

Schools OUT UK response to the Government's consultation on GRA

DATE 27/11/20

Summary

As an organisation that works both in education and society at large we are deeply concerned that Transpeople are denied their human rights. We are baffled that many countries have made massive adjustments to meet the needs of Transpeople without any serious repercussions. We urge the government to take the earlier feedback from consultations seriously. We do welcome the recent moves and as you will see below we consider them to not to be anywhere near sufficient.

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

No, the proposals do not go anywhere near far enough in meeting the Government's aim of making the process 'kinder and more straight forwards'. Trans individuals and organisations have not been listened to, despite being clear throughout the process as to what reforms are needed to improve the process.

These reforms are:

- the £140 fee being removed or lowered,

- the requirement of a diagnosis of gender dysphoria being removed,
- the spousal veto being removed,
- the two year waiting time being removed,
- the statutory declaration being removed
- the age limit being lowered,
- the introduction of legal recognition for non-binary people.

These reforms would make the process less expensive, bureaucratic, time consuming and intrusive and would also give trans people autonomy over their identity. The Government's commitments to place the process online, reduce the fee and open three new gender clinics though welcome, do not go anywhere near far enough towards making this process kinder and more straightforward. Having to prove that you have lived in your gender for two years, having to obtain a diagnosis of gender dysphoria and having to make a statutory declaration are three aspects that make the process unpleasant and complicated, therefore without their removal the process will not be kind or straight forward!

This lack of progress is especially disappointing as it follows a process that has lasted over two years, during which trans people have seen a horrifying rise in abuse on social media, in person, in the media and from prominent figures. The constant delays to the process (which were happening even before the Covid-19 pandemic) and the eventual watered-down reforms have left many feeling that the process has been pointless and has actively harmed trans people and their rights.

Trust in the Government to protect and support trans people is incredibly low as a result of this process and the Government must urgently seek to undo the damage it has done to trans people.

2. 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?

The fee should be removed. This has been backed up by the responses to the Government Equalities Office consultation, where 58.5% said the fee should be removed. A further 35.1% of those

who said it should not be removed said that it should be reduced. In Ireland, the gender recognition process is free, England and Wales should follow this example of international best practice. As supported by the UN Yogyakarta Principles, having the law accurately represent your gender is a fundamental human right. No-one should be prevented from having their human rights protected due to their financial situation. The fact the fee is high creates an additional barrier to legal gender recognition, especially considering that there are additional financial costs associated with obtaining a GRC. The 2018 National LGBT Survey found that 34% of trans respondents who had heard of the process but had not obtained a GRC, cited high costs as a reason for not having a GRC.¹ This inequality in legal recognition of personhood for trans people is particularly stark when considering employment and housing discrimination. The 2018 National LGBT Survey found that just 63% of trans respondents aged 16-64 had been employed at any time in the last 12 months, despite the fact that trans people as a group are more likely to hold a degree or postgraduate qualification compared to the general population.² Research from Crossland Employment Solicitors found that 1 in 3 employers said that they would be 'less likely' to hire a trans person.³ Stonewall research indicates that 25% of trans people have experienced homelessness.

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

Yes, there should be no requirement in the future for a diagnosis of gender dysphoria. This is backed up by the results of the GEO consultation, where 64.1% said that there should not be a requirement for a diagnosis of gender dysphoria in the future. International rulings and guidance state that trans people should not have to have a diagnosis of gender dysphoria to have their gender legally recognised.

In 2015 the Parliamentary Assembly of the Council of Europe passed Resolution 2048 which states that requiring someone to have been medically treated or diagnosed in order to have their gender legally recognised is a breach of their right to respect for their private life under Article 8 of the European Convention on

Human Rights (ECHR). The resolution is a call to “develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents”.

The right to self-declaration has also been specified by the UN Yogyakarta Principle 3 which states that “everyone has the right to recognition everywhere as a person before the law” and “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom”. Principle 31 specifies that states should “ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity”. It also specifies that states should “ensure that no eligibility criteria, such as... a psycho-medical diagnosis... shall be a prerequisite to change one’s name, legal sex or gender”.⁵The GRA 2004 clearly infringes upon a trans person’s human right to self-declare and receive legal recognition by requiring them to provide a diagnosis in order to access this right. The World Professional Association for Transgender Health (WPATH), the body who set the standards for medical care of trans people around the world, are clear that a diagnosis should not affect whether someone can access legal gender recognition. “Medical and other barriers to gender recognition for transgender individuals may harm physical and mental health. WPATH opposes all medical requirements that act as barriers to those wishing to change legal sex or gender markers on documents. These include requirements for diagnosis, counselling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.”⁶Requiring a medical diagnosis for legal gender recognition contributes towards the pathologisation of trans people, which in turn has widespread negative effects on trans communities including worsening mental health and health inequities. Forcing trans people to obtain a diagnosis and engage with health care professional creates an additional series of barriers to legal gender recognition because trans people often face discrimination and

