

26th November 2020

LGBT+ Labour trans caucus

**LGBT+ Labour's transgender caucus submission to
Women & Equalities Select Committee Inquiry:
Reform of the Gender Recognition Act.**

Dear Committee

I write as Chair on behalf of the transgender caucus of LGBT+ Labour. The caucus consists of hundreds of transgender activists in the Labour Party. It meets regularly online to share members experiences and debate policy, and this submission is a distillation of these.

It was three years between the government announcement that it intended to reform the Gender Recognition Act (GRA) towards a self-declaration model, until its decision not to reform the Act. Over these three years, scare stories and misinformation about GRA reform went unchallenged by the government, which gave a space for toxic debate and abuse to thrive. Transgender members of LGBT+ Labour, their families and allies were subject to vile transphobic abuse.

We note that those opposed to GRA reform are a vocal minority. The result of the government's consultation on reform showed that over 70% supported reform and self-declaration. Despite this overwhelming support the government decided to ignore the data from the consultation, meaning all the toxic abuse arising from having a consultation was for nothing.

The government's justification for dismissing the data was that it regarded it as having been biased by effective transgender campaigns. This claim is contradicted by the analysis of the data in the report which noted that¹: Pro-reform submissions from individuals were based on sources of information provided by LGBT+ Labour, Stonewall and others but were clearly different and gave personal experiences. In contrast anti-reform submissions from individuals were carbon copies of the Fair Play for Women suggested submission. If the Select Committee does accept the government claim that the submitted data had been biased by effective transgender campaigns, then it follows that an effective campaign by the government would lead to greater public acceptance of transgender people.

Self-declaration GRA reform goes wider than the rights of transgender individuals, it promotes societies acceptance of gender identity. A worrying trend in attitudes has been reported by many of our transgender members. They have reported an increase in the number of times members of the public challenge them to prove they are the gender they identify as.

We have reordered our response to the questions of the committee so our response to the new reforms comes after our response to why the original reforms should not have been dropped. We believe this better demonstrates why the new reforms do not address the problems which transgender people face.

Part I

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

Yes. The hurdle of a diagnosis adds needless stress and further delays. The diagnosis is redundant because it is no longer recognised by world medical authorities. 80.3% of respondent to the

¹ GRA consultation report pages 21-22: "Sources of Responses".

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consultation on GRA reform were in favour of dropping the requirements for medical report to obtain a GRC².

The requirement for a diagnosis of gender dysphoria places many barriers in the way of trans people exercising their right to legal gender recognition. A requirement for a diagnosis in and of itself is demeaning for trans people, as it defines our gender identity and expression as pathological.

Medical opinion across the world has moved on. Being transgender is no longer thought of as a psychiatric condition of gender dysphoria, but rather a sexual health matter described as gender incongruence. This shift in opinion is now recognised in the 11th edition of the International Classification of Disease (ICD-11) compiled by the World Health Organisation.

Given gender dysphoria is no longer a medically recognised diagnosis it is absurd to require transgender people to obtain this diagnosis to exercise their right to legal gender recognition.

The long waiting times for Gender Identity Clinic (GIC) appointments to obtain a diagnosis adds months or years to the minimum two years requirement unless a patient can afford a private appointment. One of our members reported that to obtain their diagnosis from Leeds GIC took 4 years from the time of referral. A further complication in obtaining a diagnosis from Leeds GIC was reported by another member, they were refused a diagnosis report until they could show they were employed. When they asked the doctor to justify this, the response was that the patient had to demonstrate they were accepted in their assigned gender, and employment was one of the tests for that.

Problems with waiting times for Leeds GIC are not unique. It was reported by the BBC earlier this year that there were 13,000 people waiting for their first GIC appointment, with waiting times longer than 18 months in most places and often above 30 months. These waiting times will have been further increased since the pandemic. A medical report to obtain a GRC is not issued at the first appointment. At least one further appointment is required adding at least three months and usually six months.

