

I. Introduction

1. The Equality Network is a national lesbian, gay, bisexual, transgender and intersex (LGBTI) equality organisation in Scotland existing since 1997. The Scottish Trans Alliance, based within the Equality Network since 2007, focusses specifically on trans equality. This submission is on behalf of both the Equality Network and Scottish Trans Alliance.
2. It is based on our extensive knowledge of trans people's experiences of discrimination, harassment and inequality; of trans equality and human rights legislation in the UK and beyond; and our experiences of working with national governments, public bodies and service providers to ensure they are upholding trans people's rights in line with the protections afforded to them within the Gender Recognition Act 2004 and the Equality Act 2010.
3. We welcome this inquiry into reform of the Gender Recognition Act and wider trans equality issues and hope the UK Parliament will use the results of the inquiry to protect and improve the equality and human rights of trans people.
4. We have already addressed many of the points raised in the Committee's inquiry addressing how the Gender Recognition Act 2004 needs to be reformed to ensure it is in-line with international best practice and treats trans people with dignity and respect¹. We have also provided information to the Committee in the previous parliamentary term about how trans people's equality and rights currently function, particularly in the context of accessing single-sex services, in the Equality Act 2010². In the interest of keeping this submission from becoming over long, we will address the points that we have not previously provided publically available information on. However, we are happy to provide supplementary written evidence or oral evidence on any of the matters set out in the inquiry.
5. We are aware that there is currently a large debate around trans equality and inclusion across the UK, and this may result in submissions that call for a reduction in the existing legal protections for trans people, particularly with regards to accessing single-sex services.
6. Throughout, we consider the equality and human rights needs of non-binary people within the topics covered for all trans people. Where we use the term "trans people" we are referring to trans men, trans women and non-binary people. Where we are referring to only some of these groups, we will make this explicit by referring to those group(s) specifically.

II. Summary of submission

¹ See for example, our response to the Scottish Government consultation "Review of the Gender Recognition Act 2004" <https://www2.gov.scot/Resource/0053/00539302.pdf>

² See our response to the Women and Equalities Select Committee Inquiry "Enforcement of the Equality Act" <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/written/90985.pdf>

7. The main points and recommendations of our submission are:

- That the UK Government response to the consultation on the Gender Recognition Act and its proposed changes fall far short of the reforms needed to create a legal recognition process in England and Wales that works for all trans people.
- The proposal to reduce the fee is welcome, but trans men and trans women may still face large financial barriers due to the other evidence requirements that have been retained.
- The draft Gender Recognition Reform (Scotland) Bill that the Scottish Government consulted on would provide a much greater improvement to the law in Scotland, although it would still fall short of international best practice. The existing Scottish approach to spousal consent could be mirrored in England and Wales.
- The current law and guidance on how trans people should be included in separate sex and single-sex services are clear, although funding for sector specific guidance that deals with practical tips and case studies may be helpful.
- Whilst there are some gaps in the protection given to trans people through the Equality Act 2010, the most important focus currently is to ensure trans people's existing rights are upheld.
- Trans people face a range of barriers in accessing services. These have been exacerbated by the ongoing spotlight on trans people's lives, and concerted campaigning efforts to undermine existing rights of trans people.

III. The Government's response to the GRA consultation: what hasn't been done³

8. The UK Government's response to the GRA consultation proposes minimal changes to the current process for obtaining a Gender Recognition Certificate (GRC). The proposed changes clearly fail in their aim to make the process "kinder and more straightforward".
9. The UK Government is planning to retain the requirement for a psychiatric diagnosis of gender dysphoria to apply to obtain legal gender recognition. This pathologises trans people's identities, and creates barriers to them accessing their legal rights. It also medicalises a legal process, despite this being opposed by medical experts themselves such as the World Professional Association of Transgender Health⁴ and the British Medical Association⁵.
10. The UK Government is also planning to retain the requirement to provide medical reports and two years of evidence that you have been living in your 'acquired gender' to obtain a GRC. This is despite the fact that many jurisdictions have now moved to a system of self-declaration, and this is recognised as best practice by trans equality and human rights experts.
11. We support retaining a statutory declaration for obtaining legal gender recognition, as it is a fair way to ensure that applicants know that they are making a serious and important decision. Whilst we think that asking a person to prove their gender to receive

