

Response of the Equality and Human Rights Commission to the consultation:

Consultation details

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For more information please contact

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About the Equality and Human Rights Commission

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006 (EA 2006). It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. We are committed to our vision of a modern Britain where everyone is treated with dignity and respect, and we all have an equal chance to succeed.
2. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at United Nations level as an 'A status' national human rights institution (NHRI) in recognition of its independence, powers and performance.
3. The Commission has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws, and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

Executive summary

4. We welcome the UK Government's consultation on proposed changes to the Gender Recognition Act 2004 (GRA) to remove unnecessary barriers trans people currently face in obtaining a Gender Recognition Certificate (GRC) in England and Wales. The Commission considers that a simplified system for obtaining legal recognition of gender through a change in legal sex would better support trans people.
5. Our submission to the consultation is based on the following key principles, which we have distilled from the relevant legal frameworks (set out below) and through balancing feedback received from a range of stakeholders. The principles that inform our response are:

- i. Unnecessary barriers for those seeking legal gender recognition should be removed.
 - ii. The process for seeking legal gender recognition should not perpetuate the false assumption that being trans is a mental illness, and should therefore not rely on any medical diagnosis or intervention.
 - iii. There should be appropriate processes in place to ensure that individuals fully understand the legal, social and personal implications of a change in legal sex.
 - iv. Proportionate mechanisms should be built into the system to ensure that the rights of all groups who may be affected by potential changes are respected and protected.
 - v. The precise shape of a new system for seeking legal gender recognition should draw extensively on the knowledge of those with lived experience of the issues facing trans people and those seeking to change legal sex, and other groups affected by potential changes,¹ and all aspects of the new system should be reviewed with extensive input from these groups after a defined time period in order to assess its appropriateness and effectiveness.
6. The interaction between the GRA and the Equality Act 2010 (EA 2010) is a complex area of law with implications for how the protections on the basis of sex and gender reassignment work in practice. Although the Government does not intend to make changes to the EA 2010, our consultation response also seeks to bring clarity to both the legal and practical issues at stake and make our recommendations on the best ways to respect the rights of all those affected by changes to the GRA.
7. To inform this consultation, we conducted a series of roundtable discussions with stakeholders with lived experience of the issues affecting trans people and of seeking legal gender recognition, and other groups who may be affected by potential changes. There were inevitably limitations on the scale of our consultation exercise due to time and resource constraints, which we have kept in mind in our response to the consultation questions.

¹ See paragraph 7 below for info on our stakeholder consultations, including inevitable limitations.

Context

8. We recognise that the present system for obtaining a GRC may be creating unnecessary barriers to acquiring legal gender recognition. Only 4,910 GRCs have been issued since the GRA came into force in 2005, which appears to fall short of the number of trans people estimated to be living in England and Wales.² While the reasons for this disparity are complex and not fully understood, it suggests that the current mechanism may not be meeting the needs of its users.
9. Many trans people find the current process overly bureaucratic, expensive and intrusive.³ Unnecessary barriers amount to an additional burden for trans people, who already face a number of obstacles to full participation in wider society.⁴
10. Other countries have adopted various models for the legal recognition of a change in gender. For example, Ireland moved to a system of statutory self-declaration in 2015,⁵ and other approaches can be found in Malta, Argentina and Norway.⁶ Our submission does not provide a comparative analysis, and we recommend that the UK Government considers learning from a range of international models in the course of its consultation.
11. We know there are specific concerns that removing barriers to acquiring legal gender recognition might affect women-only spaces and services provided under the single-sex and separate-sex service provisions in the Equality Act 2010. Below we set out our firm legal view that the reform of the GRA will not erode the special status of these important services and facilities. Given the sensitive

² While there is no clear data, research suggests that there are between 200,000 and 500,000 trans people living in the UK. A lack of robust quantitative evidence may be driven by limited monitoring for gender reassignment or gender identity in academic research and in public services (although this is improving), or people's reluctance to disclose their trans status.

³ The [Government's LGBT survey](#) found that, amongst those who were aware of the process for obtaining a GRC but did not have one, 44% thought they did not satisfy the requirements, 38% found the process too bureaucratic, and 34% found it too expensive.

⁴ There is a large amount of grey literature and an increasing number of academic studies which demonstrate the many barriers trans people face in participating fully in wider society. For instance, there is a high prevalence of discrimination against trans people, and they face significant health inequalities compared to both the general population and to lesbian, gay and bisexual people. For example see: LGBT Foundation (2017), '[Transforming outcomes: a review of the needs and assets of the trans community](#)'.

⁵ See: [Ireland: self-declaration](#)

⁶ TGEU (2016), '[Legal Gender Recognition in Europe](#)'. 2nd revised edition. Available at:

and complex nature of many of the issues involved, it is vital that Parliamentarians, policy makers, trans and non-trans people understand the implications of any changes to the law, and how changes to the law will translate into practice.