Many transgender people are too desperate to wait two years for a GIC appointment and for the prescribing of hormones. Instead they obtain them from internet sources with all the risk around the quality of the drugs and unsupervised medical treatment. Many GICs will not see patients if they know they have already been taking hormones unsupervised. Thus, there are many patients who are taking hormone treatment but will not be able to obtain a GIC medical report to that effect.

The law recognises that not every transgender person will seek medical intervention to live their lives in comfort. Thus, requiring them to have a diagnosis from a GIC wastes appointments, which are in short supply.

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

Yes, 78.6% of the consultation respondents were in favour of removing the requirement to provide evidence of lived experience of their gender for a period of time³.

² Report (page 8, point 9): 4 in 5 (80.3%) respondents were in favour of removing the requirement for a medical report, which details all treatment received.

³ Report (page 9, point 10): Majority of respondents (78.6%) were in favour of removing the requirement for individuals to provide evidence of having lived in their acquired gender for a period of time.

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Currently transgender people are in legal limbo while transitioning and waiting for gender recognition. This undermines their dignity and there are no legal protections to their privacy, which a GRC affords. This allows the curious and malicious to ask about birth assigned gender or disclose private information. This can then be used to out trans people during transitioning.

The principle of proving “living in your acquired gender” is of itself nonsensical. What proves that one is living as a man or a woman or a non-binary person? If proof requires testimonies from others, then their stereotypes might determine their testimonies. Administrative proof such as name change does not account for people continuing to use their androgenous name, or that people often use a name which is not officially recorded as their first name.

A change of title on utility bills is problematic to those who live with other people who may pay the bills. Some people will live in households or flats where they do not want others to know this private detail. In some cases, it might expose the person to risk of physical or emotional abuse/assault. We had one case in Nottingham, of a person who was subjected to verbal abuse because a neighbour identified they were transgender from a letter they had seen. In that case the person was living in sheltered accommodation with mail being delivered through the letter box of the entrance to the accommodation block. The neighbour picked up their post to put it though their internal letter box, but then realised they were transgender. This led to harassment and verbal abuse.

Obtaining the necessary evidence to show you live in your acquired gender can be expensive, see below, and arduous in the amount of time it can takes. It assumes that people will be in possession of records which they had two years ago. Again, a case in Nottingham showed how unfeasible this is. This person had lived rough for three months before being housed in temporary accommodation, they had nothing from before they became homeless. Other people have disabilities that make it difficult or impossible to maintain the necessary records.

The two years' time frame is entirely arbitrary. The reason why proof of living for a given time frame was introduced was to ensure that applications were not made on a whim. However, three months is more than long enough to show that your transition is not a whim.

A set minimum timeframe also assumes that there is a clear day on which you start to live as your acquired gender. Most transgender people will say they have always been their acquired gender, and the process of other people knowing that comes in steps. Such as coming out to friends, experimenting with appearance at home or with friends, and then coming out to everyone except perhaps family members. When does the clock start ticking for living in your acquired gender? Does it reset if you do not tell your granny when you see her at Christmas? The more this requirement is scrutinised the more absurd it gets.

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 should be retained?

The fee for a GRC should be removed. 58.5% of the consultation's respondents were in favour of removing the £140 fee⁴. The other financial burdens in obtaining evidence to apply for a GRC, could be easily removed by moving to a self-declaration model.

The cost of applying for a GRC is prohibitive. In addition to the £140 fee, and the £160 for two medical reports, there are frequently solicitor fees for signing statutory declarations and witnessing deed-polls, and costs of collecting other evidence. The total cost of application and providing

⁴ Report (page 9, point 13): 58.5% of respondents were in favour of removing the £140 fee from the process of applying for legal gender recognition.

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evidence averages to around £300-400. This is a burdensome cost for many people, being equivalent to a week's median take home pay.

