Written evidence submitted by Megan Talbot [GRA0839]

The government should have included a number of other measures in its proposals, including expanding recognition for non-binary people and adopting a self-recognition approach. For a model of legislation that recognises and accommodates the diversity of trans people's identities and experiences the government should refer to the current law in Tasmania<sup>7</sup>, which as adopted following research and consultation with the transgender and intersex communities.

The bill proposed in Scotland represents a step forward from the 2004 Act, however it retains a number of flaws. The removal of the medical requirements is welcome, however it retains the problematic requirement to "live as" the gender to be recognised, which does not seem to be ascertainable without resorting to stereotypes or subjecting transgender people to standards of gendered conduct that cisgender people are not held to. There does not appear to be any evidence that the three month 'reflection period' meets a genuine need or addresses a genuine problem, or is a proportionate way of addressing that problem. Additionally this bill does not provide any recognition for people with nonbinary gender identities, and does not appear to have given any consideration to the intersex community. The "self declaration" model has been recognised as the best practice in this area<sup>8</sup>, and problems do not appear to have arisen in the jurisdictions that have adopted it<sup>9</sup>. Because of these shortcomings I would not recommend the Scottish Bill as a model for the law of England and Wales to follow, but would instead recommend the current law in Tasmania<sup>10</sup> as an example of gender recognition legislation that meets the needs of the transgender and intersex communities including those with nonbinary gender identities.

## Wider issues:

### The number of GRC applicants:

The number of those applying for recognition certificates is low compared to the percentage of transgender people in the population for a number of reasons. For example the percentage of transgender people who have a nonbinary gender identity is higher than previously thought<sup>11</sup>. As there is no provision for recognition of nonbinary genders in the Gender Recognition Act it is not surprising that these individuals do not generally seek a GRC. People may also be prevented from seeking a gender recognition certificate by the obstacles to obtaining one, such as the fee for application and the difficulty some people may face in obtaining medical evidence. The transgender community is very diverse, and the gender recognition only seems to cater to a narrow vision of who is a transgender person worthy of recognition (someone with financial means, with a specific

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<sup>7</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019

<sup>8</sup> TGEU Human Rights and Gender Identity Best Practice Catalogue, Second Revised Edition December 2016, Located at [https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU\\_BestPracticeCatalogue.pdf](https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf), accessed 25/11/2020

<sup>9</sup> For example, this report found no conflict with women's rights in Tasmania, Tasmania Law Reform Institute, Legal Recognition of Sex and Gender, Final Report No. 31, June 2020, Located at [https://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0018/1342080/tlri-legal-recognition-of-sex-final-report.pdf](https://www.utas.edu.au/__data/assets/pdf_file/0018/1342080/tlri-legal-recognition-of-sex-final-report.pdf), accessed 24/11/2020 at 2.7.1

<sup>10</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019

<sup>11</sup> National LGBT Survey Report, GEO Research Report RR001, Government Equalities Office 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf), accessed 25/11/2020 page 16

medical history and a binary gender identity, who lives in a way that can be perceived as “living as” that gender). Because of this the diversity of the transgender community is not catered to by the act, meaning that many people are simply not eligible for recognition. People may also refrain from applying for a gender recognition because in many cases the costs may be outweighed by the benefits. In addition to the obvious financial and time related costs, the gender recognition process has additional costs, notably the cost of having a committee of strangers examine ones personal details, many of them quite intimate, in-order to determine if one should be granted a GRC. This process has been described as demeaning<sup>12</sup>, and thus the loss of ones privacy and dignity in this way should be understood as a cost that may deter people from applying for a GRC.

### GRA and the Equality Act:

There does appear to be a great deal of confusion with regards to the interaction of the GRA and Equality Act 2010. In particular it appears as though members of the public misunderstand the purpose and role of a gender recognition certificate, as pointed out in the 2015 report from this committee<sup>13</sup>. The terminology used may well be one of the reasons. The protected characteristic of gender reassignment is perhaps misleadingly named, as one need not have gone through any reassignment process in order to be protected. It appears that a person would be protected merely if there is any external manifestation of a transition of any sort<sup>14</sup>, including social only transition, as well as being protected if they are believed to be transgender even if this does not reflect reality. As such it may be beneficial to rename the characteristic “gender identity”, to clarify that one need not be “reassigned” to be protected. This would also bring the somewhat stigmatising and medicalizing language currently used in the act more up to date. There also appears to be confusion about the meaning of the phrase “for all purposes”<sup>15</sup> used in the GRA. This may be avoided by ensuring that any amendments to the GRA make clear exactly what this means, what a GRC is necessary for (mostly just changing ones birth certificate) and what it is not necessary for (recognition in the vast majority of areas of life).