³ For further details on all aspects of Gender Recognition Act reform see our response to the Scottish Government consultation "Review of the Gender Recognition Act 2004" <https://www2.gov.scot/Resource/0053/00539302.pdf>

⁴ <https://www.wpath.org/policies>

⁵ <https://www.bma.org.uk/news-and-opinion/push-for-progress-on-transgender-rights-in-healthcare>

legal recognition is unreasonable, it is still important that an applicant knows that their declaration carries real-life consequences, and that they feel comfortable making the application in the context of it being a solemn and true declaration of their current situation and future intentions. Making a fraudulent statutory declaration is an offence.

12. The UK Government is planning to retain the minimum age of 18 to apply for a GRC. This means that all trans children and young people will remain unable to obtain legal gender recognition, even when to do so would be in their best interests.
13. The UK Government is not planning to introduce legal recognition for non-binary people. This means that non-binary people will remain in the same situation as all trans women and trans men were before the Gender Recognition Act 2004 was passed: with no way to update their birth certificate or have the law fully recognise how they live their life.
14. Given the level of support demonstrated in the public consultation in favour of reforms to all of the above areas, and evidence from other jurisdictions that such changes can be implemented and work well, the UK Government's proposals are extremely disappointing and largely cosmetic. This means that England and Wales will continue to have a gender recognition process that is far behind international best practice.

IV. The Government's response to the GRA consultation: reducing the fee

15. The only welcome aspect of the proposed changes is to reduce the fee to a nominal amount. We think the current fee for applying for a Gender Recognition Certificate is prohibitively expensive, and that it should be free in order to ensure that there is fair and equal access for everyone. Legal recognition of your gender identity is a human right. We do not think that anyone should incur a fee for accessing their human rights.
16. However it is worth noting that beyond the fee to apply, there are often more significant additional costs to applicants in assembling the evidence they need in order to successfully obtain legal gender recognition. This will remain the case after the UK Government's proposed changes, as they have suggested no reduction in the type or amount of evidence required to apply.
17. One of the evidence requirements for obtaining a GRC currently is a psychiatric diagnosis of gender dysphoria from a list of gender dysphoria specialists provided by the UK government⁶. If a trans person finds themselves needing to obtain a gender recognition certificate relatively quickly – for example because they are planning to marry and want to ensure they can marry legally in their correct gender, this may mean that they need to pay to see a private gender dysphoria specialist to obtain their psychiatric report. This is particularly likely given current waiting times at NHS Gender Identity Clinics across the UK, which range from around 18 months for a first appointment up to as long as 48 months. In Scotland, the only private provider listed as an accepted gender dysphoria specialist charges £250 per one hour appointment⁷. So a trans person who needed to obtain a psychiatric report in this way would need to pay

⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710983/t493-eng.pdf

⁷ <http://your-gp.com/services/sexual-health-gender-clinic/gender-dysphoria/>

at least £250, and this could rise as high as £500 or £750 if the specialist wanted to have several appointments before providing the report.

18. Similarly, if a trans person has transitioned abroad and then moved to the UK, they will be unable to use a report from their country of origin as all of the approved gender dysphoria specialists must be registered in the UK with the General Medical Council. Such a person may be less likely to want to join a long NHS waiting list, and may in fact be unable to be referred by their GP to a NHS Gender Identity Clinic if they no longer require any support or treatments. They may also therefore have to spend several hundred pounds in order to obtain a private diagnosis.
19. One of the other current requirements when applying for a GRC is a report detailing 'any treatment you've had to change your sexual characteristics, for example hormones or surgery'⁸. This is most often completed by a trans person's GP, who are broadly aware of all of the treatment the trans person has or has not undergone as part of their medical transition. The British Medical Association suggests that an appropriate charge for such a report is £133⁹.
20. Finally, accruing evidence that you have been living in your gender for two years may cause applicants to incur a number of small fees. This may be due to having to request reissuing of documents that can be used as evidence such as utility bills and bank statements, applying for identity documents that can be used as evidence that you may not otherwise have updated due to the cost, and costs of printing and photocopying. The costs for this aspect could be as low as £5, but could be as high as £150.
21. Therefore, it is not particularly unlikely that a person applying for a GRC using the current process may have to spend £1000 accruing the evidence necessary for their application, in addition to the new nominal fee.