The costs of obtaining the documents necessary to succeed in one's application for a GRC are quite high cumulatively. This typically includes passports and drivers licences among others. Many GPs will charge for their medical report and patients who have paid privately to obtain a GIC will need to pay for the clinics report. Note that many transgender people have paid for a private GIC appointment because they are desperate to obtain hormones, the cost of an additional medical report is rarely considered at that stage.

People should not need to pay to have legal recognition of their identity. If there is to be any charge it should be no higher than the charges the government schedules for data protection applications or fixed at £10. It should be waived for those with low income.

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

83.5% of respondents to the consultation were in favour of keeping the statutory declaration⁵. This indicates that generally the public feels that the statutory declaration is the only reassurance they need that a GRC will not be applied for frivolously or for malign intent. We are happy to keep the statutory declaration to provide that reassurance.

Around half of those in favour of keeping it thought the current wording should be changed. The public recognise that the wording is restrictive, and we agree. The current wording is too limiting and does not reflect the journey of identity which some transgender people experience.

As noted above, "Living in the acquired gender" is hard to define and the criminal sanction risks transphobic people acting as a gender police resulting in malicious or vexatious allegations against transgender people. It is also not clear how living in the acquired gender would be determined in any criminal case, which adds a feeling of insecurity for those who have a GRC.

Currently applicants for a GRC swear a statutory declaration that they will "live permanently in the acquired gender until death." This requires a crystal ball to see how your life turns out. It does not reflect the journey of identity experienced by many. A significant proportion of our members at first defined themselves as one of the binary genders, only to later realise non-binary better describes their identity. In addition, people who identify as non-binary from the start have no option at present but to fall into either binary category. The wording of the statutory declaration should accommodate these caveats.

We would suggest that the statutory declaration is changed to "intends to live as their acquired gender indefinitely" but this may need further modification following the government's consultation with the non-binary community.

The penalty for a false statutory declaration is far too draconian. If found guilty under section 5 of the Perjury Act 1911 you can be sentenced to two years imprisonment with an unlimited fine. This should be reduced to the equivalent penalty used in the Republic of Ireland, which is a proportionate fine, or three months imprisonment under their Statutory Declaration Act 1938.

⁵ Report (page 9, point 11): The majority of respondents (83.5%) were in favour of retaining the statutory declaration requirement of the gender recognition system. Of those who were in favour of retaining the declaration, around half (52.8%) did not agree with the current declaration wording that the applicant intends to "live permanently in the acquired gender until death"

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?

84.9% of respondents to the consultation were in favour of removing the spousal consent clause⁶. The rule should be that a partner is informed if a GRC is to be issued but will not have a veto. The issuing of a GRC can be cited in divorce proceedings if a no-fault divorce cannot be obtained.

Societies views and the laws on same sex marriage and no-fault divorce were different when the Gender Recognition Act was originally passed in 2004 compared to what they are today. In 2004 the spousal veto was regarded as a protection for spouses against people challenging to their sexuality because of the transitioning of their partner. In practice the law was frequently used coercively. Transgender people report that it was used by spouses to coerce them in abusive marriages and/or to settle a divorce on unfavourable terms of child-access and financial settlements. Our proposal above protects both the rights of both the transgender spouse and their partner.

Will the Government's proposed changes meet its aim of making the process "kinder and more straight forward"?

While reducing fees and putting the process online are welcome, this will make very little difference to the cruel and undignified process being currently used.

It is difficult to see how the Government thinks these changes make the process kinder! What are unkind at the moment are: (i) the long wait to get a GRC, a minimum of two years and in reality a lot longer, (ii) needing proof of diagnosis for a condition that does not exist, and requiring medical reports which are intimate, unnecessary, and potentially expensive (see above), (iii) the long waiting times to get a GIC appointment to obtain the necessary medical report (above), (iv) compiling proof of living in acquired gender which is time consuming, costly, and subjects you to other people's idea of gender. None of these unkind processes are changed by the government's proposals.

