

Summary

1. Amnesty International UK (AIUK) has been advocating for a meaningful reform of the Gender Recognition Act (GRA) so that it meets human rights standard both in England and Scotland. AIUK provided a response to the original consultation and engaged in dialogue with MPs on the issue. Our 2019 Write for Rights campaign raised awareness of the issues faced by young trans people¹.
2. AIUK remains of the view that the GRA is out of date and not in line with human rights standards. While it is welcome that the process will be brought online with a reduced fee these limited changes are disappointing and do not amend the most problematic aspects of the law. The fact that the requirement for a diagnosis of gender dysphoria has not been removed means that being trans continues to be treated as an illness and the government's aim of making the process 'kinder and more straightforward' has not been met. The situation has not improved since this Committee's inquiry in 2015 inquiry which found that 'the Gender Recognition Act 2004 was pioneering but is now dated. Its medicalised approach pathologises trans identities and runs contrary to the dignity and personal autonomy of applicants'².
3. AIUK is concerned that the lack of reform of the GRA and the rise in transphobic rhetoric in the media and public discourse are damaging the progress made on LGBT equality in the UK. According to ILGA's annual monitoring of LGBTI equality in Europe the UK has fallen from 1st place in 2015 to 9th place in 2020 in parts because of the failure to reform the GRA and for a surge in hate crimes, transphobic rhetoric and anti-trans groups³.
4. AIUK's position on legal gender recognition is based on human rights standards and AI's research on legal gender recognition in Europe⁴. The main recommendation is for the process to be de medicalised, based on self-determination, accessible and timely. AIUK's recommendations submitted to the 2018 consultation still stand⁵:
 - Removal of the requirement for a diagnosis of gender dysphoria.
 - Removal of the requirement to have lived in the acquired gender for two years.
 - Removal of the spousal consent provision.
 - Lower the age limit for obtaining a GRC to 16 years and provide an option based on parental consent for young people under 16.
 - Provide legal gender recognition for non-binary people.

Should a fee for obtaining a Gender Recognition Certificate be removed or retained? Are there other financial burdens on applicants that could be removed or retained?

¹ https://www.amnesty.org.uk/files/2019-10/UK_TransYouth.pdf?yG8HCOZmJ2MYaCL1aMgbOTeoHrMiPAFa=

² <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

³ https://www.ilga-europe.org/sites/default/files/2020/united_kingdom.pdf

⁴ Amnesty International, *The state decides who I am: lack of legal gender recognition for transgender people in Europe*, 2014, available at <https://www.amnesty.org/en/documents/EUR01/001/2014/en/>

⁵ AI UK full response to the 2018 GRA consultation is available at <https://www.amnesty.org.uk/files/2018-09/GRA%20question%20and%20response.pdf?wQRoyWuUb2V3HzN5h25VJWaPKpNAkzDW=>

It is welcome that the government is seeking to reduce the fee to a 'nominal amount'. However, given that the process remains medicalised applicants will still have to produce medical reports that can cost £80 each. The National LGBT Survey (2018) found that, of trans respondents who were aware of the application process but didn't have a GRC, 34% gave the process being too expensive as a reason⁶. Legal gender recognition should be accessible to all who seek it: no-one should be barred from accessing legal recognition of their gender for financial reasons. Legal gender recognition should not cost more than any other comparable procedure like a change of name.

Should the requirement for a diagnosis of gender dysphoria be removed?

Yes, it should be removed. The requirement for a diagnosis of gender dysphoria is intrusive and humiliating, violates transgender people's right to privacy, and further stigmatise trans identities. In May 2019 the World Health Organisation (WHO) officially took steps to remove gender dysphoria (or gender incongruence) from its list of mental health disorders to classify it as a sexual health issue⁷. The WHO has recognised, through improved understanding of the issue, that gender dysphoria is not actually a mental health condition and that classifying it as such had perpetuated stigma against trans people. This is also reflected by international best practice as stated by World Professional Association for Transgender Health (WPATH) and the British Medical Association (BMA).

According to the Yogyakarta Principles⁸ (an affirmation of existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics), neither medical or psychological interventions nor a psycho-medical diagnosis should be a prerequisite for accessing legal gender recognition.

The requirement for a gender dysphoria diagnosis adds significant barriers to access legal gender recognition, as to receive a diagnosis a person must either navigate a long waiting list for NHS services (18 months on average) or incur high costs for private services. Removing the diagnosis requirement would both increase accessibility of legal gender recognition and reduce pressure on gender identity clinics.