Domestic and international legal and policy framework

12. Under the Human Rights Act 1998, trans people have the right to full recognition of their acquired gender in law under Article 8 (right to private and family life) and Article 12 (right to marry) of the European Convention on Human Rights (ECHR).⁷
13. Under UK law, ‘sex’ is binary (male or female), with legal sex being determined by what is recorded on an individual’s birth certificate. While a trans individual can have their acquired gender recognised administratively, for example on a passport, they can only change how their gender is recognised in law by acquiring a GRC. This also enables the individual to acquire a new birth certificate recording their legal sex in line with their acquired gender.
14. The EA 2010 protects individuals from discrimination and harassment because of specified ‘protected characteristics’. This protection applies to those who have the protected characteristic, those perceived to have it and those who are associated with it. One of these protected characteristics is sex, which applies “to a man or to a woman”. Another is gender reassignment, which protects an individual who “is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.⁸
15. Individuals are treated under the sex discrimination provisions of the EA 2010 in line with their legal sex. Thus, a trans person with a GRC is treated as having the sex recorded on their GRC (and new birth certificate), while a trans person without a GRC is treated as having the sex recorded on their birth certificate. In both cases, they are protected from discrimination because of gender reassignment.

⁷ See [summary of European case law](#).

⁸ The Explanatory Notes to the Act make clear that a person does not have to be under medical supervision to come within the definition of gender reassignment.

16. The exceptions permitting different treatment on the basis of gender reassignment in the EA 2010 (for example the exceptions related to single-sex services and associations) do not hinge on whether or not an individual has a GRC. Any use of the exceptions permitting different treatment must be objectively justified, meaning that it must be a proportionate means of achieving a legitimate aim, and will therefore depend on the particular circumstances. While an individual's possession, or not, of a GRC may be part of the evidence a court would consider in a gender reassignment discrimination case, it is unlikely to be a determining factor.⁹
17. In developing our submission, we have given due consideration to relevant principles and standards related to international human rights law that are designed to inform and guide domestic policy-making and the development of administrative rules and laws. We consider these principles and standards alongside the domestic and international legal standards set out above.
18. In 2006 the Yogyakarta Principles relating to sexual orientation and gender identity were set out by a group of human rights experts, representatives of non-governmental organisations and others. In 2017 additional principles were articulated in relation to sexual orientation, gender identity, gender expression and sex characteristics.¹⁰ Certain aspects of the principles are particularly relevant to this submission. For example, Principle 3 asks countries to “take all necessary...measures to ensure that procedures exist whereby all State issued identity papers which indicate a person’s gender/sex including birth certificates...reflect the person’s profound self-defined gender identity” and to “ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned”.¹¹
19. In 2015 the Parliamentary Assembly of the Council of Europe – the body responsible for overseeing the European Convention on Human Rights (ECHR) – adopted Resolution 2048, which calls on all Member States to “develop quick, transparent and accessible procedures, based on self-determination, for changing the name

⁹ The one exception to this is the provision relating to solemnisation of marriage through religious ceremony in Part 6 of Schedule 3.

¹⁰ See [Yogyakarta Principles](#)

¹¹ Ibid.

and registered sex of transgender people on birth certificates, identity cards...and other similar documents”.¹²

¹² Available at: [Resolution 2048](#)

Response to consultation questions

Question 3

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

Yes

No (selected response)

Please explain the reasons for your answer.

Question 4

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

Yes

No (selected response)

Please explain the reasons for your answer.

20. The Commission supports de-medicalising the process for obtaining a GRC.

21. While the World Health Organisation recently revised its International Classification of Diseases so that ‘gender incongruence’ (another name for gender dysphoria) is no longer classed under ‘mental and behavioural disorders’, requiring a diagnosis of gender dysphoria in order to obtain a GRC has created the perception that being trans is a mental illness. Even if gender dysphoria had not been de-classified as a mental illness, requiring a diagnosis still creates the impression that variance in gender identity or expression is fundamentally a medical disorder.

22. Resolution 2048 of the Assembly of the Council of Europe calls upon Member States to “abolish sterilisations and other compulsory medical treatment, as well as a mental health diagnosis” as a prerequisite for individuals to obtain legal recognition of their acquired gender.¹³

¹³ Ibid.

23. While many trans people may seek medical interventions in the form of hormone therapy or surgery, requiring a diagnosis of gender dysphoria in order to obtain a GRC unnecessarily medicalises what is essentially a change in legal status, and does not reflect the way that many trans people live their lives. Similarly, requiring a report detailing treatment received may currently be contributing to the misconception that medical intervention is a pre-requisite for legal gender recognition.¹⁴

24. A simplified approach, as set out in our response to the subsequent questions in this consultation, would remove unnecessary burdens while ensuring applicants fully understand the legal, social and personal implications of acquiring legal gender recognition through a change in legal sex, and ensure that the rights of others affected by the changes are respected.

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 (selected answer)

Please explain the reasons for your answer.

25. The Commission considers that having to provide evidence of ‘real-life experience’ of living in their acquired gender is an unnecessary burden to place on applicants.

26. It would run contrary to the Council of Europe Resolution 2048 (referred to above) which calls on all Member States to “develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards...and other similar documents”.¹⁵ Having to collate a significant amount of

¹⁴ The [Government’s LGBT survey](#) found that 15% of trans people who were aware of the process for obtaining a GRC but did not have one mistakenly thought that surgery is a requirement.