While online applications will be easier for some, if it is simply the case of moving the current complex form to being online it will not make much difference, it will still be complex and confusing and require evidence. The process may be more difficult for those who lack digital access, especially if multiple documents require scanning and sending.

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

Yes. Waiting until a young adult is 18, before they can apply for a GRC robs them of their identity and dignity when applying for a provisional driving license and proof of age.

Having a birth certificate in your affirmed gender on the day of your 18th birthday is important because it will be used as proof of id if buying alcohol or cigarettes.

Given that Gillick competency affirms that a person can make their own medical decisions at 16, there does not seem to be any logic in saying that young adults need to wait until 18 before they can apply for a GRC.

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

The proposed changes will have almost no impact for those applying for GRCs and on transgender people more generally for the reasons given above. The application will still be complex and ~~expensive and will undermine our dignity.~~

⁶ Report (page 9, point 12): A majority of respondents (84.9%) disagreed with the spousal consent requirement in the GRA.

The main impact on transgender people more generally comes from the dropping of the original proposed reform. The misinformation and toxic atmosphere generated during the consultation means respect for transgender people and their dignity is at an all-time low. This will take years to undo.

Part II

Why is the number of people applying for a Gender Recognition Certificate so low compared to the number who identify as transgender?

The low numbers of applications for gender recognition certificates arises from (i) the complexity and cost of the process, (ii) the long period of time spent before a certificate can be granted.

For most transgender people, the process is too long, complex, and humiliating to be worth applying for a GRC. Your public transition process is usually emotionally painful and exhausting with family, old friends, and work colleagues often failing to accept your identity. Two years after transition most transgender people have carved out a new life with friends and colleagues who accept them. To go through the process of proving yourself once again to a Gender Recognition Panel has an emotional cost which has to be weighed against what further rights a certificate will give you. The possibility of being legally rejected and this effect on confidence, and possibly others acceptance, is too much of a risk for many.

A GRC is most useful at the start of transition to legally validate your identity and provide privacy protections around your birth gender. If GRCs were issued earlier the uptake would be higher.

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.

The Equality Act is easy to understand and most people and organisation do not know statutes verbatim. Instead they rely on knowing the principle of the Act and their common sense about what it means in their situation. The Equality Act is easier to understand and apply common sense to, than most Acts because the principle is simple: do not discriminate against people with a protected characteristic. If there are any differences of language or terminology their ordinary meaning is the same. The courts have thus far taken this view as well, so any differences have not generated legal problems.

The language in both Acts is out of date, such as the use of the terms (i) gender dysphoria is used instead of gender incongruence, (ii) transsexual is used instead of transgender. Any updating of language should occur at the same time for both Acts, but language is the least pressing of the problems transgender people face.

If the Equality Act is reformed, the protected characteristic of gender reassignment should be changed to gender identity because this more accurately reflects the characteristic of being transgender. It would also unambiguously protect non-binary people. However, again the need to change the Equality Act is not pressing. Employment Tribunals have already interpreted gender reassignment as covering non-binary identities.

Sex or Gender? During the GRA reform consultation, anti-transgender campaigners made an issue of whether there is a significant difference between sex and gender. They claimed this difference should be recognised in law to exclude transgender people from laws which concern sex. The Equality Act

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has it right when it says that gender reassignment is a change of sex for the purpose of the law. Sex is used in all other Acts of parliament, not gender.

Where the line is drawn between sex and gender varies with whether you ask a scientist or sociologist, and opinions vary within those groups. The embryonic development of the brain and where a person's gender identity comes from is far more complex than whether a person has XY or XX sex chromosomes. Many neurologists use sex/gender or gender/sex instead of trying to find a clear distinction between the two terms [Gina Rippon, *The Gendered Brain*], and because our brain determines who we are, trying to draw a distinction in the Equality Act would be pointless.