V. Comparing the UK Government and Scottish Government approaches

22. The Scottish Government are proposing more extensive reforms to the Gender Recognition Act 2004 as detailed in their draft Gender Recognition Reform (Scotland) Bill which they consulted on until March 2020.
23. These would make several significant improvements to the current process of applying for a GRC. These are removing the requirement for a psychiatric diagnosis; removing the requirement for medical evidence; removing the requirement for evidence that you have been living in your 'acquired gender' for two years; and lowering the age at which someone can apply to obtain legal gender recognition to 16. These improvements are to be welcomed.
24. However, the Scottish Government's draft bill proposes that a trans man or trans woman must have been living as a man or woman for three months before applying,

⁸ <https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>

⁹ <https://www.bma.org.uk/advice/employment/fees/fee-finder-what-to-charge-your-patients>

and for a further three month reflection period to occur between the application and the person's gender being legally recognised.

25. The Scottish Government's draft bill would also still see a process where under 16s were unable to obtain legal gender recognition even where this was in their best interests, and would not allow non-binary people to obtain legal gender recognition.

26. This leaves the proposals falling short of international best practice. International best practice uses statutory self-declaration, without any time limits or reflection period requirements. It also recognises trans children and young people, and provides legal recognition of non-binary people as well as trans men and trans women.

VI. Spousal consent

27. One area where Scotland already has a different approach to England and Wales is around spousal consent. It is currently possible in Scotland to obtain legal gender recognition without the need for spousal consent, and has been since the introduction of the Marriage and Civil Partnership (Scotland) Act 2014¹⁰.

28. The provisions in Scotland mean that when a married trans person applies for a GRC, they can indicate whether their spouse has consented or not. If they have not consented, they are issued with an interim GRC. The trans person then has their interim GRC converted to a full GRC by the sheriff court in an administrative procedure. The spouse of the trans person can then apply for divorce or dissolution, on the grounds that an interim GRC has been issued.

29. Equivalent provisions should be introduced in England and Wales. This would create a balance that allows both spouses to access their legal rights, and to choose to end the marriage.

VI. Trans people's inclusion in separate sex and single-sex services¹¹

30. The Equality Act 2010 outlines the situations in which it is lawful to provide separate sex or single-sex services¹² (as otherwise to exclude men or women from a service would be sex discrimination).

31. It additionally outlines the situations in which trans people (who the Act calls "transsexual persons") can be treated less favourably by these separate sex or single-sex services. This applies to all trans people covered by the protected characteristic of gender reassignment in the Act, which is not restricted to only those who are medically transitioning¹³. A trans person is also not required to have a GRC to have the protected characteristic.

¹⁰ <https://www.scottishtrans.org/our-work/completed-work/equal-marriage/marriage/>

¹¹ For a lengthier explanation of the current situation for trans people accessing separate and single-sex services, see our response to the Women and Equalities Select Committee 2018 Inquiry into "Enforcement of the Equality Act" <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/written/90985.pdf>

