**Response to Government consultation on the Gender Recognition Act 2004**

from Rights of Women

October 2018

Note: We did not answer every question in the consultation; we have only answered consultation questions where we believe we have relevant expertise to do so.

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<th>Question 3. Do you think there should be a requirement in the future for a diagnosis of gender dysphoria?</th>
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<td>Yes</td>
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[Neither yes or no answer]

This is not our area of expertise, so we feel unable to give a definitive yes or no answer. We defer to the expertise and experience of others who are better positioned to do so.

However, as a women’s legal rights organisation whose purpose is to improve the rights of all women through access to the law and legal protections, we will comment and raise queries insofar as this is a ‘gateway requirement’ that may impact on equal access to legal rights for trans women.

Our concern is that access to a GRC only being available to those who have a gender dysphoria diagnosis is restrictive and overly-medicalised. It does not take account of the different routes to transition that are frequently cited by organisations working directly with and supporting trans women.

We also share the view of others that should this requirement be removed it should not lead to any unintended consequences in relation to withdrawal of health care provisions needed by some trans women.

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<th>Question 4. Do you also think there should be a requirement for a report detailing treatment received?</th>
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[Neither yes or no answer]

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However, as a women’s legal rights organisation whose purpose is to improve the rights of all women through access to the law and legal protections, we will comment and raise queries insofar as this is a ‘gateway requirement’ that may impact on equal access to legal rights for trans women.

Our concern is that access to a GRC only being available to those who have a medical report potentially excludes trans women who have chosen not to have a medical interventions, are unable to access them or would like the freedom to commit to such decisions in their own time.

Other organisations with specialist expertise, such as GALOP, have stated that this is a lengthy, bureaucratic and expensive process and that disclosing details of it to a panel can be distressing. These factors are likely to impact disproportionately on trans women from different economic, class and cultural backgrounds.

**Question 5. Under the current gender recognition system, an applicant has to provide evidence to show that they have lived in their acquired gender for at least two years.**

(A) Do you agree that an applicant should have to provide evidence that they have lived in their acquired gender for a period of time before applying? Yes No Please explain the reasons for your answer.

(B) If you answered yes to (A), do you think the current evidential options are appropriate, or could they be amended?

(C) If you answered yes to (A), what length of time should an applicant have to provide evidence for? Two years or more; Between one year and two years; Between six months and one year; Six months or less.

(D) If you answered no to (A), should there be a period of reflection between making the application and being awarded a Gender Recognition Certificate?

[Neither yes or no answer]

This is not our area of expertise, so we feel unable to give a definitive yes or no answer. We defer to the expertise and experience of others who are better positioned to do so.

However, as a women’s legal rights organisation whose purpose is to improve the rights of all women through access to the law and legal protections, we will comment and raise queries insofar as this is a ‘gateway requirement’ that may impact on equal access to legal rights for trans women.

Our concern is that the current time requirement to live in an acquired gender appears to be arbitrary. We believe the gateway process of ‘providing evidence to show that a person has lived in an acquired gender for two years’ is fraught with obvious problems: what constitutes acceptable evidence; who makes the decision that the evidence is acceptable;
what happens to trans women who cannot provide evidence; the risk to the person living in their acquired gender (visibly or otherwise) of abuse, discrimination or societal hostility may prevent them from doing so; that it may be the obtaining of a GRC that equips them with what they need to actually live in their acquired gender; that ideas of what actually constitutes living in an acquired gender are susceptible to gender stereotyping.

**Question 6. Currently applicants for a gender recognition certificate must make a statutory declaration as part of the process.**

(A) Do you think this requirement should be retained, regardless of what other changes are made to the gender recognition system? Yes  No Please explain the reasons for your answer.

(B) If you answered yes to (A), do you think that the statutory declaration should state that the applicant intends to ‘live permanently in the acquired gender until death’? Yes  No

(C) If you answered no to (A), do you think there should be any other type of safeguard to show seriousness of intent?

(A) Yes

Making a statutory declaration is understood to carry the weight of serious intent by an individual, which reflects the seriousness and significance of the process.

As a ‘gateway requirement’ to obtaining a GRC it is less intrusive and more respectful of individual choice than other current requirements. It is also unlikely to disadvantage or discriminate against trans women facing structural inequality with the same disproportionate impact that other current requirements appear to do.