Some recent examples of best practice come from Malta, Belgium and Ireland. Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 which states that people have a right to 'bodily integrity and physical autonomy'⁹. In this jurisdiction, the gender recognition procedure is quick, transparent and accessible and the requirement of psychological or medical proof is forbidden. In May 2017, the Belgian Parliament introduced legislation which removed the requirement for mental health diagnosis (as well as enforced sterilisation), a move which has the potential to reduce the 'pathologisation' (when health or behaviour is treated as a medical condition) of gender identities. Amnesty also notes progress in Norway, Ireland and Greece, where the respective parliaments granted legal gender recognition on the basis of self-identification¹⁰. In

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

⁷ <https://www.cbsnews.com/news/world-health-organization-removes-gender-dysphoria-from-list-of-mental-illnesses/>

⁸ <https://yogyakartaprinciples.org/>

⁹ <https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/>

¹⁰ <https://www.amnesty.org/en/documents/pol10/4800/2017/en/>

the Republic of Ireland, the Gender Recognition Act 2015 enables trans men and trans women over the age of 18 to have their gender legally recognised through a straightforward administrative process based on the principle of self-determination, with a statutory declaration witnessed by an official.

Should there be changes to the requirement for individuals to have lived in their acquired gender for at least two years?

Yes. The two-year waiting period is arbitrary and unnecessarily long and can lead to violations of the right to privacy and to discrimination because of the divergence between trans people's gender, gender expression and documents within that time. The two years requirement does not comply with international human rights standards which stipulate that a process must be quick, transparent, and accessible. The current process is also difficult, time consuming and expensive as it requires original copies of a passport, driving licence, payslips or benefit documents, utility bills and other documents of an official nature. This is a significant amount of information, which is both logistically difficult, time consuming and can be challenging to obtain in particular for trans people who have been unemployed or have experienced homelessness or are not able to provide a permanent address.

What is your view of the statutory declaration and should any changes have been made to it?

A statutory declaration could be retained within a system based on self-determination. However, the requirement that the applicant intends to "live permanently in the acquired gender until death" should be removed. This language is unnecessary and implies that people seeking legal gender recognition may be doing so without full understanding of the decision they are making or fraudulently. A statutory declaration would already provide a safeguard against any fraudulent application.

Some people may wish to change their legal gender status a second time and should not be barred from doing so because of an arbitrary limit. When a person is undergoing a legal gender status change it is likely to be an extremely stressful period, and the introduction of arbitrary limits on the number of times a person can undertake the process would only add pressure and additional anxieties to the process. People who seek to change their legal gender status may already have limited resources and sources of support available. This is likely to be especially true for young people.

Does the spousal consent provision in the Act need reforming? If so, how? If it needs reforming or removal, is anything else needed to protect any rights of the spouse or civil partner?

According to the Yogyakarta Principles neither marital status nor any third-party opinion should be a prerequisite for accessing legal gender recognition.¹¹

The requirement for spousal consent can be particularly detrimental to trans people experiencing domestic violence where consent might be withheld as a form of coercive control or an abusive partner might threaten to out their trans spouse as highlighted by Safelives¹² (2018) .

¹¹ YP+10, Principle 31 http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

¹² <https://safelives.org.uk/sites/default/files/resources/Free%20to%20be%20safe%20web.pdf>

Should the age limit at which people can apply for a Gender Recognition Certificate (GRC) be lowered?

Yes. Having an arbitrary age limit that cuts off access to legal gender recognition is not consistent with existing standards regarding the rights of children. Legal gender recognition should be accessible to minors, taking into account the child's freely expressed views regarding their own best interests, and in light of their evolving capacities.

The UN Convention on the Rights of the Child (CRC) requires states to respect the right of children to be heard and to duly take into account their views. A key requirement of the CRC is the 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child has highlighted that the identity of the child includes characteristics such as sexual orientation and gender identity and 'the right of the child to preserve his or her identity is guaranteed by the Conventions (Article 8) and must be respected and taken into consideration in the assessment of the child's best interests.'

AIUK recommends that the self-determination process is open to those aged 16 and above. For those aged 16 and below there should be an administrative process based on parental support. A back-up mechanism should be available by which a child without parental support should be able to apply for gender recognition – ideally an administrative rather than court-based process.

What impact will these proposed changes have on those people applying for a Gender Recognition Certificate, and on trans people more generally?

The National LGBT Survey (2018) found that 93% of trans people who did not have a Gender Recognition Certificate, would be interested in getting one so a reformed system would have a positive impact on trans people's health and wellbeing as well as their ability to exercise their rights and be protected from breaches of privacy and discrimination. Implementing a system of legal gender recognition based on self-determination would bring the UK in line with human rights standards.

What else should the Government have included in its proposals, if anything?

The government should include legal gender recognition for non-binary people who at present have no option. Individuals who identify as a gender other than male or female should be able to obtain documents that reflect their gender identity in the same manner as those who use the binary male or female. A lack of non-binary inclusion leaves a significant portion of the trans population without any legal recognition. Of the respondents to the National LGBT survey who identified as trans, 52% identified as non-binary.

Having driving licenses, birth certificates, passports, and other official documentation, including medical documentation, that reflects this would have a significant impact on their sense of acceptance in society. Acknowledging non-binary identities on legal documentation has international precedence: options for non-binary people to obtain legal documents exist in Malta, Denmark and are under discussion in Germany, Ireland and Scotland. Outside Europe, several countries, including Canada, Nepal, Australia, New Zealand, Pakistan and India, already allow for passports with gender markers other than 'F' or 'M'; these countries typically use 'X', which is recognised by the International Civil Aviation Organisation¹³.