¹⁵ Available at: [Resolution 2048](#)

evidence can cause unnecessary delays and potentially prolonged distress for those seeking legal recognition of their acquired gender. Many trans people may also find it difficult to demonstrate lived experience even if they have it, as they are at greater risk of homelessness and unemployment,¹⁶ so may not have easy access to documents such as passports, driver's licences, payslips and utility bills. Young people may also have more problems producing two years' of evidence, especially if their families are not supportive.

27. Insofar as a requirement of evidence of real-life experience acts as a proxy for ensuring that an individual fully understands the legal, social and personal implications of their decision, we consider that this function can be more proportionately served by a different process, as set out below. Providing valid consent to a legal process is never usually contingent on having acquired lived experience of that change, and we do not see why it needs to be in this case. While we consider that evidence of lived experience should not be required, it could still play a part for some applicants in showing that they fully understand the implications of their decision.

28. We advise that further consideration is given to whether any additional steps are needed to ensure that a young person fully understands the social, personal and legal implications of their decision, in consultation with young people with lived experience and other relevant stakeholders.

(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?

29. The Commission consider that a period of reflection is unnecessary if the process of acquiring a GRC is designed in such a way as to ensure that applicants demonstrate that they fully understand the legal, social and personal implications of a legal change in status. In order to ensure there is full understanding and valid consent, the Commission considers that individuals applying for a GRC should have a face-to-face meeting with a suitably qualified person, such as a registrar. The process for selecting and

¹⁶ LGBT Foundation (2017), '[Transforming outcomes: a review of the needs and assets of the trans community](#)'.

appointing registrars for this purpose should be done in partnership with representative organisations and experts by experience.

30. The process of engaging with this meeting will help to ensure that adequate reflection has taken place. The registrar should ensure that the applicant has received all the necessary information about, and has fully understood and considered:

- a. The legal consequences, such as changes to marriage/civil partnership, pension and social security rights;
- b. The social consequences, such as how it may affect their day to day interactions with friends, family, neighbours and colleagues, and how they can best prepare to manage their change in status;
- c. The personal consequences, such as the impact on their mental and emotional well-being in the short and longer-term, and sources of support they have or could turn to if needed as they adjust to their change in status.

31. The registrar could also answer any questions the applicant might have to ensure that the individual can provide fully informed consent to the process.

32. The registrar would replace the current panel system, but should not be responsible for deciding whether the applicant should receive legal recognition of their acquired gender, as the decision to change legal sex should rest with the individual rather than being conditional on third-party evidence and evaluation.

33. However, as in the case of marriage, the registrar should be under a duty to report any reasonable concerns that the threshold for valid consent has not been met (for example if they believe the individual to be under the coercive control of somebody else or that they lack capacity in decision-making).¹⁷ In addition, we consider that the registrar should report any serious concerns that the applicant has not fully understood the legal, social and personal implications of changing legal sex or the impact of making a statutory declaration, and a clear process for escalating or resolving such concerns should be set out, in consultation with those with lived experience.

¹⁷ See: General Register Office (2017), '[A guide for authorised persons](#)'. See also: paragraph 24 of the Registration of Births, Deaths and Marriages etc. England & Wales Regulations 2015 (SI/207/2015).

34. The registrar would need to be provided with suitable training to ensure that:

- They understand fully the range of issues facing trans people;
- They understand the signs that indicate a lack of valid consent;
- They know to whom to escalate concerns and how to sign-post people to appropriate support or information.
- They do not unlawfully discriminate against applicants with a learning disability for instance by making assumptions that they lack legal capacity to make relevant decisions, when in fact they can do so with reasonable and appropriate support through the process.¹⁸

35. We recommend that all aspects of the new system are reviewed after a defined time period, including a thorough consultation with those with lived experience and all other affected groups, to consider its effectiveness.

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 (selected answer)

No

(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 (selected answer)

No

Please explain the reasons for your answer.

36. We consider that requiring individuals to sign a statutory declaration is an appropriate and proportionate measure to allow applicants to demonstrate their seriousness of intent, and also

¹⁸ NB: this is a suggested list of issues that training should cover and should not be considered exhaustive.

makes it a criminal offence to intentionally make a false application.¹⁹ The declaration would also enable the applicant to confirm that the registrar has provided them with information and answered questions to assist with their understanding of the social, legal and personal implications of changing legal sex.

37. It is not uncommon for statutory declarations that involve a change in legal status with serious legal, social and personal implications, such as marriage, to involve some kind of statement that the individual commits to the change permanently, 'until death'.
38. The purpose of this statement is to confirm seriousness of intent, and the Commission considers it to be an appropriate measure that does not pose an unnecessary barrier to trans people seeking legal recognition of their acquired gender.
39. However, we recognise the possibility that, in exceptional circumstances, an individual may come to realise that gaining legal recognition of their acquired gender was not the right choice and may want to change back to their sex assigned at birth. Such occurrences should be rare if the process for ensuring the implications of changing legal sex are fully understood is robust.
40. The Commission previously considered that a limit to two applications per individual would be appropriate to ensure that the rights of applicants are respected while providing a proportionate safeguard against misuse of the system.²⁰ Further consultations with stakeholders have brought to our attention rare situations in which a limit of two applications could cause undue distress for an individual.²¹ We therefore do not suggest a limit to the number of applications, but instead propose that the registrar and declaration process outlined above is robust and thorough in order to provide appropriate safeguards for the applicant and others. It may therefore be appropriate to apply a more stringent process for

¹⁹ Under [s. 5 of the Perjury Act 1911](#), it is a criminal offence to knowingly and willingly make a false declaration on a material matter in a statutory declaration.

