

Equality and Human Rights Commission Response to the Review of the Gender Recognition Act 2004 Consultation

Creating a fairer Britain

Equality and Human Rights Commission Response to the Review of the Gender Recognition Act 2004 Consultation

1 March 2018

Contact details:

Nora Uhrig

Equality and Human Rights Commission
2nd Floor 151 West George Street
Glasgow
G2 2JJ

0141 228 5921

Nora.uhrig@equalityhumanrights.com

The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

Question 1

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaration system for legal gender recognition instead.

Do you agree or disagree with this proposal?

- Agree**
- Disagree**
- Don't know**

If you want, you can give reasons for your answer or add comments.

The EHRC welcomes the Scottish Government's review of the Gender Recognition Act 2004 and the opportunity to respond to this consultation. We support this proposal in principle. As the Scottish Government has recognised, the Gender Recognition Act 2004 is far removed from reflecting the best practice embodied by the Yogyakarta Principles, Resolution 2048 and several European states and has a significant negative impact on the lived experience of trans people. This review and reform is therefore needed to secure and enhance the right to legal recognition of trans people in Scotland.

The number of Gender Recognition Certificates issued so far does not reflect the estimated number of trans people living in Scotland. While there is no clear data on the number of trans people in Scotland or the UK, research from GIRES suggest that there are between 300,000 to 500,000 trans people

living in the UK.¹ This contrasts with the small number of Gender Recognition Certificates that have been applied for and issued thus far. By the end of September 2017, 5,269 applications for Gender Recognition Certificates were received and 4,556 full certificates were granted.² This suggests that a significant majority of trans people are not making use of the current mechanism; while the reasons for this are not fully understood, it suggests that the mechanism may present barriers to some people.

As a consequence of a lack of evidence in relation to a number of key concerns, our support of this proposal is subject to the Scottish Government taking steps to obtain further evidence on legal recognition. This evidence should address, amongst others, the following questions:

- What is the significance and cause of the small number of Gender Recognition Certificates issued to date, against the estimated number of trans individuals?
- What is the expert opinion on the psychological impact of making the Gender Recognition Certificate application process easier and without the need for medical evidence?

Whilst recognising that the requirements of the present system may create unnecessary barriers to legal gender recognition, with the removal of such barriers must come appropriate safeguards, both to assist applicants and to address legitimate concerns about potential risks of any new system. It is also important that any new process ensures that applicants understand the legal, and any social and medical, implications of legal gender recognition.

Question 2 - Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

- Yes**
- No**
- Don't know**

If you want, you can give reasons for your answer or add comments.

Requiring applicants to provide a statutory declaration confirming that they understand the consequences of obtaining legal gender recognition, do so of their own free will and intend to live in their acquired gender until death will ensure that people are more likely to consider the consequences of their

¹ GIRES (2011), *The Number of Gender Variant People in the UK – Update 2011*. Available at: <http://uktrans.info/attachments/article/197/Prevalence2011.pdf> [accessed on 21.02.2018].

² UK Government (2017), *Tribunals and gender recognition certificate statistics quarterly – July to September 2017*. Available at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2017> [accessed on 21.02.2018].

decision. It will also make it a criminal offence to intentionally make a false application.

However, given the possible legal and other consequences of legal recognition, we consider that an appropriate safeguard mechanism should go beyond a written declaration and include a meeting between the applicant and a suitably qualified person, such as a registrar. The registrar could ensure that the applicant receives face-to-face information and can answer any questions they might have. It would ensure that the trans person has received clear information and is signposted to relevant support and is aware of and understands the consequences of legal gender recognition. Such face-to-face interaction would ensure that necessary safeguards are effectively built in to any new system.

We also recommend that any new system is reviewed after a defined period, perhaps three years. The review should consider the effectiveness of the system in general and consider whether sufficient support was available for applicants, particularly those who are younger or more vulnerable.

Question 3 – Should there be a limit on the number of times a person can get legal gender recognition?

- Yes**
- No**
- Don't know**

If you want, you can give reasons for your answer or add comments.

The EHRC suggests that a limit of two applications would strike a balance between the rights of applicants and the concerns of some that the system could be abused or used frivolously. A review of the system, as suggested in our response to Question 2, could also consider the effectiveness of this part of the system.