Are the Equality Act provisions for single/separate sex spaces and facilities clear and useable? If not, do we need reform or further guidance?

For the seven years before the GRA reform consultation, the exceptions in the Equality Act worked perfectly well and were useable and clearly understood. The only confusion which has arisen about them is from the misinformation and scare stories spread by campaigners opposed to GRA reform. The government could, and should, have corrected this misinformation at the time.

The government's consultation on GRA reform was badly drafted. The government accepted that the exceptions permitted in the Equality Act are not affected by a person possessing a GRC. Given this, it was odd for the consultation to devote questions 12-19 on whether the Gender Recognition Act affects the Equality Act! Anti-transgender rights campaigners were able to use the fact that these questions were included to spread fear stories and false misinformation about the impact of transgender rights on women's safety. This misinformation fed into the toxic debate and was not countered by the government during the two years delay between the consultation and the publication of the consultation report.

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

Given the anti-trans misinformation campaigns and toxicity seen when there was proposal to reform the Gender Recognition Act, it is best that reforms to the Equality Act are left well alone.

If the Equality Act were to be updated, it could be improved in three ways:

1/ By widening the definition of gender reassignment to gender identity (see above).

2/ The legal phrase, which permits excluding transgender people, is "...proportionate to achieve a legitimate aim", which gives rise to debates about what is a legitimate aim? Does a legitimate aim get justified if other users have prejudicial fears about transgender people? It would be better that the wording avoids any language which is open to a transphobic interpretation. A better wording might be "you must not exclude a transgender person unless it is necessary and proportionate for the function of your service."

3/ Making enforcement cheaper and less prone to judicial ignorance. The Equality Act application (services) is expensive and risky to enforce. Enforcement is through the courts, with costs awarded against a losing party. A better system would be enforcement through an equality tribunal, with specialist knowledge of equalities and a no costs principle.

Expertise in the arbiters of equality law is generally desirable goal. County court Judges are unlikely to have expertise around what discrimination or harassment of a transgender person is. Nor how transgender people are routinely indirectly discriminated against. Only a transgender person who could afford expensive lawyers could be confident their case of discrimination would be understood. An equality tribunal would have expertise to draw upon.

Issues around access to services, including health and social care, domestic violence and sexual violence support services.

Most single/separate sex crisis services, such as women's refuges have always accepted transgender women. No refuge asks to see a GRC before a person uses the service, both because it is irrelevant and because the user is in a crisis and it would be impractical to expect them to go back home to get their GRC. Most refuges have a risk assessment process for all their users, if they identify a problem with a user using their services, they can exclude them as a proportionate measure to protect others safety.

The statistics demonstrate why transgender people need access to domestic & sexual violence support services, and mental health support. 28% of trans people in a relationship had been subject to domestic violence from a partner in the last year, which is twice the ratio to cis people. A similar ratio was found when looking at sexual violence. In addition, 41% of trans people had experienced a hate crime over the last year, and 46% had contemplated suicide⁷.

Transgender people can have different medical needs than their gender marker identifies, i.e. transgender women require breast and prostates screening, while transgender men require cervical screening. An extra-field on medical records should be introduced, with strict data protection, to help the NHS with its screening program. This system update should also include recognising non-binary identity in the primary gender field.

In its 2016 report on Transgender Equality, the Select Committee identified the problem of the "transgender cold", where a transgender patient would find they were denied treatment for an ordinary medical malady because the doctor would assume that it was related to being transgender. This continues to be the case nearly five years on. In addition to physical health needs not being met, mental health needs are often delayed unnecessarily because the mental health problem is assumed to need a person with specialist gender identity training, this is rarely the case. The difficult life many transgender people have and the abuse they receive might exacerbate mental health problems, but they are rarely the root of them. As said above, being transgender is not a mental illness and the medical profession needs to stop thinking of it as such.

