

## **Equal Opportunities Committee**

### **Gender Recognition – Summary of Evidence**

#### **Introduction**

On the [4 February 2016](#), the Committee heard evidence from the Scottish Transgender Alliance (STA) regarding their [Equal Recognition Campaign](#). The campaign is calling for the following reforms to the Gender Recognition Act 2004:

1. Removing the psychiatric diagnosis requirement from legal gender recognition, to be replaced with a self-declaration process.
2. Reducing the age at which people can get legal recognition of their acquired gender, from 18 to 16.
3. Legal recognition for people who do not identify as men or women.

Reference was also made to the inquiry on [Transgender Equality](#) conducted by the Women and Equalities Committee at the House of Commons. Their report was published on 14 January 2016 and supports the three reforms called for by the STA.

This note provides information on the Gender Recognition Act 2004 and summarises the evidence provided to the Equal Opportunities Committee on the 4 February 2016.

#### **Gender Recognition Act 2004 (GRA)**

The GRA provides a mechanism for transgender people to apply for legal recognition in their acquired gender. The Act came into force across the UK on 4 April 2005.

The Act established the Gender Recognition Panel, made up of legal and medical members. The Panel makes decisions on issuing gender recognition certifications. To issue a certificate, the Panel must be satisfied that the person applying:

- Has, or has had, gender dysphoria; and
- Has lived in the acquired gender for two years before the date of the application

Gender dysphoria is described in the [General Guide for all Users: Gender Recognition Act 2004](#) as

“...a recognised medical condition variously also described as gender identity disorder and transsexualism. It is an overwhelming desire to live in the opposite gender to that which a person has been registered at birth”.

Once someone has been successful in changing their gender they will be issued with a new birth certificate.

Details of how to apply are available in [Applying for gender recognition certificate](#).

#### ***Is it reserved or devolved?***

The GRA was introduced across the UK, and the Panel was set up as a UK wide panel. However, the process for applying to be recognised in a different gender is devolved.

Some parts of the GRA are reserved, for example Section 13 relates to social security and pensions, which was designed to ensure that transgender people are treated according to their acquired gender as far as survivor's benefits are concerned. This relates to Widowed Mother's Allowance, Widow's Pension, Widowed Parent's Allowance, Incapacity Benefit and Category A retirement pension.

Parts of the GRA were amended by the Marriage and Civil Partnership (Scotland) Act 2014.

### *Parliamentary consideration*

In 2002 the European Court of Human Rights found the UK to be in contravention of Articles 8 and 12<sup>1</sup> of the European Convention of Human Rights with regard to the rights of transsexual people.

In response, the UK Government drafted the Gender Recognition Bill for England and Wales. Before introduction it was expanded to include Northern Ireland. Then, through a legislative consent motion (LCM), it was expanded to include Scotland.

On 9 December 2003, Session 2, the Equal Opportunities Committee held an [evidence session](#) on the Gender Recognition Bill. The evidence was heard before the Scottish Executive submitted its LCM.

The LCM ([S2M-0813](#)) was lodged by Cathy Jamieson, Minister for Justice, on the 22 January 2004:

"That the Parliament endorses the principle of giving transsexual people legal recognition of their acquired gender and agrees that the provisions in the [Gender Recognition Bill](#) that relate to devolved matters should be considered by the UK Parliament thereby ensuring a consistent UK approach and early compliance with the rulings of the European Court of Human Rights with respect to the Convention rights of transsexual people under Article 8 (right to respect for private life) and Article 12 (right to marry)."

The LCM was considered by the Justice 1 Committee on [28 January 2004](#), and then debated in the Chamber on [5 February 2004](#).

Many members were concerned that the LCM process was rushed and did not allow sufficient time to consider and scrutinise the Bill, particularly in relation to Scots law. Concerns at the time included:

- how the provisions would relate to sexual offences legislation in Scotland given that in England, the law was gender neutral (note – the Sexual Offences (Scotland) Act 2009 made rape and sexual offences gender neutral)
- the introduction of a new ground for divorce
- whether the application for gender recognition should be possible from the age of 16 rather than 18.

