Reform of the Gender Recognition Act 2004: UK Government Consultation

The Government of the United Kingdom is proposing to revise the Gender Recognition Act 2004 (GRA) as this applies in England and Wales. Responsibility for this area of legislation has been devolved in Scotland, except where it affects pension rights and equality law, and the Scottish Parliament has already held a consultation on revising the law to which the Anscombe Centre has responded.\(^1\)

We encourage as many people as possible to engage with the consultation process and express your views on these proposals, which represent a significant shift in how the law would approach issues of gender identity. This briefing paper presents some considerations in relation to these proposals and some possible answers to some of the consultation questions, though people should respond in their own words giving reasons for their answers.

The consultation consists of 22 questions (you need not answer all) and responses must be submitted before 11 pm on 19 October 2018. You can submit your responses via email, post or the online response form at the bottom of the consultation website: https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004

Introduction

It is interesting to note the difference between the approach taken in England and Wales and that taken in Scotland. The Scottish proposals were based very overtly on international declarations and on arguments framed in terms of fundamental human rights.\(^2\) In contrast the consultation for England and Wales construes the Gender Recognition Act as “a public

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\(^1\) http://bioethics.org.uk/images/user/grasubmission.pdf

\(^2\) The Scottish government were able to point to a case on this issue decided by the European Court of Human Rights (which is binding as a legal precedent) which held that “a requirement to demonstrate the irreversible nature of a change of appearance (such as a requirement for sterilisation or surgery) was a breach of Article 8 of the European Convention of Human Rights” (3.15 citing AP, Garcon and Nicot v France [2017] ECHR 338 (06 April 2017)). However, the same ECHR judgement held that the State was within its margin of appreciation for the balancing of rights if it required a medical diagnosis before providing a certificate. Hence, the current model for gender recognition in Scotland and in England and Wales is compatible with human rights law.
service” and asks simply whether this service is “working for its users”.3 In England and Wales, fundamental issues of ethics, philosophy and human rights are assumed to have been settled, and the focus is essentially pragmatic: how to make the process more efficient and less onerous for those who wish to use it.

Hence, while the Scottish proposals are self-consciously radical, including extension of the GRA to children under 18 or even to children under 16, the proposals in England and Wales are on some points less far-reaching and presented in a more matter-of-fact way. The focus is on practical questions such as whether the charge of £140 represents a barrier to service provision or whether it represents a reasonable recoupment of expenses.4 This explains why so many of the questions are addressed to people who have obtained a certificate or who might wish to obtain one, asking for their experience of the service.

The Anscombe Bioethics Centre is committed to serious reflection on matters of ethics, philosophy and human rights in relation to issues such as gender identity. Nevertheless, where there is significant disagreement or confusion over the fundamentals, as there is on this question, a radical approach of the kind taken in Scotland seeking to universalise principles that arguably are mistaken can be more harmful than a more pragmatic approach such as that taken in England and Wales.

Furthermore, while the stated aim of the Government in revising the GRA is to “make it easier for trans people to achieve legal recognition”5 the Government shows some awareness that changes to the GRA might have unintended adverse side effects in other areas. The consultation document is at pains to emphasise that what is under consideration is only the process of legal gender recognition, not the treatment pathway for people with gender dysphoria nor the application of equality law. Nevertheless, while neither medical practice nor equality law need be affected by changes to the GRA, it frequently occurs that law or practice in one area can have an impact on law or practice in other areas. Hence the Government is interested not only in the experience of people who identify as trans but also in the thoughts and experiences of a wide range of citizens in relation to possible adverse consequences of legislative change and how these may be avoided or mitigated.

**Alternative models**

The consultation document refers to three models of legal gender change: “assessment” based, the “treatment” model and “non-assessment based”.6 Like the consultation authors, we are very opposed to a change to a medical model that would require a physical “sex change” via surgery and/or hormones. This is not least because requiring this could encourage or even pressure people into seeking interventions which they would not

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3 *Reform of the Gender Recognition Act – Government Consultation*, page 26, paragraph 41

4 Expenses are mentioned explicitly in the consultation as the Government’s survey of LGBT opinion found that cost was the third most common reason cited for a person who lives in the opposite gender role not applying for a gender recognition certificate.


otherwise have chosen, whose ultimate benefits are uncertain, and which do lasting harm in depriving the person of his or her natural fertility.

However, we are also opposed to a change to a “non-assessment based” model: to remove all medical/diagnostic or social prerequisites for legal transition could encourage the false idea that gender identity is simply a matter of choice, thus banalising an important personal dilemma the individual is confronting with very wide ramifications for the individual, those around that person, and society at large. The medical model of gender dysphoria may be only one aspect of a complex human reality, but it is widely accepted that gender dysphoria does affect someone’s healthcare needs (even if there are significant differences of view among clinicians as to what health care approaches are beneficial).

The move away from an “assessment” model represents a radical shift in the understanding of gender identity, and one that has worrying implications both in healthcare and in the application of equality law. If gender identity is decoupled entirely from any external assessment then how can professionals and healthcare providers make rational decisions about what should be provided to whom? If gender dysphoria no longer plays any role in legal gender recognition, why should it be a requirement for the provision of medical interventions similarly requested by the person? It is naïve to imagine that legal changes would not result in changes in medical practice.