### Exceptions in the Equality Act (single sex spaces)

The provisions in the Equality Act allow conduct which would otherwise be discriminatory on the grounds of gender reassignment to be permitted in certain situations if the conduct is a proportionate means to a legitimate aim.

In technical terms it does not appear to be correct to refer to spaces where transgender people are excluded using this means as single sex spaces, due to gender and sex being used interchangeably in the rest of UK law<sup>16</sup>. If the intent of parliament is to render sex and gender separate in the law this

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<sup>12</sup> Politics.co.uk, Demeaning gender recognition process urgently needs reform, Bex Stinson, 03/07/2018, Located at <https://www.politics.co.uk/comment-analysis/2018/07/03/demeaning-gender-recognition-process-urgently-needs-reform>, accessed 26/11/2020

<sup>13</sup> For example see the difficulties encountered by transgender people due to a lack of understanding of the law on inclusion in sport Women and Equalities Committee Transgender Equality Report, 8/12/2015, HC390, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 143

<sup>14</sup> Hansard, HC Public Bill Committee, 7th Sitting, col.204 (June 16, 2009)

<sup>15</sup> Gender Recognition Act 2004 s9

should be made more clear, and be done with consideration to the fact, initially raised in the house of lords during discussion of the Equality Act, that this separation will likely result in a “shifting of the goalposts” and the continued exclusion of transgender people.

The exceptions in the Equality Act themselves appear reasonable and to reflect the feelings of society in general at the present moment. While the statutory code of practice is fairly clear that “a proportionate means” refers to the fact that the method used must be the least discriminatory means reasonably possible to achieve the legitimate aim<sup>17</sup>, more clear examples may be beneficial to avoid confusion, due to the vagueness of the word “proportionate” when used in everyday speech. If societal feelings were to change to be more accepting of transgender people, it may become appropriate to remove these exceptions.

### Protections provided by the Equality Act:

The protections present in the Equality Act would be sufficient provided that some clarifications are made. In particular it is necessary to clarify who the comparator should be in cases of gender reassignment discrimination. For example in the case of a transgender woman who is discriminated against, it is necessary to clarify whether the comparator should be a cisgender woman, or a cisgender man. It is argued that the comparator should be a cisgender man<sup>18</sup>, however as has been pointed out by a number of academics, this would render protections for transgender people almost useless<sup>19</sup>. For the protections to be viable it should be clarified that the comparator should be a person of the same gender identity as the complainant but who is not transgender.

### Support services for domestic abuse:

The predominant attitude amongst those providing support services for domestic abuse appears to be trans-positive, with all the respondents interviewed recently by stonewall stating that they provide services to all who identify as women regardless of trans status and that they do not find it necessary to use the exceptions in the Equality Act<sup>20</sup>. However it appears as though the fear of bigotry or being excluded from services remains a significant barrier to help seeking in many cases<sup>21</sup>. This is disappointing, as those transgender people who access these services tend to find them helpful<sup>22</sup>. This may be due to the high amounts of anti transgender rhetoric in the press, in which

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<sup>16</sup> House of Commons, Gender Recognition Bill in Standing Committee A, 4th sitting 11th March 2004 (afternoon), Located at

<https://publications.parliament.uk/pa/cm200304/cmstand/a/st040311/pm/40311s01.htm>, Column 138

<sup>17</sup>Equality and Human Rights Commission, Equality Act 2010 Code of Practice, Services, public functions and associations, located at [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf), accessed 25/11/2020 at 13.60

<sup>18</sup> Fair Play for Women, Advice to service providers who want to provide female-only changing rooms, 25/5/2019, Located at [https://fairplayforwomen.com/changing\\_rooms/](https://fairplayforwomen.com/changing_rooms/) accessed 25/11/2020

<sup>19</sup> Sharpe, A. (2020), Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?. *The Modern Law Review*, 83: 539-557

<sup>20</sup> Supporting trans women in domestic and sexual violence services: Interviews with professionals in the sector , Stonewall, Located at

[https://www.stonewall.org.uk/system/files/stonewall\\_and\\_nfpsynergy\\_report.pdf](https://www.stonewall.org.uk/system/files/stonewall_and_nfpsynergy_report.pdf) accessed 25/11/2020

<sup>21</sup> Out of sight, out of mind? Transgender people's Experiences of Domestic abuse, 2010, Located at [https://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_domestic\\_abuse.pdf](https://www.scottishtrans.org/wp-content/uploads/2013/03/trans_domestic_abuse.pdf), accessed 25/11/2020

facilities such as changing rooms or services for survivors of domestic abuse are frequently presented as battlegrounds in an imagined conflict<sup>23</sup> between the rights of transgender people and the rights of cisgender women<sup>24</sup>. Due to the current public perception not matching reality it may be helpful for the government or other agencies to be very clear that these services are in almost all cases trans inclusive, to prevent fear of bigotry being such a barrier to help seeking.