There were also some members who felt that the Scottish Executive should have introduced its own primary legislation on gender recognition.

However, the Scottish Executive view was that the UK had to meet its legal obligations and the purpose of the LCM was to enable Scotland to do the same.

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<sup>1</sup> Article 8 – Right to respect for private and family life. Article 12 – Right to marry.

In evidence to the Justice 1 Committee, Hugh Henry, the Deputy Minister for Justice said:

“We believe that the inclusion of Scottish provisions in the UK bill offers the swiftest and most cost-effective means to remedy the human rights breaches and to deliver the comprehensive legal recognition that is required by the court’s decisions. We also believe that a UK-wide approach will ensure consistency in the process of determining legal recognition and in the legal consequences that flow from recognition of a transsexual person’s acquired gender, thereby avoiding difficult and complex cross-border issues.

The relevant Scottish provisions have been included in the bill to ensure that the legislation takes account of Scots law. We believe that that is the best and most consistent way to deal with the difficulties. It avoids the problems that could be caused in relation to reserved matters such as pensions and benefit rights and the problems that would arise if people in England and Wales had legal recognition and people in Scotland did not” (col 5632 – 5633).

The LCM was agreed to: For 76; Against 35; Abstentions 7.

### **Marriage and Civil Partnership (Scotland) Act 2014 (the 2014 Act)**

The 2014 Act introduced marriage for same-sex couples in Scotland. It also ended the requirement for married transgender people to divorce their partners before officially changing their legal gender via a Gender Recognition Certificate. These provisions came into force in December 2014.

The 2014 Act also allows for a transgender person who does not have written spousal consent for their gender recognition, and who therefore obtains only an interim gender recognition certificate from the Gender Recognition Panel, to apply to the sheriff court to convert to a full certificate. This removed the so called ‘spousal veto’ and the Bill was amended to include this provision. A ‘spousal veto’ still applies in England and Wales under the Marriage (Same Sex Couples) Act 2013.

A [SPICe Briefing on Stage 2 of the Bill](#) shows that one issue regarding gender recognition that was not resolved by the 2014 Act, concerns calls to lower the age requirement of gender recognition from 18 to 16. The Scottish Government responded at the time that the Bill was about marriage and civil partnership, rather than gender recognition. It was therefore considered outside the scope of the Bill.

Mary Fee MSP lodged an amendment ([435](#)) in the Children and Young People (Scotland) Bill that would have given Scottish Ministers the power to review the age requirement and, based on the outcome, the power to lower the age requirement. The amendment was withdrawn following a commitment from the Minister for Children and Young People, Aileen Campbell MSP, that the matter would be ‘considered seriously’ by the Equalities Minister, Shona Robison MSP (Official Report, Education and Culture Committee, [21 January 2014](#), col 3593).

### **Committee Evidence**

James Morton said the STA has been engaging with the Scottish Government for over a year and they are very clear that gender recognition is a devolved matter. He

suggested that Scotland, England and Wales could make changes to gender recognition in tandem with each other, as was done with equal marriage.

“We think that legislating in Scotland would provide us with the best opportunity to get the law right; the 2004 legislation was passed by the Scottish Parliament through a Sewel motion.

We think that, ideally, there should be a tandem approach, with the UK Parliament legislating for English and Welsh birth certificates and the Scottish Parliament legislating for Scottish birth certificates. The process would be similar to how equal marriage was progressed by the two Parliaments, and it would enable us to make sure that the legislation was right for Scotland and maximised the potential to achieve all the good practice that we desire.” (col 16)

It was argued that the legislation would not have to be exactly the same as there are already differences in some aspects of how gender recognition works in Scotland and in England.