Concerns have been expressed about enabling access to a GRC solely via a statutory declaration. This is felt to be a process that is oversimplified and vulnerable to abuse by those without serious intent. We are as keen as others to ensure the GRC process is not open to abuse or that there are no unintended consequences that could lead to harm to women. However, we do not believe that restricting access to the law by denying self-determination to trans women as a whole class is the right answer to dealing with abusive behaviour by individuals or the foundation on which new law should be created.

We are minded of the fact that the experience from the Republic of Ireland (since adopting a similar process in 2015) does not appear to indicate that a lack of serious intent has been a repercussion. Stonewall state [GRA response, October 2018] that “since the introduction of self-determination through their Gender Recognition Act 2015, 297 people have been issued with Gender Recognition Certificates upon application. There is no recorded case of any of them asking for their certificate to be revoked.”
Equally, we are conscious that the experience in England and Wales could be different and that conclusions drawn from the Republic of Ireland’s statistics could be premature and that this is a fear of some of our sister organisations. We are concerned that there are women’s organisations in our sector that may have felt threatened by the toxicity of the debate and have been discouraged from having formal dialogue with each other and in other forums about whether they may be compromised in the safe and appropriate delivery of their services by a simpler GRC process. We believe this has not been assisted by the ambiguity about existing powers within the Equality Act 2010 relating to the use of exemptions. The absence of opportunity to scrutinise proposals against a clearer and accessible evidence base and the lack of legal clarity around equality law, have in our view, created a vacuum that has allowed debate to become polarised and divisive.

A Stonewall report [‘Supporting trans women in domestic and sexual violence services’, July 2018] provides testimony from 15 frontline women’s organisations across the country about their experiences of offering domestic and sexual violence support to trans women. The report shows high levels of expertise in ensuring a safe environment for all women that is trans inclusive.

It is essential that all potential abuse - whether that be by or against trans women - can be robustly prevented through a framework of adequate risk management and safeguarding, particularly in situations where women are extremely vulnerable and at high risk such as in prison. The Government has a duty to enable this by supporting organisations responsible for safeguarding through adequate resourcing.

**Question 7. The Government is keen to understand more about the spousal consent provisions for married persons in the Gender Recognition Act. Do you agree with the current provisions?**

**Yes**  No  Please explain the reasons for your answer. If you think the provisions should change, how do you think they should be altered?

No

We do not believe that a spouse or civil partner should essentially have a veto over whether someone is able to have their gender legally recognised. Although a spouse transitioning during a marriage is going to raise issues for any couple to discuss and possibly work through, the ability to prevent your spouse from acquiring a GRC creates a power imbalance that disadvantages trans people.

Research by Stonewall [LGBT in Britain: Home and Communities, 2018] has found that 51% of transgender people who had experienced domestic abuse in the last year reported that their partner had ridiculed their gender identity. This shows that perpetrators of domestic abuse use someone’s trans identity as a mechanism for further abuse. The spousal veto
provides perpetrators with an additional mechanism through which they can control and abuse their partners.

**Question 8. Currently, applicants must pay £140 to apply for a Gender Recognition Certificate.**

(A) Do you think the fee should be removed from the process of applying for legal gender recognition?

Yes  No

(B) If you answered no to (A), do you think the fee should be reduced? Yes  No

The Government is keen to understand more about the financial cost of achieving legal gender recognition, beyond the £140 application fee.

(C) What other financial costs do trans individuals face when applying for a gender recognition certificate and what is the impact of these costs?

(A) Yes.

(C) We believe the current fee is problematic. Our reasons are:

We recognise charging fees creates a hierarchy of those who can afford to pay and those who cannot. We do not think an ability to pay fees should in any way determine access to this process or be a ‘gateway requirement’ to the acquisition of rights.

We recognise that trans women face intersectional discrimination in society and as such are likely to be at increased risk of poverty or unemployment and therefore less able to pay fees.

**Question 9. Do you think the privacy and disclosure of information provisions in section 22 of the Gender Recognition Act are adequate?**

Yes  No If no, how do you think it should be changed?

No

We are not aware of any criminal prosecutions being brought under section 22 of the GRA 2004. This suggests that the current provisions are ineffective. GALOP states that cases have been reported to the police and the police have not pursued them largely due to the view that this is a privacy issue and not a criminal issue. This response is not unlike the way in
which many police forces continue to respond to survivors of domestic abuse when they tell them to go to the family court for protection rather than pursue a criminal case.

Whilst we agree current provisions are inadequate, we would not like to see the criminal offence disappear. We believe it is an important deterrent and many people will ensure they comply with the law exactly because it is a criminal offence to disclose the stated information.