²⁰ EHRC Scotland (2018), '[Response to the review of the Gender Recognition Act 2004 Consultation](#)'.

²¹ For example, where individuals are faced with a lack of support such that they personally feel unable to live in their acquired gender, and as a result revert to their sex assigned at birth, but later feel better supported and able to live in their acquired gender and wish to again obtain legal recognition of a change in sex. The registrar process set out in our submission aims to minimise the risk of this kind of situation arising by ensuring that applicants have fully considered the legal, social and personal consequences of changing legal sex and informed about how to access further support.

second or third and subsequent applications. In our view, ensuring that the process for acquiring legal gender recognition is robust and effective could support better understanding of and respect for trans people in wider society.

41. If a limit to the number of applications is considered, it would need to take full account of the views of those with lived experience of changing legal sex, and consider the implications for non-binary identities.

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 (selected answer)

No

Please explain the reasons for your answer. If you think the provisions should change, how do you think they should be altered?

42. Following the introduction of the Marriage (Same Sex Couples) Act 2013, it became possible for marriages to continue after one party to the marriage obtains a GRC, as long as the other spouse consents to the marriage continuing. If the other spouse does not consent, an interim GRC can be awarded, which can be used as grounds to annul the marriage. Once the marriage is ended, a full GRC is issued.
43. The Women and Equalities Select Committee (WESC) have noted in their report that some trans people feel that this provision gives another person undue power to delay legal recognition of their acquired gender.²²
44. The Commission appreciates that this may be particularly distressing if the dissolution of the marriage is complex or drawn out or if the spouse is unable to consent, for instance due to lack of capacity in decision-making; however, in legal terms marriage is a contract between two consenting parties, the terms and substance of which cannot be changed without the consent of both parties.

²² Women and Equalities Committee (2015), '[Transgender Equality. First Report of Session 2015-16](#)'.

45. In a marriage where one party applies for a GRC, the other spouse has a legal right to be consulted in respect of proposed changes to the terms of the marriage. Any change may also engage Article 8 (right to family and private life) and Article 9 (right to freedom of conscience, thought and religion) of the ECHR; both parties are entitled to an expectation regarding the validity and sanctity of their marriage.
46. The Commission therefore considers that the current system strikes the right balance in recognising the rights of both parties in relation to Article 8 and Article 9 of the ECHR.
47. However, we recommend that the Government provides clearer guidance on this issue to ensure that trans people and others are aware of the legal necessity of spousal consent and the role of an interim GRC as a path to annulment of the marriage. We also agree with the WESC that “the Government must ensure that it is informed about the extent of [a spouse denying consent with malicious intent] and ways of addressing the problem”.²³
48. In addition, as noted in paragraph 70, research to understand the needs and experiences of trans people with different religions or beliefs could help to inform any changes required in the context of the spousal consent provisions where applicants experience certain difficulties (for example, the spouse does not believe, for religious reasons, in marriage of same sex couples but wishes to continue to be married to the applicant).

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 (selected answer)

49. The Commission understands that it is necessary for the Government to charge for the provision of some public services,

²³ Ibid.

including those which involve a change of legal status, but this fee should not be prohibitive to applicants.

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

Yes (selected answer)

No

50. We are concerned that the current fee may pose an unnecessary barrier for some trans people seeking legal recognition of their acquired gender.²⁴ In light of this, the Government should raise awareness of the availability of fee remission available to applicants who receive certain benefits or are on a low income, and options for reducing the fee should also be considered.

51. Streamlining the application process in line with our recommendations above, particularly the de-medicalisation of the process, is likely to reduce the costs of providing the service and this should be reflected in the level of the fee.

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?

52. The Commission is aware that there are a number of 'hidden' costs associated with fulfilling the requirements of the current process. On the basis of our consultations with stakeholders, these costs may include:

- Solicitor's fees (to assist with paperwork)
- Fees for the two medical reports currently required
- Fees for changing gender markers on identification documents, to be used as evidence of two years lived in the acquired gender.

²⁴ The Government's LGBT survey found that 34% of respondents who were aware of the process but did not have a Gender Recognition Certificate said they did not apply because the process was too expensive.

- Fees for copies of the above documentation to evidence two years lived in the acquired gender.

53. When combined with the application fee, such costs may be a prohibitive factor for some trans people seeking legal recognition.

Question 9

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

Yes

No (selected answer)

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

54. Section 22 of the GRA is designed to protect the privacy of people who have applied for or who have obtained legal recognition of an acquired gender. Section 22(1) of the GRA makes it a criminal offence for a person to disclose protected information that they have acquired in an authorised capacity.