Does the Scottish Government’s proposed Bill offer a more suitable alternative to reforming the Gender Recognition Act 2004?

The proposed Scottish bills offers a more comprehensive reform of the GRA as it seeks to de-medicalise the process and have a new system based on self-determination. However, the proposal still aims to retain a ‘reflection period’ of 3 months which is unnecessary and would contribute to stigma against trans people as it would imply their ability to self-determine is not adequate.

The Scottish Government’s initial consultation document published in 2018 stated the view of the Government to be that applicants for legal gender recognition should no longer need to produce evidence that they have lived in their acquired gender for a defined period. The current proposal for a reflection period of three months – if included in legislation - will require explicit justification. The Cabinet Secretary has stated that building in a reflection period will enshrine in law the seriousness of this process. It is Amnesty’s view that the statutory declaration fulfils this purpose, and a reflection period only serves to delay the process of obtaining a GRC, without a clear rationale.

The Scottish proposal also fails to provide an option for non-binary people and young people under 18. AIUK strongly agreed with the Scottish Government’s original proposals to extend self ID to 16- and 17-year olds. Many 16- and 17-year olds are in the process of moving away from home, starting higher education and new jobs, and it is vital that they are able to legally self-identify to avoid continually having to disclose their trans status. 16 year olds in Scotland are considered legally capable of consenting to many adult decisions including voting, marriage and joining the army. Ensuring a legal right to self-declaration of gender identity would simply be consistent with these other rights in Scotland.

Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?

The overtly bureaucratic and intrusive nature of the current GRA is definitely a critical reason for this discrepancy. In 2018, 4,910 trans people had successfully acquired a GRC – a tiny proportion of the Government Equality Office’s tentative estimate of 200,000-500,000 trans people in the UK¹⁴. The National LGBT Survey (2018) found that of the trans respondents who were aware of the process but did not have a GRC, the most frequently given reasons were not satisfying the requirements (44%), finding the process too bureaucratic (38%), and the process being too expensive (3%). Only 7% said they were not interested in getting a GRC.

Are there challenges in the way the Gender Recognition Act 2004 and the Equality Act 2010 interact? For example, in terms of the different language and terminology used across both pieces of legislation.

Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?

¹³ <https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf

Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed?

AIUK is concerned about the growing rhetoric around 'trans ideology' or 'gender ideology' and narratives that portray trans people as predators and a danger for children and trans women in particular as a threat to the safety of cis women and girls. This fearmongering is a breeding ground for hate crimes and cause immense stress to trans people. It is estimated that transphobic hate crime recorded by the police has soared 81% since 2016¹⁵. The government should be much more explicit about rebutting these dehumanising narratives and affirming that transphobic stereotypes have no place in society.

From an international human rights law perspective, the established consensus is that both gender and sex are prohibited grounds for discrimination and that discrimination is borne out of social constructs rather than strictly biological characteristics. This has been explicitly recognized by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment (GC) 20 on non-discrimination¹⁶: 'The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights. Since the adoption of the Covenant, the notion of the prohibited ground 'sex' has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights'.

In addition, the term 'gender' (and respectively gender-based discrimination, gender-based violence) is being used in international standards developed after the Convention on all Forms of Discrimination Against Women (CEDAW) such as CEDAW GC 19 (1992) and 35 (2017), the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (or the Convention of Belém do Pará) (1994), the Maputo Protocol (2003) and the Istanbul Convention (2014).

In addition, the CEDAW committee has recognised that women experience discrimination in different ways, including because of their gender identity, and that intersectionality must inform states' approach to core obligations under article 2: 'Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned'¹⁷.

When a consultation on reforming the GRA was announced the government was clear that any changes to the Equality Act were not in the scope of GRA reform, this continues to be the case. The further changes needed to bring the GRA in line with human rights standard would not have an impact on the Equality Act and would only affect trans people and would not affect the provision of single sex services, which is regulated by the Equality Act.

Trans people have been using facilities and services (such as toilets and refuges) matching their gender for decades. Many domestic and sexual violence services are taking proactive steps to deliver

¹⁵ <https://www.bbc.co.uk/news/uk-48756370>

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en

¹⁷ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>

trans-inclusive support. This support is particularly important, given, for example, the high rates of domestic violence experienced by trans communities.

Are legal reforms needed to better support the rights of gender-fluid and non-binary people? If so, how?

As mentioned in previous response AIUK believes that there should be an option for legal gender recognition for non-binary people. Currently, the Equality Act does not explicitly prohibit discrimination against people because they are non-binary, however a recent employment tribunal judgment¹⁸ against Jaguar Land Rover suggested that the characteristic of 'gender reassignment' protected under the Equality Act could include non-binary and gender-fluid people. If cases in higher courts lead to similar judgments, this could provide significant clarity and reassurance on the legal protection that non-binary people have from discrimination.

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¹⁸ <https://oldsquare.co.uk/et-finds-that-gender-reassignment-s-7-ega-includes-gender-fluid-and-non-binary-individuals/>