If there were to be additional measures included in the form of some type of civil injunctive, or ‘gag’ order provision we would support this, but Government would have to make the process straightforward, easy to understand and make legal aid available for those who need the order.

**Question 11. Is there anything you want to tell us about how the current process of applying for a GRC affects those who have a protected characteristic?**

In answering this question, we first wish to explain the principles that inform our approach:

- We are a women’s legal rights charity run by women for women with a special focus in supporting women experiencing or at risk of violence against women and girls (VAWG).
- Our vision is to achieve equality, justice and safety for all women by improving their access to the law. This includes trans women.
- We are guided, but not restricted in our approach to being inclusive of trans women, by the requirements of the Equality Act 2010 and Gender Recognition Act 2004.
- We recognise that trans women experience intersectional discrimination, harassment and violence both because they are trans and because they are women. We understand that it is our duty as an equality organisation to address this.
- We respect the autonomy of women to define their needs based on their own experiences. This includes their requirements from the law to address the intersectional inequalities and discrimination they face.

We are answering this question in relation to its relevance to the protected characteristic of sex in the context of women who also hold the protected characteristic of gender reassignment.

We are concerned that the current GRC process may be yet another barrier for trans women who are already marginalised. Without full and equal access to the legal recognition and protection in this area, we are concerned that it will leave trans women even more vulnerable to facing disproportionate discrimination, harassment and abuse.

Research reports in relation to the experience of trans people as a whole (including the limited research that is available on trans women) suggest a worrying picture:

- 16% of trans women had experienced domestic abuse from a partner in the past 12 months [LGBT in Britain: Home and Communities, Stonewall and YouGov, 2018]
- Two in five trans people have experienced a hate crime or incident because of their gender identity in the last 12 months [LGBT in Britain: Hate Crime and Discrimination, Stonewall, 2017]

- A local study into the level of hate crime related incidents experienced by trans women over a period of 6 weeks (conducted through them keeping diaries of incidents) recorded a total of 41 incidents with one women experiencing 14 incidents over the 42 days [Equity Partnership (West Yorkshire), Hate Crime Report, Lived experiences of trans people, April 2016]

- A study found 84% of participants had thought about ending their lives at some point. 35% of participants overall had attempted suicide at least once and 25% had attempted suicide more than once. [Trans Mental Health Study 2012, GIRES]

- 60% of transgender people have experienced some form of transphobic discrimination in the workplace [Totaljobs survey of 450 transgender employees, March 2016]

- The average life satisfaction score (out of 10) for trans women was 5.5 [National LGBT survey: Research report, Government Equalities Office, July 2018] compared to 7.7 for the general population [Personal wellbeing in the UK Oct 2015 – Sept 2016, ONS, 2017]

We are also aware, through the work of specialist organisations and research, that trans women who face other structural discrimination – whether in relation to holding additional protected characteristics (for example, race or disability) or related to being from a refugee or migrant background - face some of the highest levels of discrimination and abuse. For example, the report ‘Free To Be Safe: LGBT+ people experiencing domestic abuse’ [Safe Lives 2018] shows these experiences are often hidden from society, frequently due to the barriers to reporting or being unable to access appropriate specialist support.

To challenge the disadvantage and oppression faced by trans women is difficult, but a less intrusive process by the state could be a significant step towards enabling it. An improved and less onerous process could potentially empower trans women in other areas of their lives to be better recognised and included. It could also enable more trans women survivors to feel more validated and able to approach and access specialist support for domestic abuse more easily.

Question 13. (A) Do you think that the operation of the single-sex and separate-sex service exceptions in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes  No Please give reasons for your answer.

(B) If you provide a single or separate sex service, do you feel confident in interpreting the Equality Act 2010 with regard to these exemptions?  Yes  No Please give reasons for your answer.
(C) If you are a trans person who has experienced domestic abuse or sexual assault, were you able to access support? Yes  No Please give reasons for your answer.

(D) If you answered ‘yes’ to (C), was this support adequate? Yes  No

(A) [Neither Yes or No]

We are an organisation run by women for women, which has provided single sex services to women since 1975.

We do not feel confident in interpreting the Equality Act 2010 in relation to the gender reassignment exemptions.

We believe there is a fundamental lack of clarity around how the existing GRA 2004 and EA 2010 exemptions interact with each other and that this relationship, in the absence of any clear case law, is open to interpretation.

