

Gender Recognition Inquiry Response

Preamble

The Diversity Trust is a Community Interest Company working to achieve a fairer and safer society. We provide trans awareness training to a wide variety of clients across all sectors, including organisations that provide women-only services. We work closely with trans communities in the South and West of England, including running LGBT+ youth and adult support groups. Our work is grounded in the principles of the Equality Act.

Introduction

Following the previous consultation on the proposed reforms of the Gender Recognition Act we are concerned that the Government hasn't fully considered the substantial support that reform of the Gender Recognition Act received from the general public in 2018. Thankfully the Government has not followed through with rollbacks to existing trans rights, but we know from our contacts that the UK trans community continues to live in fear of their rights being taken away.

Government Response to the GRA Consultation

We are broadly in favour of the original proposals for GRA reform. The analysis of the responses to the previous GRA reform consultation by Nottingham Trent University found no evidence of bias in the results¹. We hope that the Women & Equalities Committee will ask the Government to outline why it hasn't considered public opinion and implemented the results from the previous consultation.

The Purpose of GRA Reform

As the Committee rightly notes, the number of people applying for legal gender recognition is substantially smaller than the number of people in the UK who identify as transgender. We believe that only around 5000 Gender Recognition Certificates have been issued. The Government Equalities Office 2018 survey of LGBT life received responses from around 14,000 trans people. The GEO estimated the total UK trans population as between 200,000 and 500,000.

These figures do not show the number of people who are undergoing treatment at UK gender clinics, and the number who have changed their passports and/or driving licences as part of a gender transition process. Anecdotal data from our contacts in the trans community suggest that a substantial number of trans people who have updated their ID in these ways, and could apply for legal gender recognition, are not doing so.

From a legal point of view, it is undesirable that citizens should be changing the gender on their personal ID, such as passports and driving licences, but should retain the sex that they were assigned at birth. The purpose of GRA reform should be to identify why trans people are not applying for legal gender recognition, and then change the process so that more of them do so.

How the GRA Works

When the GRA was first created, the established medical consensus was that trans people were suffering from a mental illness which could be "cured" by facilitating gender transition. Accordingly, legal recognition of gender transition was to be withheld until, in the opinion of medical experts, the patient had been so cured.

The modern medical view of trans people is very different. Trans people are no longer seen as mentally ill, and gender transition is simply a process that helps trans people live happier, more productive lives. It should no longer be necessary for trans people to prove themselves "cured" in the way that the GRA requires.

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A key part of the gender transition process is the so-called “Real Life Test”. Trans people under the care of a gender clinic are not allowed to proceed to surgery, or to change their legal gender, until they have shown that they can live successfully in their acquired gender for a set period of time. To undertake this test, they must have ID that matches their acquired gender. Both passports and driving licences, if they exist, must therefore be changed at the start of the transition process. This is done routinely, and typically only requires a simple letter from a doctor.

While obtaining a GRC does confer a small number of additional rights to trans people, it is mostly a rubber-stamping process that marks the end of a gender transition process that has been ongoing for a number of years. It does not make much difference to the day-to-day lives of trans people.

One of the major failings of the GRA Consultation process was the failure to explain correctly to the general public how gender transition currently works, and what effect the proposed changes would have. Instead the media was allowed to mislead the public with scare stories about how trans people would gain “new rights”, in particular new rights to access women-only spaces, as a result of the reforms. This was conflating two different areas of law – the proposed reform of the GRA and the Equality Act.

Reforming the Existing Process

Given the change in the medical understanding of trans people, the medicalisation in the GRA process is no longer necessary or appropriate. A simple letter from a suitably qualified medical practitioner should be sufficient. This change will likely save applicants more money than reducing the fee.

Government should also look at reducing the fee as promised. A useful way of reducing costs would be to disband the Gender Recognition Panel, whose only purpose seems to be to second-guess the decisions of doctors.

While there has been considerable public unease about the proposals, the use of a statutory declaration should be sufficient to ensure that gender changes are not undertaken frivolously. Most of the public unease seems to have resulted from the suggestion that changing legal gender could, after reform, be undertaken on a whim, with no consequence if this was done dishonestly and frivolously. We do not believe that this was Government’s intention, and we wish that this had been made clearer.

There is no evidence that such systems in place elsewhere cause problems. The Irish law has been in place for over 5 years, and there have not been any cases of men fraudulently claiming to be undergoing gender changes to gain access to women only services and spaces.