unfair treatment within health services.⁷ Many trans people delay or avoid accessing health services due to past negative experiences and perceptions of transphobia within services.⁸ This requirement also makes the process more time consuming; official waiting times for a first appointment at a UK Gender Identity Clinic (GIC) are currently 12 to 30 months long.⁹ Obtaining a diagnosis for gender dysphoria requires an in depth assessment carried out by two or more specialists, this can take several consultations which will be carried out over many months, if not years, apart.¹⁰ If someone was diagnosed overseas, or they were diagnosed long ago and their diagnosing doctor has retired or died, trans people may have to pay to be privately re-diagnosed to meet the requirements of the Gender Recognition Panel. This will significantly add to the financial cost of obtaining legal gender recognition; getting a letter from a private gender specialist confirming a diagnosis of gender dysphoria can cost in excess of £300.¹¹ There are several examples of international best practice that could be used to model a self-declaration process. Denmark, Ireland, Malta and Norway allow people to change their legal gender by completing a self-declaration application form and do not require a diagnosis of gender dysphoria or a report detailing any medical treatment received.

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

Yes. There should be no period of reflection, no mandatory waiting time, and no 'cooling off' period between making an application and being awarded a Gender Recognition Certificate. This is backed up by the responses to the GEO GRA consultation, where 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. Making someone prove that they have been living as who they are for two years can significantly delay the process of obtaining legal gender recognition which can already feel long and drawn out. Many trans people told us that they reflected for a long time before finally coming out as trans due to family responsibilities, fear of rejection and discrimination, risk of losing employment and financial and housing instability. Trans people told us they wanted to obtain

legal gender recognition at the same time as they finally began living as who they are. The current two-year waiting time was decided arbitrarily based on a tiny amount of anecdotal evidence relating to people who had obtained new passports. There is no evidence to suggest that an arbitrary waiting time has a beneficial impact on the gender recognition process or on trans individuals. Obtaining the necessary documents to prove someone has been living as who they are for two years creates additional financial barriers. In some circumstances it may not be possible to gather sufficient evidence that would be deemed acceptable by the Gender Recognition Panel due to lack of funds. This means that some trans people with low incomes are currently unable to afford their human right to respect for their private life.

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

Statutory declarations are bureaucratic and potentially costly which seems at odds with the aim of reducing the administrative and financial burdens and making the process more 'straight forward'. Requiring one places a legal requirement upon trans people (with a gender recognition certificate) that is not placed upon cis people.¹² Trans people already need to update relevant legal documents, which prevents fraud. Existing fraud legislation is sufficient to prevent people with transphobic intentions from abusing a self-declaration system to perpetuate transphobia. A trans person could indicate that they understand the significance of legal gender recognition by providing a signature or ticking a box to say they understand the significance of the decision. Requiring trans people to agree that they will live as their acquired gender for the rest of their lives potentially reinforces the harmful stereotype that trans people are likely to 'change their mind' or are just 'going through a phase'. We have an opportunity to counter such misconceptions and show leadership in trusting trans people to be valued and equal members of society. The requirement for a statutory declaration that states a person will live 'permanently in the acquired gender until death' does not acknowledge non-binary people and those with fluid

gender identities. Non-binary and gender-fluid people should also have their human rights protected and upheld.