### **Removing the psychiatric diagnosis requirement from legal gender recognition**

The [Equal Recognition](#) campaign states:

“In order to change the gender on their birth certificate, the Gender Recognition Act 2004 requires a person to submit a highly detailed psychiatric report confirming they have been diagnosed with gender dysphoria, how that diagnosis was determined and any treatment they have received. This intrusive and humiliating requirement violates trans people’s right to privacy and self-determination and adds to the stigma that they already face”.

#### ***Committee evidence***

The STA explained the current process for changing your legal gender.

It requires people to be 18 or over and to provide a range of documents, such as bank statements, passports, bills and payslips, to prove they have been living in their new gender for more than two years.

People are also required to provide a written report from their GP and from their psychiatrist. According the STA there are about seven specialists in Scotland who can write the psychiatric report.

The two reports must provide detail, if any, of any medical treatments the person has undergone as part of their gender reassignment. They would need to provide details of hormone dosage, length of treatment, medication names, and exact details of any surgeries. James Morton of the STA said “it is easy for doctors to make a slight mistake in those reports or to provide details that are not technical enough, and then the application gets rejected by the tribunal panel” (col 3).

James Morton said the Gender Recognition Panel expect the psychiatrist to

“detail everything right back to their childhood, including their sexual preferences and what toys they played with as a child. If we took the average person and listed all those things, I am not convinced that they would get through the gender recognition panel” (4).

In terms of the impact on people seeking to change their gender, James Morton said they find the process:

“traumatic, difficult and frustrating. They feel that it removes their autonomy and ability to self-declare and places the decision in the hands of a judicial panel. That makes people feel very demeaned” (col 3).

Reference was made to the World Professional Association for Transgender Health, which represents psychiatrists, psychologists and other gender specialists around that world. James Morton said that the association does not think a psychiatric diagnosis should be a legal requirement for gender recognition (col 4).

Instead of the requirement of a psychiatric diagnosis for gender recognition, the STA is seeking to replace it with a process of self-declaration. It is argued that the process could be similar to how people change their gender on other documents at the moment. This can currently be done on medical records and bank statements, for example. Reference was made to other countries which now use the process of self-declaration for gender recognition, for example, Ireland, the Netherlands, Denmark, Malta, Sweden, Norway and Belgium (col 4).

James Morton said that there has been some concern that some people, using the self-declaration model, might change their gender for “some kind of nefarious purpose or as a joke” (col 5). However, there is no evidence to support this view. Further, that Scottish Women’s Aid, Rape Crisis Scotland and the Scottish Prison Service already voluntarily use a good practice self-declaration model for access to their single sex services.

A distinction was made between the process of legal gender change and access to medical treatments. While the STA has concerns about the questions that are asked in relation to readiness for hormone blockers, for example, the focus of the campaign is on the process for legally changing gender (col 6).

### ***Women and Equalities Committee – UK Parliament***

The Women and Equalities House of Commons Select Committee support the removal of the psychiatric diagnosis for gender recognition, and called for it to be replaced with a process of self-declaration.

“Within the current Parliament, the Government must bring forward proposals to update the Gender Recognition Act in line with the principles of self-declaration that have been developed in other jurisdictions”.

The Committee described the current process as bureaucratic, expensive and humiliating. The requirement to provide documentation of ‘gender dysphoria’ was criticised for treating transgender identities as a mental health issue. The “model of self-declaration” was described as the “gold standard” for the law on gender recognition in western European jurisdictions.

## **Reducing the age at which people can get legal recognition of their acquired gender, from 18 to 16**

The [Equal Recognition](#) campaign states:

“Young people under 18 years old are currently prevented from accessing legal gender recognition. Increasing numbers of young people are transitioning, with the full support of their parents, to live as the gender they identify as. Although they can satisfy all of the other conditions required to change the gender on their birth certificate, young people are denied this human right purely because of their age”.