Question 4 – If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

- (A) only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?**
 - (B) to everyone?**
 - (C) don't know?**
-

If you want, you can give reasons for your answer or add comments.

The EHRC believes that any new process should be open to everyone. Registering in Scotland will only affect the applicant's legal gender identity in Scotland and in countries that recognise Scotland's process. As the consultation paper states, opening up legal gender recognition to everyone would ensure that trans people, who reside outside Scotland but are planning to move to Scotland, are able to make an application. This will ensure that trans people are able to live in their acquired gender and integrate into Scottish society with full legal recognition of their acquired gender from the moment that they start their life in Scotland. The above-mentioned Yogyakarta Principle 31 states that the immigration status of an applicant should not prevent them from applying or obtaining legal gender recognition.³ The Scottish Government should also seek to ensure that a legal recognition issued certificate in Scotland is recognised elsewhere in the UK and in other jurisdictions.

Question 5 – (This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16).

The Scottish Government proposes that people aged 16 and 17 should be able to apply and obtain legal recognition of their acquired gender. Do you agree or disagree?

- Agree**
- Disagree**
- Don't know**

If you want, you can give reasons for your answer or add comments.

16- and 17-year-olds are legal adults in Scotland. The EHRC agrees that 16- and 17-year-olds should be permitted to apply for legal recognition of their change of gender. This is in line with the current age in Scotland where people have the right to make other major decisions such as vote in the Scottish elections, join the armed services and marry. However, as set out in our response to Question 1, there is a clear need for any new system to balance the removal of unnecessary barriers with the introduction of adequate safeguards. This is particularly important when the system is extended to younger applicants. We suggest therefore that the

³ International Commission of Jurists (2017), *op.cit.*

Scottish Government should consult widely, including with 16- and 17-year-olds themselves, in order to ensure that legal, psychological and other consequences of a lowering of the age of applicants are examined and addressed. We suggest that the Scottish Government particularly considers the use of a process that includes face-to-face information and support, as set out in our Question 2 response.

Question 6 - Which of the identified options for children under 16 do you most favour? (Please select only one answer).

- Option 1 – do nothing for children under 16**
- Option 2 - court process**
- Option 3 - parental application**
- Option 4 – minimum age of 12**
- Option 5 – applications by capable children**
- None of these options**

If you want, you can give reasons for your answer or add comments.

The EHRC believes that further research and consideration of the effects of legal recognition on children and younger people should be carried out before there is any extension of the gender recognition system to those below 16. In this regard it is important to remember that gender recognition does not and should not impact on access to treatment linked to changing one's gender. Whilst young people below the age of 16 have fundamental rights which must not be ignored, the Commission does not believe that there is sufficient evidence of the potential effects of a change in legal gender on children and young people to allow the Government to make an informed decision on such an important extension of the gender recognition system. The Government should aim to gather further evidence and engage with key stakeholders in order to assess the possible psychological and legal implications of different approaches.

Question 7 - Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

- Yes**
- No**
- Don't know**

If you want, you can give reasons for your answer or add comments.

Trans people can already gain legal gender recognition without requiring their spouses consent. While the spouse must be informed in order to consider whether they want their marriage to continue, spousal consent to legal recognition is currently not needed. If the spouse refuses to give consent to continuation of their marriage, a sheriff can then take a decision on whether the Gender Recognition Certificate should be granted. We suggest that this process should be maintained, as there has been no indication that this currently prevents trans people from gaining legal gender recognition. This recognises the balance between the trans person's and their spouse's rights in terms of Article 8 and Article 9 of the European Convention on Human Rights. Article 8 guarantees the right to family and private life and Article 9 protects the right to freedom of conscience, thought and religion.

Question 8 - Civil partnership is only available to same sex couples. This means that civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

- Yes**
- No**
- Don't know**

If you want, you can give reasons for your answer or add comments.

The current system of civil partnership does not allow for opposite sex civil partnership. Unless or until this changes, those who change legal gender should not be able to remain within a civil partnership. It is important to note that they can of course change their civil partnership into a marriage and can then stay in that marriage when they legally change gender. In 2015, the Scottish Government held an open consultation asking for the public and stakeholder's views on opening up civil partnerships to everyone.⁴ It published its response in November 2017 stating that it will gather further evidence and conduct additional analysis but might legislate later during this Parliament.⁵ We support these recent developments and would support civil

⁴ Scottish Government (2015), *Review of Civil Partnership Consultation*. Available from: <https://consult.gov.scot/family-law/review-of-civil-partnership/> [accessed on 22.02.2018].