6. 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

Spousal consent provisions, sometimes referred to as 'the spousal veto', must be removed. This is backed up by the results of the GEO GRA consultation where 84.9% disagreed with the spousal consent requirement in the GRA. The spousal veto infringes on a trans person's right to self-declaration, limiting an applicant's rights and autonomy. In accordance with the UN Yogyakarta Principles, everyone has the right to recognition everywhere as a person before the law. Principle 31 states that "no eligibility criteria, such as... marital or parental status, or any other third-party opinion, shall be a prerequisite to change one's name, legal sex or gender". The current provision seems to conflate two issues: a person's identity, and a person's marriage. A marriage is an agreement between two people, but an individual's identity is not. Instead, we advise that someone wishing to obtain legal gender recognition should have to inform their spouse, if this is possible and appropriate (with adequate provisions for those whose spouses may be uncontactable or may lack capacity to acknowledge receipt of information). Being married does not grant someone the right to control or manipulate their spouse's identity. 80% of trans people report experiencing emotionally, sexually or physically abusive behaviour by a partner or ex-partner.¹³ Preventing a trans person from accessing legal gender recognition is a specific form of domestic abuse enabled by the current GRA. This aspect of the GRA that allows for misuses of power which can form part of a pattern of coercion and control as demonstrated by specialist LGBT domestic abuse organisation Galop.¹⁴ Additionally, requiring spousal consent can make the process even more time consuming, causing further distress to trans people and potentially exacerbating the psychological impact of enforced waiting to have one's identity

acknowledged and recognised.¹⁵ This is especially the case if the application for legal gender recognition is used as grounds for an annulment. Additional barriers to the gender recognition process are the financial and emotional burdens that come with the separation of a marriage.

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

Yes, all trans people regardless of their age deserve respect and recognition. Transpeople aged 16 and over should have their gender recognised through a process of self-declaration. Those under the age of 16 should be able to do the same but with a parent or guardian's consent. Refusal from a parent or guardian to give consent for a trans child or young person to be who they are should be seen as a safeguarding issue. Trans children and young people who are in unsupportive and transphobic homes are at risk of harm. A parent or guardian refusing to let a child express their identity is often a form of coercion and control, which in turn has long-term impacts on the health and wellbeing of that child. A child or young person who does not have consent from a parent or guardian but has been certified Gillick competent should be able to apply for legal gender recognition through a process of self-declaration. There should be a process for those who are not certified Gillick competent and those who are deemed to lack mental capacity to access legal gender recognition, in order to protect the human rights of all trans people. Denying trans children and young people the possibility of a birth certificate that aligns with their gender, places them at risk of unnecessary disclosure within educational institutions. Disclosure puts trans children and young people, who are already marginalised, at increased risk of transphobia and discrimination, exclusion by their peers, and violence. Currently, the lack of provision for trans children and young people is in breach of the UN Convention of the Rights of the Child. Legal gender recognition for children and young people ensures that the following rights are protected:

- Prohibition from Discrimination

- The Right to Autonomy and Self Determination
- The Right to be Heard (the right for children to play a role in all administrative and judicial procedures that concern them)
- The Right to Private and to Family Life
- The Right to Freedom of Expression
- The Right to Education
- The Right to be Safe from Violence

In Malta, Germany, Switzerland, Austria and Argentina, there is no lower age limit for applying for legal gender recognition. Norway has a lower age limit of 6 years old. In Ireland, the Gender Recognition (Amendment) Bill to allow young people under 16 to change their legal gender is progressing through the Irish Seanad. It passed the second stage with full support of the house on 10 May 2017 and is currently at the third stage.

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

The Government's proposed changes will make it marginally easier for some trans people to apply for a GRC. However, reducing the fee, placing the process online and promising to open at least three new gender clinics this year does not go anywhere near far enough in making a significant difference for people applying for a GRC. Retaining the two-year waiting period, the diagnosis of gender dysphoria, the statutory declaration and the spousal veto and not introducing self-identification means that the process is still time consuming, intrusive and still limits trans peoples' autonomy. Therefore, these changes will not have a significant impact on trans people applying for a GRC.

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

The key reforms that the Government should have included in its proposals are outlined in detail in the responses to the previous questions.

To summarise, the GRA needs to be reformed in the following ways:

- the £140 fee being removed or lowered,
- the requirement of a diagnosis of gender dysphoria being removed,
- the spousal veto being removed,
- the two-year waiting time being removed, •the statutory declaration being removed,
- the age limit being lowered,
- the introduction of legal recognition for non-binary people.