The Bill currently before the Scottish Parliament looks to be a good implementation of the ideas expressed in the original Westminster consultation. We are not convinced of the need for a “period of reflection” as this seems to be yet another expression of the idea that trans people do not know their own minds, but it does little harm.

We are concerned that the current proposals will do little to change the number of people applying to change their legal gender because too many of the existing roadblocks will remain in place.

Wider Issues of Gender Recognition Reform

The proposed reforms will not completely solve the problem of trans people not changing their legal gender. Some common reasons for this are set out in the recent publication, *Legal Gender Recognition in the EU*ⁱⁱ. The research for this was carried out in 2019, so UK data is included. The

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study found that, even in countries such as Ireland where so-called “self-ID” was in use, 72% of trans people had taken no steps to avail themselves of the process. In countries such as the UK with a heavily medicalised process, that number rose to 79%.

The study did not dig deeply into the reasons why this might be the case, but the explanations that the authors suggest are familiar from our own interactions with the UK trans community.

A significant proportion of the trans community identifies as non-binary; that is neither male nor female. In the EU study, 20% of respondents specifically identified with non-binary identities. A further 8% chose “other” or “choose not to say” as their gender. In our own 2018 survey of trans health needs in the South Westⁱⁱⁱ, conducted in collaboration with a consortium of local Healthwatch, there was no specific non-binary option, but 22% chose “other” and a further 8% chose “intersex”, “don’t know” or “prefer not to say”. This shows that there is a significant proportion of the trans community who cannot change their legal gender because the option that they need is not available.

In the 2018 Government Equalities Office National LGBT Survey there were approximately 14,000 respondents who identified themselves as trans. Roughly half of them described their gender as neither male nor female.

Several other countries now allow their citizens to have an X marker rather than an M (Male) or F (Female) on personal ID, including driving licences and passports^{iv}. The UK could do the same. We understand that matters of gender are deeply embedded in UK law, and that a full overhaul to make space for non-binary people is a major undertaking. However, we also feel that discrimination in law on the basis of gender is generally inappropriate, and that equality between persons of all genders will be well served by making a start on this project.

There are many other reasons why trans people might not wish to change their legal gender. Even among those who strongly identify as male or female, the EU study found that 40% were not interested in doing so. The reasons for this are many and varied, but in a society where there is less and less discrimination based on gender, positive reasons for making the change will inevitably reduce.

One group of people who cannot avail themselves of legal gender changes is people under 18. While younger people will need parental guidance, the situation for young trans people at school is very difficult. If there were some means for parents to register the fact that a social transition has taken place, this could be very helpful to them and their child.

Finally, the government could easily gain goodwill with the trans community by removing the so-called “spousal veto”. The fact of a legal gender change should be sufficient grounds for a no-fault divorce. No one should be forced to stay in a marriage, or a gender, that is not working for them.

Issues regarding the Equality Act

It is our experience that the Equality Act works well as it currently is. We provide a lot of training to clients on trans and other diversity issues, and while there is sometimes some confusion among the class to begin with, the way in which the Act works is easily explained. The fact that so many organisations that specialise in providing support to vulnerable women have responded to the Scottish and Westminster GRA Consultations to say that they are trans-inclusive, and that this has not been a problem for them, should be all the evidence that is needed.

There has been a lot of discussion, particularly in the media, of “sex-based rights”. The assumption appears to be that everyone has an innate and unchangeable “biological sex”, that this is the basis of the Protected Characteristic of Sex, and that rights of people with a “biological sex” of female

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automatically take priority over those of people with the Protected Characteristic of Gender Reassignment.

The UK has, since at least the 1930s, accepted that the sex assigned at birth is not always correct, and can be changed on medical advice. We do not test a baby's chromosomes at birth, and even if we did this is not always a clear indication of the sex of the individual. Intersex people exist, and while their numbers are small, they are similar in proportion of the population to the numbers of trans people.

The sex recorded on a birth certificate is therefore a legal sex, not a biological sex. This can be changed, as the GRA makes clear. Appeals to "biological sex" and dictionary definitions of "woman" cannot challenge this.

Where the Equality Act makes reference to Sex as a Protected Characteristic, it should therefore be referring to legal sex, and not to any other proposed definition of what sex a person is.

Where conflicts exist between the priorities of people with different Protected Characteristics, these conflicts must be resolved by mutual agreement or, if necessary, a legal case. It should never be the case that people with one Protected Characteristic can claim that their rights automatically take priority over those of everyone who does not have that Protected Characteristic.