⁵ Scottish Government (2017), *Review of Civil Partnership – Scottish Government Response to Consultation*. Available at: <http://www.gov.scot/Resource/0052/00527978.pdf> [accessed on 18.02.2018].

partnership being open to all.

It should be noted that the English Appeal Court ruled in the case of *Steinfeld and Keidan v. Secretary of State for Education* that the current English law, which restricts civil partnerships to same-sex couples, is discriminatory based on Articles 8 and 14 of the European Convention on Human Rights (ECHR).⁶ However, it concluded that, as the UK Government has decided to wait and evaluate the present law over the next few years, this does not constitute a breach of the ECHR. The UK Supreme Court has permitted the appeal of the judgment.⁷

Question 9 - Should legal gender recognition stop being a ground of divorce or dissolution?

- Yes
- No
- Don't know

If you want, you can give reasons for your answer or add comments.

While acknowledging that this can be seen to single out and be potentially stigmatising of trans people, we believe that legal gender recognition should remain a ground of divorce or dissolution in order to balance the trans person's right to legal recognition and their spouse's right to decide whether to stay married.

Question 10 - Are any changes to section 22 (prohibition on disclosure of information) necessary?

- Yes
- No
- Don't know

If you answered Yes, describe the changes you consider are needed.

Section 22 of the Gender Recognition Act 2004 is aimed at protecting the privacy of people who have applied for or who have obtained legal gender recognition. It makes it illegal for a person to disclose protected information that they have acquired in an authorised capacity. However, there are

⁶ Court of Appeal (2017), *Steinfeld & Kaidan v The Secretary of State for Education*, [2017] EWCA Civ 81. Available from: <https://www.judiciary.gov.uk/judgments/steinfeld-and-keidan-v-secretary-of-state-for-education/> [accessed on 21.02.2018].

⁷ The Supreme Court (2017), *Permission to Appeal Results July and August 2017*. Available at: <https://www.supremecourt.uk/docs/permission-to-appeal-2017-0708.pdf> [accessed on 14.02.2018].

exceptions that, for example, allow for information to be disclosed to prevent crime or ensure detection and for pension and social security system purposes, court proceedings and medical purposes. Prison services, for instance, should be able to access relevant legal gender recognition information to be able to carry out necessary risk assessments.

We believe that these exceptions are generally reasonable. Prison services, for example, should be able to access relevant legal gender recognition information to be able to carry out necessary risk assessments. It is important to note that key stakeholders, including the Equal Recognition Campaign, also support the exemptions.⁸

The Gender Recognition Act 2004 makes it a criminal offence to disclose a person's gender reassignment history. Companies House, however, do record and display information about someone's previous name, which reveals their history of transition. The Commission wrote to Companies House about this issue asking for their policy, and if it had been impact assessed. They replied saying that they are under a strict legal duty to make available a director's name as well as a notification of any change to it, under the enactments of the Companies Act 2006. Therefore, they are exempted under Section 22 (4)(j) of the Gender Recognition Act 2004. However, they say that they are currently working to review their policy with BAIS. Any change would require legislative change and public consultation. Nicky Morgan MP is sponsoring a Westminster Bill to ensure that people are allowed to keep their previous name from being recorded in Companies House and that it is treated as a protected disclosure under Section 22 of the Gender Recognition Act 2004. We recommend that a new system is created that ensures protection from fraud without outing people.

We would also like to highlight the concerns raised before the Westminster Women and Equalities Committee detailing how exemptions have been misused.⁹ GIRES, for instance, reported that trans people were frequently 'outed' during court proceedings by the opposing side in order to deliberately create a negative view of the trans person regardless of the relevance of their legal gender history.¹⁰ We believe that the Scottish Government should further examine these specific concerns.

⁸ Equal Recognition Campaign (2017), *Statement of Support by National Gender Equality Organisations*. Available at: <http://equalrecognition.scot/supporters/gender-orgs-statement/> [accessed on 16.02.2018].