Similarly, if non-assessment is taken to imply that claims to gender recognition are indefeasible or unassailable, like playing a trump card, then how can such claims properly be qualified by the rights and interests of others with protected characteristics (such as sex or religion)? Again, a radical change in the basis of legal gender recognition will inevitably have an impact in how equality law is interpreted and implemented.

If the aims of the Government are essentially pragmatic, to improve efficiency and remove what it sees as undue barriers to the provision of a legal service, then the Government need not at the same time embrace a radical change that could have long-term adverse effects that are difficult to predict. It should be noted that the LGBT National Survey, which is invoked by the Government as the rationale for the changes, gives as the most common reasons for not seeking a certificate the belief that the person did not meet the requirements and the bureaucracy and expense of the process. Less than 10% were unhappy about sharing medical information for this purpose. It is hence not clear that the medical assessment model is the primary concern.

In opposing a “non-assessment based” model we would stress that we are not thereby endorsing the existing “assessment” system for changing legal gender. Rather, we are simply claiming that the proposed new system would not represent an improvement on the current situation, but rather the reverse. We offer some brief reasons in support of this conclusion before sketching some very brief answers to some of the consultation questions below.
Dysphoria and psychological support

While the “non-assessment based” approach tends to suggest that transitioning from one social gender to another is simply a matter of personal choice, other approaches view transition more as a response to a person’s experience of gender dysphoria, seen as a life-affecting medical condition.

Those experiencing gender dysphoria (i.e. unease or distress with regard to their birth sex and the gender in which they were reared) deserve to be treated as individuals and have their health care needs taken seriously, not least as dysphoria is so often associated with suicidality and other comorbid conditions. Such issues will not necessarily disappear if a person transitions legally and/or socially and/or medically. A non-assessment based model fails to acknowledge these complexities, and if gender dysphoria is no longer seen as relevant to the process, there is a real risk that people will not receive the individual psychological support they need. This risk may also be exacerbated for those from other countries applying for certificates who may lack access to psychological support whether from professionals or even from family and friends.

In considering a change to a non-assessment model, we should also remember the experience of those who regret transitioning medically and/or socially and have “detransitioned” or “reidentified” with their birth gender. Making the process of legal transition quicker may encourage earlier social or medical transition, increasing the possibility of people making choices they later regret and/or that harm them in objective terms.

Marriage and divorce

The current law recognises that if someone who is married obtains legal recognition in the opposite gender then this will have an impact on the spouse. Either the spouse will consent to converting their marriage into a marriage to someone in the same gender (or for same-sex marriages, to someone of the opposite gender) or will seek divorce. Without the consent of the spouse, an interim certificate can be granted and can be used to facilitate divorce.

We would reluctantly suggest that this ground for divorce needs to remain to protect the interests of the spouse, who may have good reason to doubt the validity of the marriage especially if the transitioned person’s feelings of dysphoria were both strong and hidden at the time the marriage took place.

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7 Many though not all studies find poor health, including suicidality, in those identifying as transgender including those who have transitioned – for a recent example, see Reisner, S. et al. (2015). Mental health of transgender youth in care at an adolescent urban community health center: A matched retrospective cohort study. *Journal of Adolescent Health* 56: 274 V79.

8 From a Canon-legal perspective, the incongruent gender identity, if present at the time of the original wedding, would be prima facie grounds for annulment, especially if it was strong in nature and especially if hidden from the spouse. The Catholic Church does not encourage divorce but supports legal divorce in certain circumstances and the transition of a spouse may be one such circumstance. If the couple choose to stay together after transition, this should not be expressed through the outward...
In England and Wales, the State recognises marriages between persons of the same sex and legal gender. Nevertheless, the sex of the partner remains an essential element in the intention to marry. This is clear from the Gender Recognition Act which clarifies that, where a person has hidden the fact of gender reassignment from his or her spouse, then the marriage is null.

Analogously, if a person transitions there should be no possibility for the unilateral conversion of the marriage into what presents legally and socially as a same-sex marriage. No one should be forced to be in a marriage explicitly recorded as a marriage to a person of the same legal gender, nor should any spouse be left in ignorance of a person’s change of legal gender. Rather, the original legal marriage to which both parties consented should be retained and not re-registered.

The Government should be encouraged to give full consideration to the genuine rights and needs of the spouse and children no less than those of the person affected by dysphoria who wishes to transition. It would be important to listen to the stories of spouses and family as part of any assessment of the impact of a change in the law. There should be some consideration here also of the way in which (natal) women can be in a more economically and socially vulnerable position in relation to marital breakdown; this remains relevant in cases where the male partner transitions.

**Interpretation of equality law – conscience protections**

As regards rights of conscience, the right of any marriage celebrant to decline to officiate where both parties are of the same natal sex should be recognised in law. Currently the law recognises this right in relation to religious ceremonies but not in relation to civil marriage. Similarly, the rights of those wishing to confine to members of one or other natal sex access to certain gender-specific employment or voluntary roles (such as membership in male or female religious orders, or youth work with male or female groups) should also be respected. Where it is legal and reasonable to restrict roles or spaces to one sex (without this constituting sex discrimination), for example to respect the feelings of those who have experienced sexual violence, then it should be legal, and may be reasonable, to maintain these restrictions notwithstanding legal gender transition. The law should be flexible in this area.

