



Gender Recognition Act reform briefing note: The purpose of the GRA

Background

1. In December 2019 the Scottish Government published its draft Bill on reforming the Gender Recognition Act 2004 (GRA) and opened its plans to consultation. The draft Bill can be accessed [here](#), the explanatory notes [here](#), and the consultation paper [here](#). This briefing note argues that the draft Bill reflects a significant shift in thinking about the fundamental purpose of the GRA.
2. This shift matters. It means that lawmakers will be deliberating on a Bill with a fundamentally different rationale to the 2004 Act, embracing a larger, more diverse group of people. It is not, as former Stonewall CEO Ruth Hunt suggests, just ‘admin’ for the group currently entitled to a Gender Recognition Certificate (GRC).

The purpose of the Gender Recognition Act 2004

3. The Gender Recognition Act 2004 was originally agreed by the Westminster Parliament as a pragmatic step aimed at a very small number of people to alleviate the distress of gender dysphoria, and who could demonstrate to a body called the Gender Recognition Panel (GRP) that they had been living in what the law terms their “acquired gender” for at least two years. The law requires only social transition: surgery or other physical interventions have never been a legal requirement for a GRC. However, under the current detailed procedures, applicants who have had no physical interventions are expected to explain to the GRP why not, and for those who have, to provide details.
4. The GRA 2004 allows this group to change their sex in law, with strong privacy protections. This includes the facility to change birth (and ultimately also death) certificates. The change of sex in law is subject to some exceptions, set out in the GRA itself, and also in the Equality Act 2010.
5. The Act was stimulated particularly by privacy cases brought under the European Convention on Human Rights (ECHR). The two main specific issues cited at the time (different state pension ages for men and women and the absence of same sex marriage) have since been dealt with in other legislation, but broader privacy issues related to aligning birth certificates with other documents such as passport and drivers’ licences can still be argued, particularly for those whose transition would otherwise be unlikely to be apparent. [Note that, since 2004, the sex marker on passports and drivers licences can be altered without possession of the Gender Recognition Certificate (GRC).]
6. Since 2004, around 400 GRCs have been issued to people whose birth certificate was originally issued in Scotland. This is consistent with the original prediction that around

5,000 individuals would seek a GRC UK-wide. Currently around 30 people per year who were born or adopted in Scotland obtain legal recognition of their “acquired gender” under the GRA (para. 3.8.12).

7. As acknowledged in the 2019 consultation, the current arrangements for obtaining a GRC are compliant with the ECHR, and there is no obligation on Scotland under international human rights law to introduce a system for obtaining gender recognition based solely on an applicant’s statutory declaration (para. 2.13).

Beliefs underpinning GRA reform

8. The case for reform is underpinned by a fundamentally different set of beliefs and arguments, compared to the original 2004 Act. This shift in thinking is not discussed in direct terms in the consultation paper, but underlies the arguments presented.
9. In place of a pragmatic privacy-driven concession for a limited number of cases where a substantial transition has taken place as the means to alleviate diagnosed distress, the Scottish Government proposals for reform reflect a belief that people should have the right to switch sex in law, if they believe this would represent better who they feel they are, and they have made whatever changes they feel are needed to reflect that. The paper states that ‘Gender identity is a personal matter, with gender recognition sought by individuals who know their own mind’ (para. 3.24).
10. It is proposed that applicants for a GRC would have to declare that they had lived for a shorter period in their “acquired gender” (three months rather than two years, with a three month “cooling off” period between declaration and issue of the GRC). Consistent with the belief in self-definition, it appears it will largely be for applicants to choose how to interpret what that means. The existing scrutiny of applications and evidence of transition by the GRP would end entirely.
11. While the Scottish Government accepts criticism of the existing application process as overly bureaucratic and intrusive, the paper does not discuss any alternative proposals to simplify or streamline this process, nor to reduce the cost to applicants. The GRP is UK-wide so any changes to it would involve working with other administrations. However, if that were seen as a problem, the Scottish Government could have proposed, using devolved competence, a more light touch form of oversight for Scotland only. Instead, the specific practical criticisms of the current process are used to support an objection in principle to any external involvement in applications.
12. The paper therefore also accepts an argument that it is inappropriate to link obtaining a GRC to having a diagnosis of gender dysphoria. It notes that association with a mental health condition is seen by some to be stigmatising, while also noting that gender dysphoria is no longer classified as a psychological condition, but a sexual health one. There is therefore an unresolved tension in the paper about how to think about gender dysphoria.

Significance of removing the need for a diagnosis of dysphoria

13. Losing the need for a diagnosis of gender dysphoria is the most important change proposed, for a number of reasons:
 - It is central to the fundamental rethinking of the purpose of the process, away from a *pragmatic response to a medical condition*, to an *entitlement to affirmation of identity*, and the translation of that into a change of sex in law.
 - It opens the process to a new and larger group of people, some of whom have never sought, or who may have sought but been refused, a diagnosis of gender dysphoria.
 - Removing all input from medical professionals continues to generate significant concern about the potential for mischievous applications. This might be for purposes related to facilitating access to single sex spaces or occupations, or else to take advantage for any reason of the powerful provisions preventing a GRC holder's previous identity from being disclosed; as reinforced and expanded by a recent Employment Tribunal ruling (*Forstater v CGD*). The *legal* requirements for "having lived in the acquired gender" for three months appear likely to be self-policed and flexible (the document does not say what would be expected, but in other policy contexts it has suggested transition might have the minimum requirement of a name change, changes to sex markers on documents such as a passport and/or driving licence, and stating what pronouns a person says they wish other people to use when referring to them). The only deterrent to misuse would then become a person's unwillingness to take the risk of being found to have made a false declaration, which if proved would carry a criminal penalty of up to two years imprisonment.

Beyond simple administrative reform

14. The consultation paper estimates a ten-fold increase in the number of people seeking a GRC than have done so over the last 15 years, with a figure of around 250 a year suggested ([para. 3.8.12](#)). The change in the rules for issuing a GRC is therefore also expected to make possession of a GRC more common. Reform to any system which extends access beyond those currently entitled and envisages expansion on this scale is by definition doing more than improving existing administrative systems.

Conclusion

15. The case made for reform shifts the argument for having the GRA away from the limited pragmatic concession envisaged in 2004 to a relatively small population of individuals diagnosed with gender dysphoria, to enshrining in law the right to obtain a legal change of sex based on a person's self-perception, and to self-determine exactly what that requires by way of personal changes. This change in thinking explains the removal of all third-party involvement from the draft Bill, including the need to produce evidence of a diagnosis of gender dysphoria, and means that, although the consultation does not say so, lawmakers would be deliberating on a Bill with a quite different rationale to the 2004 Act.