55. However, there are exceptions that, for example, allow for information to be disclosed to prevent or ensure detection of crime and for pension and social security system purposes, court proceedings and medical purposes. The Commission considers that these exceptions are generally reasonable. Prison services, for example, should be able to access relevant information on a change of legal sex to be able to carry out necessary risk assessments.

56. The current provision imposes a six month limit²⁵ which starts from the time disclosure is made. As of 2015, there had been no prosecutions under section 22, which could be due in part to this time limit, as an individual may not become aware of the unlawful disclosure for some time.²⁶ We consider that time should start to run from the date the individual becomes aware of the disclosure.

²⁵ For such summary offences, time starts to run from the date of the criminal act by virtue of section 127 of the Magistrates Court Act 1980.

²⁶ Women and Equalities Committee (2016) [Transgender equality: first report of session 2015-16](#). House of Commons, para 82-86.

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?

57. The Commission has identified a number of areas where the current legislation may have additional implications for individuals with certain protected characteristics.

58. **Age:** Our stakeholder consultations revealed a lack of consensus on the age at which it should be possible to apply for a GRC. While some stakeholders recommended lowering the age at which an application can be made to 16 or below, others expressed concern about safeguards to protect the best interests of the child and the need for more information about the increase in the number of young people referred to the Tavistock and Portman NHS Foundation Trust Gender Identity Development Service.²⁷ The Commission considers that further research and consideration of the effects of changing legal sex on children and younger people is needed. We welcome the Government's commitment to gather evidence on the issues faced by young people assigned female at birth who transition in adolescence.

59. The costs associated with applying for a GRC may pose additional barriers to young people, who are less likely to have the financial means to apply. Information on fee remission should be made more widely available.

60. As noted in paragraph 26 above, young people may face more difficulty in providing evidence of having lived in their acquired gender for a defined period of time.

61. Older people who have not undergone medical treatment because of its limited availability in the past may also be at a disadvantage under the current system as they may be unable to provide the necessary medical diagnosis and reports. De-medicalising the process would help to ensure that older people do not face unnecessary barriers to legal recognition of acquired gender.

²⁷ See: [Tavistock and Portman NHS Foundation Trust Gender Identity Development Service](#)

62. **Disability:** Evidence suggests that there is a higher prevalence of disability within trans communities,²⁸ so it is particularly important that the process for applying for a GRC is fully accessible to disabled people.

63. People with a learning disability may face particular barriers under the current process. The current evidence requirements may be burdensome for individuals with a learning disability, and guidance on completing the process, including information about social, legal and personal consequences, should be available in Plain English and Easy Read formats.

64. As noted in paragraph 34 above, it is vital to ensure that people with a learning disability are not assumed to lack legal capacity to make relevant decisions and that appropriate safeguards are in place. It is therefore important to provide adequate support throughout the GRC process, for example by an independent advocate. Any authorised person or persons involved in the process through which a GRC can be obtained should receive adequate, training so that they can fully understand the needs and experiences of disabled people.

65. People with a mental health condition may find the current GRC process unduly distressing because of the evidential burdens, intrusiveness and bureaucracy of the process. Given the higher prevalence of poor mental health for trans people,²⁹ this is an issue which should be considered when making changes to the process.

66. **Gender reassignment:** As set out in this consultation response, the Commission considers that unnecessary barriers to legal gender recognition may interfere with an individual's Article 8 and Article 12 rights under the ECHR.

67. Additionally, trans people may be at greater risk of their gender history being disclosed without their consent if their birth certificate does not match their other identity documents. This compromises their Article 8 right to private life.

²⁸ The UK Government's LGBT Survey found that trans respondents were more likely to be disabled compared to non-trans respondents

²⁹ McNeil, J. et al. '[Trans Mental Health Study 2012](#)'. Scottish Trans Alliance, 2012. [accessed 12 Oct 2018].

68. **Pregnancy and maternity:** The Commission does not consider there to be any distinct impacts of the process for applying for a GRC for those who are pregnant or new mothers.

69. **Race:** Some ethnic groups may have more difficulty in obtaining evidence that they have lived in their acquired gender for a period of time if there is heightened stigmatisation of being trans in their community. However, ethnic minorities are usually under-represented in research on trans identities and issues.³⁰ The Commission suggests that further research is necessary to understand the needs and experiences of ethnic minority trans people.

70. **Religion or belief:** Individuals of some religions may have more difficulty in obtaining evidence that they have lived in their acquired gender for a period of time if there is heightened stigmatisation of being trans in their religion. Further research should be conducted to better understand the needs and experiences of trans people with different religions or beliefs.

71. **Sex:** In the eight jurisdictions which have thus far introduced self-determined legal gender (Argentina, Malta, Denmark, Ireland, Norway, Sweden, Colombia and Belgium), we are not aware of reported cases that indicate a problem with individuals – men or women – applying for legal gender recognition for dishonest or fraudulent purposes.³¹ However, our engagement with stakeholders has revealed accounts of the lengths to which some people will go to gain access to single-sex spaces such as domestic violence refuges.³² We consider that further research and ongoing monitoring is required to determine (i) the extent of the risk that opportunists may use or are using trans identities (with or without a GRC) to perpetrate offences, and (ii) whether enabling GRCs to be granted on the basis self-identification may lead to the GRC process being misused to this end. Such research and ongoing monitoring could be used to help ensure the legal framework, including policies and guidance on its application, provides adequate safeguards as required by ECHR Articles 2, 3 and 8.