### ***Committee evidence***

In response to a question about whether people are ready to change their gender at the age of 16 or 16, James Morton said:

“The evidence suggests that, if somebody experiences gender dysphoria—significant difference between their gender identity and their assigned gender at birth—when they hit and go through puberty, it is highly unlikely that they will change their mind. The current national health service treatment in Scotland—indeed, the current treatment throughout Europe and further afield—is to allow people to have hormone blockers if entering puberty is causing them to feel extremely distressed. That gives them some breathing space and time to work out how they want to live their lives. They are not usually given any hormones until 16 but they would usually have all their documents except their birth certificate changed over at an earlier age.”(col 7)

Young people are able to change their gender on other documents, but not their birth certificate. This can mean schools hold contradictory information and can lead to confusion on how to register for exams, for example. Allison Ewing of the STA spoke about her daughter who transitioned at the age of 14. She was able to change a range of documents, but not her birth certificate.

“She has been living under her name for three and a half years since she transitioned at school. The school was extremely good at dealing with that, but it would help schools in general if the age was brought down” (col 8).

Allison Ewing said there had been an increase in the number of referrals to the Sandyford Children and Adolescent gender identity services. In 2013 there were 67 referrals, but last year there were more than 180 referrals (col 8). There is only one psychiatrist at Sandyford who is there one day a week. Because of this increase in referrals, the waiting list is now a year, although they will see people sooner if they are experiencing acute distress, are self-harming or have attempted suicide. Parents are involved in the assessment process for children under 16. The psychiatrist will ask parents, as well as the child, about the child’s history of gender dysphoria. This assessment will be undertaken before a diagnosis of gender dysphoria can be made.

James Morton said that the STA do not see any risk in lowering the age for legal gender recognition:

“Because it involves a document change, it is not irreversible – it simply enables the person to feel valued, understood and accepted. We do not see a significant risk from lowering the age” (col 9).

And further:

“We think that reducing the age would be a positive change and would show that people know their gender from a young age. If you think back to age three, four or five, you knew that you were a boy or girl and the degree to which that fitted.” (col 10)

In terms of support for young people, it is limited at the moment; there is just one psychiatrist working one day a week for the entire Scottish caseload. It was argued that it would be a small drop in the ocean to double the provision and bring down the waiting times (9).

### ***Women and Equalities Committee – UK Parliament***

The Women and Equalities Committee said: “We recommend that provision should be made to allow 16 and 17 year olds, with appropriate support, to apply for gender recognition, on the basis of self-declaration”. The Committee said there was growing support to allow people to legally transition at a younger age and heard evidence that earlier interventions can improve mental health and physical well-being for transgender young people.

### **Legal recognition for people who do not identify as men or women**

Non-binary people are those who do not identify as being men or women. The [Equal Recognition Campaign](#) states:

“Every time they use health services, apply for a job, go to college, or interact with the state in any way, non-binary people are told that their existence is not valid; they must fit in to one of two categories, both of which undermine how they actually live and identify”.

### ***Committee evidence***

Vic Valentine, from the STA, explained that non-binary people do not feel the gender they were assigned at birth and do not wish to switch to what might be considered the opposite gender:

“We are asking for the ability to opt out of having that M or F on all our official documents. For example, passports can use an X marker rather than an M or an F, as already happens in Australia and New Zealand. We could have something similar on birth certificates so that people do not have a legal marker that undermines their sense of who they actually are” (col 11).

Good practice was referred to; for example, driving licences and bank statements allow people to use gender neutral titles, such as ‘Mx’ (Vic Valentine col 22).

In response to any potential risks in creating a gender neutral option in legal documents such as birth certificates and passports, Vic Valentine said:

“There are certainly no particular risks in adding that option to passports. Passports have been able to have gender-neutral markers for decades now; that is widely accepted by the International Civil Aviation Organization.

Although a few countries will not let in people with gender-neutral markers, it would be the individual's choice whether they would rather have a gender-neutral passport and limited travel options or have a binary gender passport and the ability to travel everywhere" (col 11).