The process needs to be reformed so that is based on a system of self-declaration, where trans people have more autonomy over how their gender is legally recognised. There are several examples of international best practice that could be used to model a self-declaration process. Denmark, Ireland, Malta and Norway allow people to change their legal gender by completing a self-declaration application form and do not require a diagnosis of gender dysphoria or a report detailing any medical treatment received

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

The Scottish Government's proposed Bill is more favourable than the English and Welsh proposed Bill, however further changes should be made to the Scottish Bill. The proposal to reduce the time that someone has to live in their acquired gender from 24 months to 6 months will make the process less unnecessarily time consuming, however there should be no waiting period. Removing the current medical requirements would be a positive step as it would make the process less intrusive. The removal of the need to apply to the Gender Recognition Panel is also positive as it makes the process

less intrusive and gives more autonomy to trans people. However, the requirement to submit Statutory declaration should be removed for the reasons outlined above. The proposed Bill should also provide legal recognition to non-binary people. Wider issues concerning transgender equality and current legislation:

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

Obtaining a GRC is difficult, costly, time consuming and intrusive. The National LGBT Survey revealed why so few trans people have a GRC. Among trans men and women who were aware of the process to apply for a Gender Recognition Certificate but didn't have one, only 7% said that this was because they didn't want one. 44% said they didn't have a GRC because they did not satisfy the requirements, 38% because the process was too bureaucratic and 34% because it was too expensive. 16% of trans women and 21% of trans men said they didn't have one because they couldn't get the support they needed to put together a successful application.¹⁶ This clearly demonstrates that a significant proportion of trans men and women want a GRC but do not have one due to the process being too complicated, too expensive and having too many requirements. It is unacceptable that people are unable to have their identity legally recognised because of imposed and unnecessary bureaucratic barriers. This issue is further compounded by the fact that there are significant obstacles around transitioning, including long waits for Gender Identity Services, long waiting lists to have surgery and a lack of willingness from healthcare professionals to provide bridging prescriptions and other support while people are waiting to access a Gender Identity Service. Therefore, the emotional, financial and time burdens placed on trans people are incredibly high, even if they do not obtain a GRC. Some may feel that they do not have the time, money or resilience to try to obtain a GRC due to the countless other barriers they face. There are also a significant number of people who have misconceptions about the process, which creates further barriers to obtaining a GRC. In the National LGBT Survey, of those who were aware of the process but did not have a GRC, 43%

thought that you needed to have an interview with a Gender Recognition Panel and 15% thought that having surgery was a requirement.¹⁷

12. Are there challenges? For example, in terms of the different language and terminology used across both pieces of legislation.

There should not be any challenges in the way the Gender Recognition Act 2004 and the Equality Act 2010 interact as to have the protected characteristic of gender reassignment, and therefore to be protected under the Equality Act, trans people do not have to have a Gender Recognition Certificate. There is a significant amount of misinformation around the way that the GRA interacts with the Equality Act and the government must do more to clarify with public services and the government that the Equality Act and the GRA do not interact. It is also important to recognise that the Equality Act does not define 'male' or 'female' and there is no statutory definition of 'sex'. The terms 'sex' and 'gender' are used interchangeably throughout UK law.

13. 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?

Guidance should make it clearer that as a default, single-sex and separate-sex spaces must be inclusive of anyone identifying in line with the gender/ genders they are provided for. A woman's space must permit access to trans woman and non-binary people who wish to access the space. In fact, under the Public Sector Equality Duty, public services must proactively ensure that trans and non-binary people feel comfortable to access their space and can do so without facing discrimination. We recognise that the Equality Act states that services are exempt from liability for unlawful discrimination against trans people proving it is a 'proportionate means of achieving a legitimate aim' and that this applies regardless to whether or not a trans person has a GRC. However, it should be made clear that instances where it is legal to exclude a

trans person from a single sex space are incredibly rare. Rather than assuming in the first instance that they should exclude trans and non-binary people, service must seek to be inclusive and only change this policy if and when there is a legal and legitimate reason to do so. The reasoning for any proposed legal and legitimate exclusions should be made clear and decisions to this effect should include consultation to understand the potential impact of excluding trans people from that service or space

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

The Equality Act provides adequate legal protections for binary gendered (male or female) trans people, especially as it protects all trans people regardless of whether they have taken steps such as obtaining a GRC, having medical interventions or legally changing their name. This is key because for trans people coming out as trans and transitioning is a long process which can last years, so it must be ensured that trans people are legally protected at all times. Some trans people choose not to take certain steps such as having medical interventions or getting a GRC so this should not limit the legal protections they are afforded.

15. What issues do trans people have in accessing support services, including health and social care services, domestic violence, and sexual violence services?