³⁰ Budge and Pankey (2016), '[Ethnic Differences in Gender Dysphoria](#)', Current Psychiatry Reviews, Vol 12, Issue 2. and LGBT Foundation (2017), '[Transforming outcomes: a review of the needs and assets of the trans community](#)'.

³¹ See: '[Transgender rights in the United Kingdom and Ireland reviewing gender recognition rules](#)'

³² A number of stakeholders raised this issue in our roundtable discussions.

72. There is evidence that practical guidance and other forms of assistance is required to help trans people, single-sex and separate-sex service providers understand and navigate the complexities of sex-based exceptions in the Equality Act 2010, without compromising the service provided to women in difficult and vulnerable situations.³³

73. Given the role that legal sex has played as an indicator of biological or physical sex differences, it is also important that Parliamentarians consider any implications for existing sex-based legislation and social policy where biological or physical sex differences remain relevant,³⁴ and how they should operate in practice, before any change in the law.

74. **Sexual orientation:** The Commission welcomes the recent announcement of plans to amend the law to allow opposite sex couples to enter into civil partnerships. Until this amendment is enacted, individuals who are in a same-sex civil partnership and are seeking legal recognition of their acquired sex face additional obstacles, as civil partnerships are not currently available to opposite-sex couples. In this instance, the individuals concerned would either have to end the civil partnership or convert it to a marriage before a full GRC could be issued.

Question 12

Do you think that the participation of trans people in sport, as governed by the Equality Act 2010, will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

75. We do not consider that GRA reform will affect the operation of this exception in the EA 2010. These provisions of the EA 2010 do not operate by reference to possession of a GRC granted under the GRA.

³³ Ibid.

³⁴ For example, the Human Fertilisation and Embryology Act 2008.

76. Sections 195(1) and (3) of the EA 2010 permit the exclusion of men or women from competitive sports events or activities where the average physical strength, stamina or physique of one sex puts them at a disadvantage compared to the respective average of the other sex.

77. In addition, trans people can be excluded from gender affected activities, under section 195(2) EA 2010, where it is necessary to do so for reasons of fair competition or the safety of competitors.

78. The EA 2010 permits an inclusive approach towards trans people while setting out safeguards for the rights and interests of others. Under the EA 2010, fair competition and the safety of competitors (and not possession of a GRC) will be the critical considerations to determine if gender reassignment discrimination is permitted. The lawful operation of this exception will still depend on a fair and reasonable assessment by responsible bodies, applying the above-mentioned factors on the relevant evidence on a case-by-case basis, and not on prejudices, unwarranted assumptions and stereotypes.

79. Further information and other awareness-raising measures should be considered, in addition to those proposed, to help people understand their rights and responsibilities under equality law when GRA reforms are enacted.

Question 13

(D) 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 (selected answer)

Please give reasons for your answer.

80. These exceptions to the general principle of non-discrimination allow service-providers to provide single-sex and separate-sex services where that is justified. They include, for example, women-only gyms, post-natal health services, male-only or female-only hairdressers, separate hospital wards and separate prisons for men

and women. They also include women-only domestic violence services and sexual assault support services.

81. The operation of these exceptions does not depend on the existence of a GRC, and they will continue to operate as they do now following reform of the GRA.
82. Separate-sex services (whether equal or different for each sex) and single-sex services (only to persons of one sex) are permitted under Schedule 3 to the EA 2010 where it is proportionate because a joint service for both sexes would be less effective or it would not be reasonably practicable because of the extent to which the service is required by one sex. A single-sex service could be appropriate, for instance, where services are used by two or more people at the same time and users of one sex might reasonably object to the presence of a person of the other sex.
83. Paragraph 28 of Schedule 3 permits different treatment of trans people in 'anything done in relation to' the lawful operation of separate services for the sexes and single-sex services, provided such conduct is objectively justified – 'a proportionate means of achieving a legitimate aim'.
84. As an exception to the general principle of non-discrimination, upon which the EA 2010 as a whole is based, these exceptions apply only in situations where it is both appropriate and necessary. The action taken under the exception must be rationally connected to a legitimate aim. Where there are alternatives, the least discriminatory approach must be pursued, striking a fair balance in the particular circumstances of each case between the relevant interests of trans people, service providers and other service users.
85. Some stakeholders with whom we consulted about GRA reform expressed strong reservations about the adverse impact on women when organisations take a trans-inclusive approach, though other stakeholders pointed to evidence of trans-inclusive policies working well when adopted and carefully implemented by providers of domestic violence services to women. There is heightened anxiety at the prospect of GRA reform opening up further opportunities for perpetrators of domestic violence or sex offenders to access safe spaces created specifically for women. Some single-sex service providers also believe the operation of these EA 2010 exceptions on

a case-by-case basis is too complex and legally risky to use in practice by small organisations with access to limited resources facing significant competing demands and pressures.