¹² <https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/paragraph/27>

¹³ <https://www.legislation.gov.uk/ukpga/2010/15/section/7>

32. Trans people can be treated less favourably by separate and single-sex services where this is a “proportionate means of achieving a legitimate aim”¹⁴. This is a well established legal concept, and sets a high threshold for less favourable treatment. In particular, the treatment must be no less favourable than is minimally required to achieve the legitimate aim.
33. The Statutory Code of Practice (SCoP) published to accompany the Equality Act 2010 gives advice on how to understand the law and put it into practice. Section 13.60 which covers using the gender reassignment exceptions in separate and single-sex services explains that:
- “any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances. A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances.”*¹⁵
34. The law, and the SCoP that accompanies the law, are clear. Trans people should be able to access separate sex and single-sex services in line with how they are living. They can be treated less favourably, up to and including being excluded from such services, if doing so is a “proportionate means of achieving a legitimate aim”.
35. Our view is that the problem with the current law and guidance is not a lack of clarity, but that opponents of trans people’s existing rights to access separate and single-sex services in line with how they are living do not agree with the current law and guidance. Requests to clarify the status quo by some organisations and individuals seem to be motivated by a wish to see trans people’s rights to access separate and single-sex services greatly restricted. They are not seeking clarity of existing rights, but reduction of existing rights.
36. In our experience, trans women have been using women’s services and trans men have been using men’s services smoothly for decades, including prior to the Equality Act 2010 and Gender Recognition Act 2004. It has never been unlawful for a women’s service to include a trans woman (regardless of whether she has a GRC).
37. In our experience, the vast majority of separate and single-sex service providers are not preoccupied with their ability to treat trans people less favourably or to exclude them from their service. On the contrary, they are interested to learn more about how they can best welcome and support trans people.
38. As such, funding that allowed for specific sectors to produce their own guidance around the law and trans people accessing their services could be helpful in this area. This could focus on practical examples of how to ensure that the general principle of inclusion is upheld, as well as practical examples of how the current exceptions may be

¹⁴ <https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/paragraph/28>

¹⁵ https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

used lawfully. Such guidance would be useful in providing advice more tailored to individual services' needs (such as gender based violence services) in line with the current law.

VII. Equality Act and adequate protections for trans people

39. The Equality Act 2010 is arguably the most important piece of legislation providing rights to trans people in Scotland and across the UK. It makes discrimination towards a large group of trans people in employment, services or the provision of goods unlawful in almost all circumstances. This has had a big impact on trans people's day to day lives and will continue to do so.
40. We were pleased to note the recent judgement in the Employment Tribunal case of *Taylor v Jaguar Land Rover* which found that non-binary people are also covered by the definition of the protected characteristic of gender reassignment¹⁶.
41. Whilst we had always thought that the protected characteristic would cover non-binary people who were proposing to, were undergoing or had undergone any part of a process for reassigning their sex, this judgement is a welcome piece of case law that puts this beyond doubt.
42. We hope that this leads to employers and service providers increasing their knowledge and understanding of non-binary people, and ensuring that their policy and practice means that trans men, trans women and non-binary people do not face unlawful discrimination when in their workplace or accessing their service.
43. It has been asserted by some that the sex protections in the Equality Act 2010 are explicitly defined as applying only to biological sex as recorded at birth. The definitions of the terms 'woman' and 'man' in the Equality Act 2010 do not state any restrictions regarding trans people nor do they include the words 'physiological' or 'biological'. They are merely clarifying that the terms 'woman' and 'man' should not be regarded as only applying to adults but rather should be regarded to cover all ages.
44. Furthermore, in section 7 of the 2010 Act, the definition of gender reassignment includes changing "physiological *or other aspects of sex*" (emphasis added). If Parliament had held to a narrow biological understanding of sex, they would not have included other aspects of sex in section 7, and if they had intended that different definitions of sex apply to different parts of the 2010 Act, it is reasonable to expect that they would have made this explicit.
45. Similarly, the frequently made assertion that a trans woman without a Gender Recognition Certificate would not be eligible to bring a sex discrimination claim based on being discriminated against as a woman is not supported by either case law or an accurate interpretation of the 2010 Act. For example, a trans woman without a GRC who received less favourable treatment in a job application because the employer did not want to appoint a woman, would indeed be able to make a sex discrimination claim under the 2010 Act. She would not have the grounds for a gender reassignment

¹⁶ <https://oldsquare.co.uk/et-finds-that-gender-reassignment-s-7-ega-includes-gender-fluid-and-non-binary-individuals/>

discrimination claim because the employer discriminated against her because of sexism, not because she was trans. The “legal sex” of the trans woman would not matter.