⁹ House of Commons Women and Equalities Committee (2015), *op.cit.*

¹⁰ *Ibid.*, para 79.

Question 11 - Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

- Yes**
- No**
- Don't know**

If you want, you can give reasons for your answer or add comments.

Trans people presently have to make an application under the Gender Recognition Act 2004 even if they have obtained legal recognition in another state. The EHRC thinks that recognising a person's legal gender recognition from another jurisdiction will ensure that trans people are able to live in their acquired gender from the moment they enter Scotland. The Government should consider the introduction of an appropriate system that allows for reciprocal recognition of suitable systems from other jurisdictions. This will help to limit the discrimination and inequality trans people who immigrated to Scotland face and ensure that the legal recognition in Scotland reflects best practice.

Question 12 - Should Scotland take action to recognise non-binary people?

- Yes**
- No**
- Don't know**

If you answered No, and if you want, you can give reasons for your answer.

Non-binary people in Scotland have no legal recognition of their non-binary identities at the moment. We welcome the Scottish Government's commitment to increasing recognition of non-binary people, as outlined by the First Minister,¹¹ and believe there is a need for detailed research to better understand the nature of their problems and identify appropriate solutions.

¹¹ Equality Network (2016), *LGBTI Hustings – discussion on non-binary gender recognition*. Available at: <https://www.youtube.com/watch?v=wQGM7Jk2HAs&t=63s> [accessed on 14.02.2018].

Question 13 - If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? (You can select more than one option).

- Option 1: Changes to administrative forms**
- Option 2: Book of Non-binary Identity**
- Option 3: Limited document changes**
- Option 4: Full recognition using proposed self-declaration system**
- Option 5: Incremental approach**
- Option 6: Amendment of the Equality Act 2010**
- None of the above options**

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 5 is suitable, describe your preferred option.

As mentioned in our response to Question 12, we support the Scottish Government taking action to recognise non-binary people and suggest that it conducts detailed research to better understand the nature of the problems and discrimination faced by non-binary people.

A survey for Scottish Trans showed that non-binary people face discrimination and harassment with, for example, 43 per cent “having been made fun of or called names for being non-binary”¹² in public spaces. A survey conducted by us in 2012, 0.4% of the respondents said they identify ‘in another way’ rather than ‘male’ or ‘female’.¹³ However, given the limited amount of information around the number, needs and discriminatory experiences of non-binary people, we believe that the suggested research and actively engaging with non-binary people will help the Scottish Government to identify solutions based on the lived experiences of non-binary people.

We support the proposal of the Scottish Government to take immediate administrative action. The immediate implementation of Option 1, the inclusion of non-binary people in administrative forms, and Option 3, which would include limited changes to identity documents such as passports or driving licences, would aid the research we suggest. However, the research needs to go beyond relying on this administrative information. Further research should be carried out to mitigate any possible unintended negative consequences and ensure the potential implementation of these Options is

¹² Vic Valentine (2016), *Non-binary people’s experiences in the UK*, Scottish Trans and Equality Network. Available at: <https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed on 18.02.2018].

¹³ Fiona Glen and Karen Hurrell (2012), *Technical note: Measuring Gender Identity*, Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf [accessed on 21.02.2018].

properly prepared.

Moreover, we strongly suggest that the collection and use of information on a person's sex is only undertaken where necessary. Where such information is deemed to be necessary, the person in question should, where possible, be able to provide an answer that they feel reflects their gender identity.

Question 14 - At paragraph 7.26 and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Are you aware of other impacts we have not identified?

- Yes
- No
- Don't know

If you answered Yes, describe the impacts you have identified.

N/A

Question 15 - Do you have any comments about, or evidence relevant to:

- (a) the partial Business and Regulatory Impact Assessment;**
- (b) the partial Equality Impact Assessment;**
- (c) partial Child Rights and Wellbeing Impact Assessment; or**
- (d) the partial Privacy Impact Assessment?**

- Yes
- No

If you answered Yes, add your comments or evidence.

N/A

Question 16 - Do you have any further comments about the review of the Gender Recognition Act 2004?

- Yes
- No

If you want, you can give reasons for your answer or add comments.

N/A.