From the side of employees, just as there should be recognition of the rights of transitioned persons to equal treatment with other employees in all situations where their birth sex is irrelevant, so equally there should be recognition of the rights of health care workers, youth workers, educators and others who are conscientiously opposed to giving the appearance of endorsing the new legal gender of the transitioned person – perhaps because of their own sincere view of what will safeguard that person’s interests. Employers and employees should have the shared goal of sensitivity and courtesy and the avoidance of unnecessary triggers in form of a same-sex marriage ceremony or certificate, but as the continuity of their former marriage or as a close but non-marital form of friendship (of value perhaps also for the sake of other important goods such as the care of the children).
speaking to or in the hearing of the transitioned person. Employers should not, however, discriminate against employees who, while showing sensitivity in how they speak and act, have detectably divergent religious, philosophical or scientific views from the transitioned person as to the relationship between sex and gender.

**Protected information**

We would urge that the exception to the ban on revealing protected information to obtain legal advice be kept (this would be required by, say, the spouse of a transitioned person who was not informed at the time of the marriage and wished to make use of that fact in legal proceedings).

**Non-binary**

The creation of a third category of legal gender that is neither male nor female would have profound effects in a number of areas of law. It would require further changes in marriage law if marriage were to be made possible between a man or a woman and someone with “non-binary” gender, or indeed between two non-binary persons.

This change is a further step away from the cultural binary of male and female in sex and gender (though in fact even the category of non-binary is dependent on binary categories: all discussion of gender is built on this).

In regard to non-binary status this represents a fundamental change in how gender is understood and potentially threatens all sex/gender specific law. It is reasonable to ask whether a person’s sex or gender is relevant in many official situations and needs to be asked routinely. It is quite different to create a new legal gender category, or a whole set of gender categories (as one will not capture the variety). If there is a third option to M/F it should be “prefer not to say”.

**Consultation questions**

**Question 3**

Do you think there should be a requirement in the future for a diagnosis of gender dysphoria?

Yes – in the sense that this requirement should not be removed, as this would not represent an improvement on the status quo. To dispense with the requirement for assessment of gender dysphoria would deprive a vulnerable group disproportionately affected by suicidality and co-morbid conditions of what may be much-needed contact with mental health professionals.

**Question 4**

Do you also think there should be a requirement for a report detailing treatment received?

Yes – in the sense that this requirement should not be removed. The requirement should carry no suggestion that applicants would be more likely to obtain a gender recognition certificate if they had already begun hormonal or surgical treatment (which might encourage an implicit “treatment” model for gender recognition). Moreover, it may be useful for a gender recognition panel to have access to the medical record of an applicant in order to understand
the situation in the round, including any ambivalence or comorbidities affecting the person’s decision there may be.

**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 – in the sense that this requirement should not be removed. This is a legal change with very wide ramifications for the individual, those around that person, and society at large. The National LGBT survey makes clear that many people who identify as transgender currently change their social identity without seeking a gender recognition certificate. It is unreasonable to make a change the law envisages as permanent without even any experience of the reality of living in the desired social gender (which the person may or may not see as worth continuing in the event).

(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?

We do not have views on what evidence should be required. However, we would not be in favour of any reduction in the current requirement for two years living in the acquired gender. Giving less time for the process would involve increased risk of potential harms for little evident benefit (bearing in mind that delay does not in any case prevent the person living in the desired social gender).

**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 – in the sense we do not want these changed, for reasons set out above.

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

Yes – possibly, it may be that there are other reasons to disclose information but, in any case, it is important that disclosure to obtain legal advice be retained.
Question 13
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 – if the basis for legal recognition shifts away from “assessment” then it seems likely that there will be greater difficulty in maintaining single sex spaces. This danger could be mitigated both by maintenance of some form of assessment model and by overt reference to this issue within any revision of the Gender Recognition Act.

And similarly, for questions 14, 15, 16 and 17.

Question 20
Currently, UK law does not recognise any gender other than male and female. Do you think that there need to be changes to the Gender Recognition Act to accommodate individuals who identify as non-binary?

No – such persons should be recognised as individuals with inherent dignity and human rights, but the law should not create a non-binary gender status (for reasons set out above).

Question 22
Do you have any further comments about the Gender Recognition Act 2004?

A significant change in the law on gender recognition should not be made merely for symbolic reasons; that is, in order to signal solidarity with those affected by gender dysphoria. The government should find other ways to express such solidarity. Revision of statute law should be undertaken if, and only if, it would bring a real improvement in the lives of those it most immediately affects and would not cause disproportionate harm.

There may well be improvements that can be made to the current law, and this submission is in any case not intended as an endorsement of current law. However, the radical proposal to move to a non-assessment model without any involvement of doctors and without any requirement to have previously lived in the desired legal gender would not improve matters but would generate serious new problems.