46. We do think that there are some gaps in the Equality Act 2010 and the protection it affords to trans people. For example, although clarification that the protected characteristic of ‘gender reassignment’ extends to non-binary people is welcome, there are still some limitations on who may be covered. This is because the protected characteristic focuses on those proposing to, undergoing or who have undergone a *process* for reassigning their sex. This may exclude some trans people who face discrimination because of their gender identity or their gender expression, but who don’t meet the threshold of the definition.
47. Similarly, gender reassignment harassment is not unlawful in schools (although gender reassignment discrimination is). This may leave trans children and young people facing circumstances that would be unlawful gender reassignment harassment if they were experienced whilst accessing services or whilst at work, but would not be able to seek redress for identical circumstances experienced in schools.
48. However, given that the Equality Act 2010 does not set a ceiling for how well employers or service providers may treat trans people, but instead a floor at which treatment poorer than what is outlined is unlawful, we think that efforts should be focused on enforcing the Equality Act as it stands.
49. This is because given the current climate in which trans people and trans equality are often discussed in highly contested terms, in the media, politics, and beyond, and which indeed is the very backdrop for this inquiry, there is a significant risk that concerted campaigning efforts will see a reduction in trans people’s rights.
50. We therefore think that the most useful role for the UK Government, UK Parliament and EHRC is to ensure that employers, service providers and public bodies are aware of how the current law works. This is particularly important given the deliberate and large volume of misinformation that is often promulgated by the media and by organisations that campaign to reduce trans people’s current access to services.

VIII. Issues trans people face when accessing services

51. Trans people face a range of issues when accessing services. These can be more acutely felt when accessing separate and single-sex services, although are not restricted to these.
52. Trans people in Scotland face a range of negative experiences in services. For example in healthcare settings:
 - 57% of trans people have experienced healthcare staff having a lack of understanding of trans specific healthcare needs¹⁷

¹⁷ https://www.stonewallscotland.org.uk/sites/default/files/lgbt_in_scotland_-_health_report.pdf

- When using mental health services, 29% of trans people have had their gender identity treated as a symptom of a mental health issue, rather than their genuine identity¹⁸
- 15% of non-binary people, 25% of trans women and 30% of trans men were asked inappropriate questions when using sexual health services¹⁹
- 11% of trans people disagreed or strongly disagreed that their GP had “smoothly prescribed and monitored my hormones”²⁰

53. Aside from actual negative experiences, one thing that consistently comes through from research into trans people’s experiences with services in Scotland is that a major barrier to accessing services is fear of facing discrimination. For example:

- 37% of trans people said they had avoided healthcare treatment due to fear of discrimination²¹
- 24% of trans people said they had avoided sexual health services due to fears and anxieties related to their gender identity²²
- Only 7% of trans people who had experienced domestic abuse contacted a domestic abuse organisation, with many citing fears of prejudice, discrimination or a lack of inclusive services as the reason²³

54. Through our community engagement work, we are aware that trans people have felt increasing anxiety, worry and uncertainty about their ability to access services in the past two years. Trans people tell us that this is due to increased negative media coverage of trans lives, increased polarised debates about trans equality, and concerted campaigning efforts to undermine understandings of and oppose trans people’s existing rights to access services appropriately to how they are living.

55. We are very concerned that much of the conversation that is taking place across the political and media sphere has an emphasis that is entirely disconnected from the reality of being a trans person in Scotland or across the UK today. Trans people still face widespread discrimination in services, and barriers to accessing services. Trans people’s inclusion in services need to be improved, whereas much coverage would suggest that the problem lies with too much acceptance. This is far from the case.

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¹⁸ *Trans Mental Health Study* (2012) McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.

¹⁹ https://www.waverleycare.org/application/files/1916/0153/7984/There_needs_to_be_care_throughout.pdf

²⁰ GIC Survey

²¹ https://www.stonewallscotland.org.uk/sites/default/files/lgbt_in_scotland_-_health_report.pdf

²² https://www.waverleycare.org/application/files/1916/0153/7984/There_needs_to_be_care_throughout.pdf

²³ https://www.scottishtrans.org/wp-content/uploads/2013/03/trans_domestic_abuse.pdf