86. We have also been told that a growing number of funders, such as local authorities, apply equality requirements to funding criteria that make it increasingly difficult to continue to provide women-only domestic violence services. The lawful application of the single-sex provisions in the Equality Act 2010 should not, in our view, preclude an organisation securing funding.

87. While we do not consider changes to these provisions of the EA 2010 are appropriate, further consideration should be given to other ways of addressing those concerns. We recommend that the UK Government considers including a provision in the legislation reforming the GRA to put beyond doubt that having a GRC is not a determining factor in how the exceptions relating to gender reassignment discrimination apply. We consider that clear, practical guidance and other forms of assistance to help trans people, single-sex and separate-sex service providers should accompany reform of the GRA.

Question 14

Do you think that the operation of the occupational requirement exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

88. We do not consider that the operation of this exception will be affected by changes to the GRA. Possession of a GRC is not the decisive consideration when determining if this exception in the EA 2010 can be used to exclude trans people from certain jobs, and that will continue to be the case following GRA reform.

89. Work-related gender reassignment and sex discrimination is generally prohibited under Part 5 of the EA 2010. Schedule 9, paragraph 1 provides an exception to some of those provisions, so that certain jobs can lawfully only be open to people of a particular sex or not be open to trans people. (It should be noted that,

because the gender reassignment protected characteristic is asymmetrical, nothing in the EA prohibits jobs being open only to people sharing this characteristic.)

90. This is permitted, as an exception to the normal non-discrimination rule, when the nature of work and/or the context in which it is undertaken mean those requirements are objectively judged to be genuine and crucial elements of the particular post. Use of this exception has to be objectively justified on a case-by-case basis using the 'proportionate means of achieving a legitimate aim' test, described in more detail in our response to question 13 of this consultation.

91. Our Employment Statutory Code of Practice³⁵ sets out the occupational requirement exception from both an employer and employee perspective. At the time of the GRA reform, we encourage the Government to confirm the continued application of the exception as set out in our Statutory Code of Practice.

Question 15

Do you think that the operation of the communal accommodation exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

92. We do not consider that the operation of this exception will be affected by changes to the GRA. Possession of a GRC is not the decisive consideration when determining if this EA 2010 exception can be used to exclude a trans person from communal residential accommodation and that will continue to be the case following GRA reform.

93. Schedule 23, paragraph 3 of the EA 2010 provides a general exception to sex discrimination and gender reassignment discrimination in respect of admission to communal residential accommodation (such as dormitories or other shared sleeping areas) and related benefits, facilities and services. They can be

³⁵ See ch 13: [Employment statutory code of practice](#)

restricted for reasons of privacy to persons of one sex (male or female) subject to conditions and when it is objectively justifiable. It is permissible to do that where the accommodation is managed as fairly as possible between men and women, account has been taken of the frequency of demand from persons of each sex and the accommodation provider has considered whether it is reasonable to extend or alter the accommodation or provide further accommodation. There is also another related exception that allows an accommodation provider to exclude a trans person from male or female communal accommodation provided it can be objectively justified using the 'proportionate means of achieving a legitimate aim' test in the precise circumstances of each case.

94. The general legal principles under which this exception can be lawfully used are similar to those described in our response to question 13.

95. Additional guidance may needed to help trans people, communal accommodation providers and other service users understand how this exception operates to accompany reform of the GRA.

Question 16

Do you think that the operation of the armed forces exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

96. We do not consider that this exception (in Schedule 9, paragraph 4 EA 2010) will be affected by GRA reform. However, given the fact that the armed forces now operate sex and trans inclusive policies, as set out in the Government's consultation document, we question the need to retain this exception in its present form. It appears to us that the exception as it applies to sex and gender reassignment can be removed without adversely affecting the capabilities of our armed forces. The Government should consult each of the armed forces with a view to repealing those exceptions that are no longer necessary.

Question 17

Do you think that the operation of the marriage exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

97. While this is the only EA exception that makes reference to the GRA, and the process of GRA reform will lead to more people having a GRC, we do not consider that there will be any impact on the operation of this exception relating to trans people as a result of GRA reform.

98. This exception (in Schedule 3, paragraph 24 EA 2010) protects individual and collective religious freedoms. It allows ministers of religion and religious officials to act in accordance with religious beliefs or doctrines by declining to marry or give their consent to marriages of trans people under religious rites. Furthermore, it allows religious clergy to act in accordance with their faith when they refuse to solemnise marriages of a person whose gender they reasonably believe is their gender acquired under the GRA. In both instances they will not be acting unlawfully under section 29 of the EA 2010.

Question 18

Do you think that the operation of the insurance exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

Yes

No (selected answer)

Please give reasons for your answer.

99. We assume this consultation question is referring to Schedule 9, paragraph 20 of the EA 2010 concerning an exception from certain forms of work-related discrimination (under Part 5 EA) in respect of employment-related insurance contracts. We are not aware of how limited or widespread use of this exception is in practice. Subject to hearing what the insurance industry, trade unions and employers'

representatives have to say, we do not have reason to believe that the operation of this exception will be affected by GRA reform.

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 (selected answer)

No

Please give reasons for your answer.

100. Reform to the process of legally recognising a person's acquired gender has the potential to affect other areas of law and public services which operate differently for persons of each sex.