Malta and Argentina now allow people to be recognised as a non-binary gender on their passports and this was described as the "international gold standard" (col 12). In terms of removing a gender requirement on documents entirely, Vic Valentine said it was important to keep the two categories, particularly for trans people to show who they are and that they are recognised by the government (col 21).

In response to a suggestion that legally recognising non-binary people creates a 'third gender', James Morton said:

"It is not a question of saying that the options are male, female and a third legal gender; it is about saying that there are male and female legal genders and then the option of not being legally gendered. Ultimately, we would probably want everybody to pick that option and say, 'Don't legally gender me', but the majority of people are comfortable with having a legal gender, so there is no need to immediately remove the gender from everybody legally.

It is simply about allowing those people who do not fit the two options to opt out and say, 'I'm a human being and I do not need to have a legal gender of male or female. I can simply live my life as me, as a human being'" (James Morton col 20).

During the discussion on non-binary recognition, a distinction was made with people who are intersex:

"Being born with an intersex body is different from being transgender and having a gender identity that varies from what people's expectations might be" (James Morton col 12).

It is unclear whether intersex people would wish to identify as being male or female, or non-binary, and suggested that the committee should look at intersex issues in their own right,

### ***Women and Equalities Committee – UK Parliament***

While the Women and Equalities Committee did not focus on trans people with non-binary and non-gendered identities, it recommended the UK Government look into "the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this". The Committee noted that the GRA does not currently make any provision for people with non-binary and non-gendered identities

### **Other issues**

#### ***Equality Act 2010***

The Women and Equalities Committee recommended two changes to the Equality Act 2010, which is reserved.

The Committee recommended that the protected characteristic of "gender reassignment" should be amended in the Equality Act 2010 to that of "gender



identity". This was based on evidence that the terms "gender reassignment" and "transsexual" in the Act are outdated and misleading; and may not cover wider members of the trans community.

On this point the STA would like to see this change to make it clear that all trans people are protected under the Equality Act, not just those who undergo a 'medicalised transition' (James Morton col 17).

The Committee also examined the provisions in the Equality Act that allow for the provision of separate-sex and single-sex services, where this is a 'proportionate means of achieving a legitimate aim' eg, domestic abuse services. The Act also permits service providers not to allow a trans person to access separate-sex or single sex services, on a case-by-case basis, and where there is a 'proportionate means of achieving a legitimate aim'. Similarly the Act provides an exemption where employers want to have a post open to individuals with a particular protected characteristic, where this constitutes a 'genuine occupational requirement'. The Committee referred to the Explanatory Notes of the Equality Act 2010 which gave this example:

"A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress".

However, the Committee heard significant concerns that these provisions allow discrimination against trans people. They recommended that the exemptions should not apply to trans people who have had their acquired gender recognised with a Gender Recognition Certificate:

"These are sensitive areas, where there does need to be some limited ability to exercise discretion, if this is a proportionate means of achieving a legitimate aim. However, we are not persuaded that this discretion should apply where a trans person has been recognised as of their acquired gender "for all legal purposes" under the Gender Recognition Act. In many instances this is unlikely, in any case, to meet the proportionate test. *We recommend that the Equality Act be amended so that the occupational requirements provision and / or the single-sex / separate services provision shall not apply in relation to discrimination against a person whose acquired gender has been recognised under the Gender Recognition Act 2004*"

The STA is supportive of this recommendation, James Morton said:

"At the moment, an employer that hires only women, for example, can refuse to hire a trans woman even if she has been many, many years transitioned. That is not appropriate. We are really pleased that women's equality organisations and violence against women services in Scotland have been trans friendly. As far as we are aware, none of them has used that possible exemption and they employ trans women in women-only posts. However, in England, such bodies sometimes use that exemption, which is wrong and unfair" (col 17-18).

### ***Criminal justice and the health service***

There was a brief discussion about attitudes towards trans people in the criminal justice system and the health service.