Trans people face a widespread barriers and issues when accessing or trying to access support services. These have been widely evidenced in the National LGBT Survey, in Parliamentary inquiries^{18,19} and in research from LGBT organisations such as LGBT Foundation, Stonewall, Galop and akt. Trans people face a number of barriers to accessing domestic abuse services. The existing discourse around domestic abuse is very much focused on cisgender heterosexual women as the victims and cisgender heterosexual men as the perpetrators. This discourages trans people who are experiencing abuse from seeking support.²⁰ Additionally, trans and non-binary people experiencing abuse face specific barriers to accessing support and housing

which contributes towards increased reluctance to access services. Shelters are often single sex and policies regarding the acceptance of trans people into single sex spaces are often unclear. Trans people may fear being rejected if they seek support and so may be reluctant to do so.²¹,

²²Two studies have found that a large majority of trans people would rather speak to a friend or family member about domestic abuse rather than access a service.^{23,24} Trans people face barriers when reporting hate crimes. The National LGBT Survey found that 37% had experienced verbal harassments or comments outside of the home based on the fact they were LGBT. Of those who had experienced a negative incident outside of the home just 8.5% had reported it. Among those who didn't report 48% gave 'it wasn't worth it or nothing would happen or change' as a reason, 32% gave 'it wouldn't be taken seriously enough' as a reason and 11% gave 'I wouldn't be believed' as a reason.²⁵ Trans people face significant issues when trying to access Gender Identity Clinics. NHS Guidelines say 18 weeks is the limit from referral to treatment. In reality, the average waiting time for a first appointment with a Gender Identity Clinics is 18 months.²⁶ Complex care pathways for transition related care also makes accessing services challenging to navigate. The National LGBT Survey found that 80% of trans people who had accessed or tried to access specialist gender identity services said that accessing them had not been easy.²⁷ 66.9% of respondents said they has to wait too long to access services, 32.2% said services were not close enough to them and 24.7% said that their GP did not know where to refer them. Trans and non-binary people also face a lack of understanding from mainstream healthcare services, a 2018 Stonewall survey found that 62% of trans respondents had experienced a lack of understanding of specific trans health needs by healthcare staff and 41% had experienced this in the last year.²⁸ This leads to reluctance to access healthcare, a Stonewall survey found that 14% of LGBT people have avoided treatment for fear of discrimination because they are LGBT, this rises to 37% of

trans of people and 33% of non-binary people.²⁹ This is only a brief summary of the barriers faced by trans people when accessing services, it is abundantly clear that more needs to be done across the public sector, private sector and VCSE sector to ensure that trans people can access services that are free from discrimination and that meet their needs.

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

As a first step non-binary people need to have their identities legally recognised. Not legally recognising non-binary identities makes non-binary people feel excluded, invisible and as if their identity is not valid. Additionally, non-binary people face discrimination across society, from schools, to workplaces, to in healthcare; not legally recognising this identity makes it more difficult to legally challenge discrimination. England and Wales are currently trailing behind a significant number of countries when it comes to the legal recognition of non-binary people. There are multiple examples of international good practice when it comes to recognising non-binary identities that should be learnt from and emulated, Iceland allows people to official register as gender neutral and have an X as their gender marker in their ID.³⁰

- Most Australian states have multiple gender options on birth certificates, including non-binary.
- Canada allows people to have an X as the gender markers on their passports.
- In Nepal non-binary is a legally recognised gender. Further work needs to be done to assess whether the Equality Act should be reformed to better protect non-binary people. Since the Equality Act came into force it has been unclear as to whether it protected non-binary people. However, the recent landmark Employment Tribunal ruling against Jaguar Land Rover goes some way in setting a precedent when it comes to the protection of non-binary people under the Equality Act 2010. The judge ruled that “gender is a spectrum” and they were “beyond any doubt” that the non-binary employee who brought the case was protected by the Equality Act.

This is particularly significant as in the WESC Transgender Equality Inquiry, it was noted that whether the Equality Act does or does not protect non-binary identities had not been tested in a court of law. In the Inquiry Terry Reed, from GIRES, stated that the Government Equalities Office believed that a legal test case would be needed to demonstrate whether or not non-binary people were protected under the discrimination by-perception provisions of the Equality Act. Schools OUT UK are not legal experts and so cannot comment on whether this ruling goes far enough to ensure that all non-binary people are protected under the Equality Act going forwards. However, we believe that the WESC should seek the opinion of legal experts as to whether this is the case, or whether the Equality Act should be reformed to include more explicit protections of non-binary identities. It must be ensured that the Equality Act prohibits discrimination against non-binary people on the basis of their non-binary identity. Currently non-binary people are protected under the act if they have, or are perceived to have, the characteristic of 'gender reassignment'. However, this does not go far enough and it should be ensured that non-binary people should be also protected against discrimination on the basis of their non-binary identity.

Footnotes

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