We believe there is an opportunity now to change this and would like to see it clarified as a matter of urgency. This will not only benefit all those affected by it in terms of understanding their rights but also because it would allow the public debate to move forward.

We currently do not have specialist equality law expertise in our organisation and would welcome being corrected if our current view is therefore misinformed. To us, it is not clear how a service provider providing single or separate sex services can confidently and practically exclude those with the protected characteristic of ‘gender reassignment’ as ‘a proportionate means of meeting a legitimate aim’ in relation to a trans person who has obtained a GRC, has legally changed sex, and is therefore entitled to additional protections against discrimination in relation to their acquired sex as a protected characteristic and has rights relating to privacy.

The GRA states: “Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman)” [GRA 2004, s 9(1)]

We note that the subsection above is subject to any other provision of the GRA or “any other enactment or any subordinate legislation” [GRA 2004, s 9(3)] and that the GRA does not address the issue of single sex services.

Government guidance for potential applicants wishing to apply for a GRC, which seeks to summarise the law for GRC holders states:

“The Gender Recognition Act 2004 safeguards the privacy of transsexual people by defining information in relation to the gender recognition process as protected information.”[page 7]

However, it later states:
“Under the Equality Act 2010, it is unlawful discrimination for a person with the protected characteristic of gender reassignment – a transsexual person, or a person mistakenly perceived to be a transsexual person – to receive unfavourable treatment because of that in employment or in the provision of services (except in some very limited circumstances).” [Page 9]

It then goes on immediately to say:

“Once a person has been granted a full GRC they have the same rights and responsibilities as their legally acquired gender.” [Page 9]

HMCTS, The General Guide for all Users Gender Recognition Act 2004

Separately, to satisfy the requirements to provide a single sex service, the service must be a proportionate means of meeting a legitimate aim and meet one of five other specific conditions that refer to the detriment caused if usage was provided to both sexes.

In relation to the gender reassignment exemptions, these specify that exemptions to exclude those with the protected characteristic of gender reassignment can be used in relation to the provision of single sex provision and the government’s accompanying ‘Equality Act 2010 guidance notes’ provide an example:

“A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.”

Equality Act 2010, Explanatory Notes, Commentary on Sections, Part 16, Sch 3, Part 7: Separate and Single Services, Para 28
http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/20/7/5

In our view, the interplay between the application of different types of legislation can be extremely complex and we would be hesitant to place confidence in guidance notes rather than the law itself particularly as they lack sufficient detail to provide certainty about their real application.

The various points raised above leave us unclear on:

• The question of how a service provider could actually establish whether someone holds gender reassignment as a protected characteristic. A GRC holder will have a birth certificate in their acquired sex. Additionally, it is unclear if a service provider has a right to ask for a GRC or whether the GRC holder has a duty to disclose.

• How rights in relation to sex as a protected characteristic acquired under a GRC interact with exemptions allowing discrimination on the basis of gender reassignment
• How the objective justification test of needing to satisfy ‘the proportionate means to meet a legitimate aim’ is affected, if at all, by someone obtaining a GRC

We are concerned that the current lack of clarity around the law could leave a women’s organisation seeking to rely on the exemption based on their interpretation of the law, vulnerable to a legal challenge of unfair discrimination that could have devastating impacts on the service provider and the women they support. Equally trans women have a right to understand the extent of the rights they obtain via a GRC and where they stand in relation to lawful discrimination against them.

Whilst we cannot foresee a situation in relation to our organisation’s specific service delivery that may mean we would ever wish to rely on these exemptions, we find the lack of clarity around the law unhelpful. For example, debate about abusive men who may obtain a GRC on vexatious grounds being able to access women-only services is enabled by confusion around this issue. In our view, these arguments only marginalise trans women and make it harder for them to access the support that they need from women-only services.

We are aware that many women’s services provide support to trans women without any issues and will continue to do so. Women-only services are experienced in assessing risk and do so for every woman that seeks access to their services, trans or not.

**Question 19. Do you think that changes to the Gender Recognition Act will impact on areas of law and public services other than the Equality Act 2010?**

Yes  No Please give reasons for your answer.

[Neither Yes or No]

We believe that there are areas of family law that will need to be clarified. These include, whether a trans man who has given birth to a child should be registered as the mother or father on the birth certificate and consequently, who has parental responsibility for the child at what stage. If the trans man is treated as the father, he will not have parental responsibility until the birth is registered, potentially resulting in the child having no parent with parental responsibility on birth.