The Scottish Prison Service takes a self-declaration approach when deciding where to place a trans person in the prison estate. The SPS would undertake a risk assessment and supervise the person appropriately.

If a trans person is in need of hospital treatment there are usually single rooms available which can make things a bit easier. James Morton said that the main thing is to uphold a person's dignity and privacy. This can work quite smoothly until someone discriminates against a trans patient, James Morton argued:

“The more that people have legal recognition and protection, the better those processes operate, because treating someone with dignity is no longer seen as an option; it is seen as a requirement” (col 13).

### **Sport**

A question was asked about sport for non-binary people and James Morton said:

“The sport officiating bodies are much more interested in people's physiology than in their gender identity. The sports have rules about the level of testosterone that someone can have circulating in their body to classify as female for participation purposes. Some non-binary people already participate in sport. Generally, they tend to continue to participate in their birth gender or sometimes they opt to go into a sport that is less gendered, because that feels more comfortable to them. Having legal recognition would still allow sporting bodies to set their rules about the physiology that a person needs to ensure safe and fair participation in a gendered sport” (col 14) .

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**SPICe**

**2 March 2016**

## Annexe A

### Comparative international law on gender recognition

The following information was provided by the Scottish Transgender Alliance.

#### ***Self-determination (i.e. the removal of need for medical evidence or diagnosis)***

The Netherlands

Argentina

Denmark

Malta

Columbia

Ireland – Information on [Gender Recognition Act 2015](#)

Sweden, Norway and Belgium (all passed legislation to allow self-determination, but yet to come into effect)

#### ***Gender recognition for people under the age of 18***

- No legal age limit
  - Germany
  - Argentina
  - Malta
- Children under the age of 16 included
  - Sweden (with parental consent from 12 years old)
  - Norway (with parental consent from 7 years old)
- Only young people aged 16 and over able to access legal recognition
  - The Netherlands (by the same process as those over 18)
  - Ireland (via a Family Court Order which requires: parental consent; supported by a statement from the person's primary medical practitioner; the statement must be supported by endocrinologist or psychiatrist with no connection to the person in question; the requirement for parental consent is not necessary if the person is unwell or unable to act in the best interests of the 16 or 17 year old).

#### ***Recognition of non-binary identities***

- On birth certificates and other legal documents/identification
  - Malta
  - Argentina
  - Australia (in state of New South Wales)
  -
- Not on birth certificates but on legal documents/identification
  - New Zealand

- Pakistan
- India
- Nepal
- Bangladesh
- Australia

## Annexe B

### What is trans and intersex?

**‘Transgender people’ or ‘trans people’** is an umbrella term that covers the range of ways people can find the personal experience of their gender differs from the assumptions in the society they live. The term includes:

- **Trans women - male-to-female (MTF) transsexual woman** is someone who was labelled male at birth but has a female gender identity, and therefore transitions to live as a woman.
- **Trans men - female-to-male (FTM) transsexual man** is someone who was labelled female at birth but has a male gender identity, and therefore transitions to live as a man.
- **Non-binary people** – some people do not feel comfortable thinking of themselves as either male or female, and their gender identity may be more complicated to describe. Other terms to describe non-binary people include genderqueer, third-gender, bigender, androgyne, agender, gender-fluid and non-gender.
- **Cross-dressing people** – People who dress as the opposite gender (usually males) do so for emotional satisfaction or just because they feel comfortable doing so. While they have a strong desire to cross-dress, they are generally happy with their birth gender.

It is worth noting that these are the terms generally used in Scotland, but not every trans person who identifies with one of the terms above would necessarily describe themselves as trans. And further, the terminology is still evolving and different words are used around the world.

**‘Intersex people’** are individuals whose anatomy or physiology differ from contemporary cultural stereotypes of what constitute typical male and female. Intersex status is distinct from trans status. Intersex people may identify as men, women or as non-binary. The intersex umbrella is distinct from the trans umbrella.