As we have explained above, it is part of the standard medical and legal transition process that trans people should live full time in their correct gender before they can be granted access to surgery and legal gender transition. It is therefore necessary that they should be protected from discrimination while they are doing so, and not only once the process has been completed. Therefore the Equality Act must protect trans people from the point at which they begin transition, which is what it currently does.

We have, in the past, had concerns that the Equality Act might not fully protect non-binary people as their status in current UK law was unclear. However, the recent Employment Tribunal decision, *Taylor v Jaguar Land Rover*^v, has clarified this. There is now precedent that transition to a non-binary gender is still gender transition, and someone who undergoes such a transition is protected by the Equality Act.

In our view, the biggest issue with the Equality Act on questions of gender is the unequal protection for people whose gender presentation is not stereotypical. There are many people whose manner of dress and other aspects of physical presentation do not conform to traditional social expectations, but yet who identify fully with the sex that they were assigned at birth. Such people are as much, if not more, likely to be discriminated against than actual trans people, because they are often very visible. They can, of course, bring a case that they were discriminated against because they were perceived to have the Protected Characteristic of Gender Reassignment. However, it is harder to win a case on this basis than it is if the victim genuinely does have the Protected Characteristic. It would help such people considerably if the Protected Characteristic were renamed in such a way as to include them.

Another group who are not effectively covered are intersex people. While some intersex people will undergo a process of gender reassignment, many are happy with the sex they were assigned at birth, and some wish to have been assigned as non-binary at birth. A re-wording of the Protected Characteristic should include them as well.

Trans and Non-Binary People in Wider Society

The need for legal recognition of non-binary people goes much wider than the GRA and Equality Act. We do a lot of work with a variety of charities in the South and West of England that work with victims of violence. A recurring question is how to accommodate non-binary people in a world that does not recognise their existence. Our clients would appreciate being able to provide specialist services for these vulnerable people, but they generally cannot do so because funding is only available for female-only services or male-only services.

Social services for non-binary people can also assist some binary-identified trans people who might otherwise find difficulty with traditional services. The current multi-year waiting times for treatment at gender clinics have left many people in medical limbo, socially transitioned, and perhaps obtaining hormones, but unable to access the additional medical care that they desire, and which might allow them to feel confident in approaching services that are male-only or female-only.

Some intersex people may also feel uncomfortable approaching existing single-sex services. Encouraging provision of services for non-binary people could help them too.

We note that the 2016 Transgender Equality Report was particularly critical of the NHS as failing in its duty of care towards trans people. We have done a considerable amount of training for NHS staff in the intervening years, and are happy to report that the vast majority of NHS employees we have met are very supportive of trans people and keen to help as best they can. Efforts at trans inclusion often meet resistance at senior level, with NHS managers impeded by changes of policy, and by fear of negative media attention should any trans-supportive policies be made public.

Intersex people are also badly served by the NHS. In particular, NHS England continues to advise parents to seek surgery for intersex children in order to “help make your child's body look more consistent with the chosen gender.”^{vi} Such surgeries are generally performed well before the child is able to consent, and can lead to life-long physical and psychological problems. We understand that proposals are being brought forward to outlaw this practice^{vii}, and hope that the Committee will encourage the NHS to make this happen as a matter of urgency.

Where there is obvious doubt as to the sex of a new-born baby, we suggest that parents be allowed to register the sex as indeterminate until such time as the child is able to express a preference (which may be to continue in a non-binary gender). This must be the choice of the parents. Experience in Germany, where it is the choice of doctors, has led to an increase in parents wanting surgery for the child in order to get the non-binary marker removed.

Berkeley Wilde,
Director

ⁱ <https://www.ntu.ac.uk/about-us/news/news-articles/2020/09/expert-blog-analysing-the-gra-consultation-reflections-by-the-analysis-team>

ⁱⁱ <https://op.europa.eu/en/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1/language-en>

ⁱⁱⁱ https://www.diversitytrust.org.uk/research_reports/trans-health-wellbeing-research-report/

^{iv} <http://equalrecognition.scot/non-binary/>

^v

https://assets.publishing.service.gov.uk/media/5f68b2ebe90e077f5ac3bb5a/Ms_R_Taylor_V_Jaguar_Land_Ro

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[ver Ltd - 1304471 2018 - judgment.pdf](#)

vivi <https://www.nhs.uk/conditions/androgen-insensitivity-syndrome/>

vii <https://www.thetimes.co.uk/article/surgery-on-intersex-children-may-stop-p2p8qq5dc>

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