### Non-binary gender recognition:

Support for non-binary people is the core of my research, with a focus on gender recognition and its impacts. As society moves towards increased acceptance of non-binary gender identities, the vast majority of gender recognition is being done by private individuals and organisations rather than by the government. This is done, for example, by university systems allowing people to record their gender as non-binary, or banks referring to clients with the title Mx if they request it. Those agencies that do not recognise nonbinary identities can, in virtually all cases, choose to do so at any time without waiting for government permission. The main gap is that currently there is no unified standard for when a person should be recognised as non-binary. This purpose is currently served by the Gender Recognition Act for those with binary genders. A business may recognise a client's gender at any time before the client has a GRC, however they cannot refuse to recognise their identity after they have obtained a GRC. In this way the GRC criteria set a standard for when even those most reluctant to recognise a person's gender must do so. It seems only fair that such a standard also exist for those with non-binary gender identities, so as to provide them the same level of legal protection as everyone else.

There is also a gap when it comes to government services. A person cannot currently be recognised as non-binary by HRMC on official forms, nor can they obtain a passport which recognises their identity, which is done by a number of other countries<sup>25</sup> and is perfectly possible under the Civil Aviation Authority guidance for the contents of machine readable passports<sup>26</sup>. It seems unnecessarily cruel to withhold these services from non-binary people, thus subjecting them to misgendering when engaging with a number of aspects of public life. With regards to sensitive issues that may be related to passports, such as searches, the recognition of non-binary identities does not appear to pose a problem. When searching a person the police already take how a person wishes to be treated into consideration, and this approach can be implemented in the cases of nonbinary people without difficulty<sup>27</sup>.

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<sup>22</sup> National LGBT Survey Report, GEO Research Report RR001, Government Equalities Office 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf), accessed 25/11/2020, page 63

<sup>23</sup> Sara Ahmed; An Affinity of Hammers. TSQ 1 May 2016; 3 (1-2): 22–34.

<sup>24</sup> For an example of this see Fair Play for Women, Advice to service providers who want to provide female-only changing rooms, 25/5/2019, Located at [https://fairplayforwomen.com/changing\\_rooms/](https://fairplayforwomen.com/changing_rooms/) accessed 25/11/2020

<sup>25</sup> For example Australia allows sex on passports to be recorded as "m" "f" or "x" Australian Government, Department of Foreign Affairs and Trade, Sex and gender diverse passport applicants, Located at <https://www.passports.gov.au/getting-passport-how-it-works/documents-you-need/sex-and-gender-diverse-passport-applicants>, accessed 25/11/2020

<sup>26</sup> 254 International Civil Aviation Organisation, Doc 9303, Machine Readable Travel Documents, Seventh Edition, 2015, Part 4: Specifications for Machine Readable Passports (MRPs) and other TD3 Size MRTDs, located at [https://www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf) page 14

<sup>27</sup> Police and Criminal Evidence Act 1984 Code of Practice C, Revised August 2019, Annex L, 4 (c)

## Written evidence submitted by Megan Talbot [GRA0839]

Gender recognition serves two main purposes. The first is allowing a person to escape possible poor treatment by being outed by documentation. The second is to allow the person to be seen and catered to according to their actual identity and lived experience. While the first may not be possible in the case of those who identify as non-binary, the second is, and offers a number of tangible benefits, such as helping nonbinary people feel more able to engage with necessary services and their communities<sup>28</sup>.

It is also worth noting that a number of other cultures and nations recognise gender identities outside the binary<sup>29</sup>. By failing to recognise these gender identities the UK does a disservice to anyone from these countries who identifies as such who may need to travel to the UK, including to support vital services such as the NHS.

Thank you for reading this submission of evidence. If you have any questions or would like to know more please contact me at [met32@aber.ac.uk](mailto:met32@aber.ac.uk).

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<sup>28</sup> As identified by a respondents to the 2018 LGBT survey National LGBT Survey Report, GEO Research Report RR001, Government Equalities Office 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf), accessed 25/11/2020 page 212

<sup>29</sup> PBS.org, Independent Lens, A map of gender-diverse cultures, 8/11/2015, Located at [https://www.pbs.org/independentlens/content/two-spirits\\_map-html/](https://www.pbs.org/independentlens/content/two-spirits_map-html/), accessed 26/11/2020