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

The UK's consultation on GRA reform reported that 64.7% supported recognising non-binary identities⁸. In 2018, Ireland's Review of the impact of self-identity for gender recognition (which had been in place since 2015), concluded that the law changes had not gone far enough and should: recognise non-binary and intersex identity. Ireland closely parallels the UK's cultural and legal systems so we should learn the lesson from them and change our law to recognise non-binary identity.

The government has kept postponing its public consultation on non-binary identity and needs. It has promised this undertaking since Elan-Cane brought an unsuccessful Judicial Review in 2018 to include a non-binary or non-gender marker on passports. In 2019 Mr Oliver Entwistle, the Deputy Director of Operations and LGBT policy, informed the Court of Appeal in a witness statement dated 5 November 2019...[that] the call for evidence will be run by the National Institute for Social Research, and the contractor was ready to commence work immediately after the General Election which was

⁷ These last three facts are taken from the 2018 National LGBT+ survey and Stonewall's 2018 LGBT in Britain Trans and Health Reports.

⁸ Report (page 12, point 26): A majority (64.7%) thought that changes needed to be made to the GRA to accommodate individuals who identified as non-binary.

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due to take place on 12 December 2019 [*paragraph 30 Elan-Cane, R [2020] EWCA Civ 363*]. A year on this consultation still has not begun.

The consultation is important in identifying the needs of non-binary people and what legal reforms are necessary to meet them. However, a few reforms are obvious.

Firstly, inclusion of a non-binary marker on passports and driving license, probably an X. Passports are issued with royal prerogative powers and therefore the Home Secretary can use their acting prerogative to include a non-binary option without any legislation.

The direction of international jurisprudence is to recognise non-binary identity on government documents. International case law development: In Australia, legal recognition for changing a birth certificate to indeterminate (X) first arose from a court case of Alex MacFarlane in 2003, which the government accepted would allow a passport to be issued with an X gender marker. In 2010 case law developed to allow gender to be non-specific and recorded as X (Norrie May-Welby). Australian Government guidelines removed medical criteria for changing to X on passports in 2011 and birth/death certificates (2013). New Zealand recognises X for intersex. Canada allows X on driving licenses and health cards. India's Supreme court has recognised third gender as neither male nor female. In the US State of Oregon, the first circuit ruled that the State should allow recognition of non-binary gender.

The law around including an X on driving licenses is less clear. However, because licenses are an administrative document, rather than an official identity document, there is no obvious law preventing the change.

Secondly, all problems over documentation recognising non-binary identity could be avoided by legislating for non-binary recognition. It is part of respecting a person's dignity to allow their gender identity to be legally recognised. Non-binary identity is a medically recognised condition, again, it is recognised as a sexual health, not a mental health, condition.

Finally, a recent employment tribunal case has ruled that the protected characteristic of gender reassignment applies to non-binary identity. However, this is not yet binding case law. Currently the Equality Act uses the outdated language of "gender reassignment" for the protected characteristic. This should be changed to gender identity and the law clarified that this includes a non-binary or non-gender identity.

Renewed Need for Privacy Protection

73.4% of those responding to the consultation thought that the privacy and disclosure protections for transgender people were inadequate⁹.

The Gender Recognition Act brought in a privacy protection for people with a GRC, which protected their original birth records from disclosure (section 22). However, the Act did not foresee that birth records would be available to be searched on the internet through ancestry sites.

The Select Committee should look at the need to update privacy protections around birth gender. Ancestry websites are now frequently used by transphobic stalkers to reveal a transgender person's birth records, this is highly distressing. It should also be clarified that this is criminal harassment and the Protection Against Harassment Act 1997 updated to include this.

⁹ Report (page 9, point 14): Nearly three-quarters (73.4%) of respondents said that they did not think the privacy and disclosure of information provisions in Section 22 of the GRA were adequate.

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Opinions are my own, not the Labour Party's
or LGBT+ Labour unless explicitly stated.

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