101. Policies and practices that explicitly operate by reference to the GRA or a GRC may need to be reviewed in light of GRA reform proposals, such as those operated by NOMS in relation to allocating trans prisoners to male or female prisons.

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?

Yes

No (selected answer)

If you would like to, please expand more upon your answer.

102. Changes to the GRA alone would not be sufficient to accommodate individuals who identify as non-binary, because a non-binary sex category would have to be established in UK law before the GRA could make it possible for individuals to change their legal sex to anything other than male or female.

103. We welcome the increasing evidence base on non-binary people,³⁶ but note that there are still significant evidence gaps on the number, needs and experiences of individuals. It is therefore difficult to ascertain the best way to develop the law at the current time in order to address the issues they face.

104. However, in our evidence to the WESC,³⁷ we recommended that legal protection from discrimination should include all of those who experience discrimination because of their gender identity. There is a lack of clarity over how the protections related to perception-based discrimination in the EA 2010 apply in this context, although it is thought that this would cover many instances of discrimination.

105. We welcome the Government's commitment to launching a call for evidence on non-binary gender identities, as there is a need for detailed research to better understand the nature of the issues faced by non-binary people in order to identify appropriate solutions.

106. In the interim, the Commission recommends that the Government commits to reducing the focus on distinguishing on the basis of binary gender in policy and practice, except where necessary. For example, sex markers on administrative forms, identity documents and data collection forms should be reviewed to facilitate inclusion. Such an approach may assist in moving away from the current polarised understanding of male and female, which carries with it unhelpful stereotypes that can hold individuals back and create difficulties for those who do not conform to them. However, further consultation would be needed to fully understand and assess the equality implications of taking this approach upon the protected characteristics of sex and gender reassignment.

Question 21

(C) What other changes do you think are necessary to the GRA in order to benefit intersex people?

107. The current GRA is focussed on the needs of trans people who wish to change their legal sex through obtaining a GRC. Therefore it

³⁶ In the Government's LGBT Survey, 51% of trans respondents reported as non-binary. Other relevant surveys seem to suggest that the proportion of individuals reporting as non-binary is large, for instance the Trans Mental Health Study 2012 and the US National Transgender Discrimination Survey 2008.

³⁷ See: [Our evidence to the Women and Equalities Committee](#)

does not meet the needs of intersex people and those with variations in sex characteristics who do not identify as trans but wish to correct the sex that was incorrectly recorded on their birth certificate.

108. The General Register Office provides for intersex people who wish to correct their birth certificate. However, our stakeholder engagement highlighted that this option is not inclusive of all intersex people and those with variations in sex characteristics as the definition of 'intersex' used is narrow. The process allows for a reissued birth certificate with the date of correction, which stakeholders have flagged as a concern in relation to their right to privacy. Stakeholders also raised that there is a lack of awareness of this option among intersex people and those with variations in sex characteristics.

109. The Government's LGBT survey found that 12% of trans intersex respondents who were aware of the gender recognition process but did not have, and had never applied for, a Gender Recognition Certificate said that they did not want to share medical records (compared to 8% of trans respondents overall), which indicates that the system may not be meeting the needs of these individuals.

110. We recommend that the Government consider whether the legislative vehicle used to reform the GRA is suitable to meet the needs of intersex people and those with variations in sex characteristics or whether separate legislation is needed. We recommend that the Government consults further with intersex civil society organisations and those with lived experience in order to fully understand their needs.

111. We welcome the Government's commitment to launching a call for evidence on intersex, as there is a need for detailed research to better understand the nature of the issues faced by intersex people in order to identify rights-respecting solutions.

Question 22

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

Yes (selected answer)

No

If you answered yes, please add your comments.

112. Although we welcome the Government's statement that it does not intend to amend the EA 2010 when reforming the GRA, in our view the following matters warrant further attention when considering GRA reform and potential impact on the EA 2010.
113. Schedule 16 to the EA 2010 concerns an exception from discrimination under Part 7 of the EA 2010 that permits single-characteristic associations. Subject to some exceptions, it allows them to lawfully admit only those people who share the relevant EA 2010 protected characteristic and restrict membership benefits accordingly, while excluding those who do not share the characteristic. However, Schedule 16 EA 2010 creates uncertainty as to whether single-characteristic associations have the legal basis under the EA 2010 to remove members who no longer share the relevant protected characteristic. For example, it is not clear whether a women's association would be permitted to remove membership from a trans male who, through acquiring a GRC, becomes male for the purposes of the law. We consider that it may be desirable to amend Schedule 16 to the EA 2010 to include explicit reference to section 101(2), which would clarify the position.
114. Further thought should also be given to the potential impact of GRA reform upon the operation of the all-women shortlist provisions in the EA 2010 (section 104(6) and (7)). This will provide greater clarity to guide political parties in how the provisions should or may be applied to trans candidates.
115. Finally, the precise legal basis to provide separate toilets in schools for boys and girls requires further consideration, clarification and may require remedial action. There are no specific exceptions permitting separate toilets for boys and for girls in schools in the EA 2010, meaning that neither is there any legislation governing the inclusion or exclusion of trans boys and girls from such facilities.