Reform of the Gender Recognition Act – Government Consultation

Closing Date – 19 October 2018

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Introduction

The Government seeks to make the existing process under the Gender Recognition Act a better service for those trans and non-binary people who wish to use it. In particular, they are seeking views about how to make it easier to obtain legal recognition. One option for streamlining would be to remove the requirement for a medical diagnosis.

The approach being considered by the Government is in line with the recommendations of the House of Commons Women and Equalities Committee report on Transgender Equality (December 2015). This report was itself influenced by the 'Yogyakarta Principles' (November 2006) and Resolution 2048 of the Parliamentary Assembly of the Council of Europe (April 2015). Neither of these documents is legally binding. The Yogyakarta Principles were drawn up by an *ad hoc* body that did not include clinicians with expertise in gender dysphoria. We also note that the European Court of Human Rights (Garcon and Nicot v France [2017] ECHR 338), in a judgement which is legally binding, held that an 'assessment model' is compatible with human rights and thus with best practice.

CMF represents some 5,000 medical practitioners in a wide variety of clinical settings across the UK. We oppose the move to a self-declaration model, not because we wish to endorse the current assessment model but because we believe the proposed change would lead to a worse outcome.

Currently, under the Gender Recognition Act 2004 people need to be over 18, have been diagnosed with gender dysphoria by a medical practitioner, have lived in their new gender identity for two years and have obtained a certificate from a gender recognition panel before being able, legally, to change their gender. The recognition process is lengthy, interviews may be seen as intrusive and the gathering of evidence in support of the application can be costly, complex and inaccessible to some trans people. Some reform is therefore required.

However, self-declaration, we believe, would be harmful for individuals, their families and society as a whole. It makes gender identity simply a matter of a person's subjective feelings about themselves and changing legal gender simply a matter of personal choice. It encourages the view that gender identity defines reality and that biological sex is but a social construct, something 'assigned' at birth. This new ideological dogma has no evidence-base in science but self-declaration would appear to reinforce it as if proven fact.

It is clear from a recent Australian study[1] that gender dysphoria in young people is often accompanied by mental health disorders such as anxiety and depression, including attempted suicide. According to trans activists this is due simply to 'minority stress' resulting from society's negative attitudes towards trans people, a claim without supportive evidence. The results of another recent study[2] suggest otherwise. It offers no proof that radical therapies such as puberty-blocking drugs, double mastectomies and cross-sex hormone treatment will prevent adolescents from attempting suicide. If anything, the findings of the survey underline the need for serious scientific research into the potential environmental causes of gender dysphoria and the risks—both physical and psychological—of medical transition.

Paediatrician Michelle Cretella comments: *'It shows that the much higher rate of attempted suicide among female-to-male, non-binary, and questioning transgender youth has more to do with factors relating to their biological sex than it does with anything related to gender identity. If confirmed, this may help explain the causes, since it is possible that common underlying psychological and environmental factors may be at play triggering both gender dysphoria and suicidal tendencies in a subset of these adolescents.*'[3]

Clearly, much more research is needed. The prevailing rush to treatment with puberty blockers and cross-sex hormones is not based on robust evidence that this approach results in lasting, improved mental health outcomes. The treatment is experimental, in response not to good quality trial outcomes so much as to well-organised activists' lobbying. Changing the law to make gender recognition dependent only upon self-declaration will catapult yet more young adults with complex mental health issues into the hands of a few, overly willing medical personnel without careful assessment of underlying causes and treatment of co-existent mental health disorders.

A new phenomenon, known as rapid-onset gender dysphoria, has been observed to begin suddenly in an adolescent or young adult (usually a girl) who would not have met criteria for gender dysphoria in childhood. A peer-reviewed study published in August 2018 noted: 'the worsening of mental well-being and parent-child relationships and behaviours that isolate adolescents and young adults from their parents, families, non-transgender friends and mainstream sources of information are particularly concerning'.[4] The role of social media in spreading a form of 'dysphoria contagion' among contacts needs further research.

The same caution is needed in treating adults with gender dysphoria. The largest study[5] following adults who have undergone medical gender transition was conducted in Sweden. Thirty years after their transition, the suicide rate was 19 times higher among transgender adults than among the non-transgender population. It is clear that these results do not support the alleged curative effects of transition.

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[1] Strauss P et al (2017). Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results. Telethon Kids Institute, Perth, Australia.
[2] Toomey RB et al. *Pediatrics* October 2018, Volume 142 / Issue 4
[3] https://www.dailysignal.com/2018/09/18/new-study-on-transgender-teen-suicide-doesnt-prove-kids-need-gender-transition-therapy/ (accessed 09.10.18)
[4] Littman L. Rapid-onset gender dysphoria in adolescents and young adults: A study of parental reports. PLOSOne, August 2018. https://doi.org/10.1371/journal.pone.0202330
[5] Dhejne C et al. Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden. *PlosOne*, February 2011. https://doi.org/10.1371/journal.pone.0016885.

The transgender community has moved away from a simple 'binary' view of gender, preferring to see gender identity as fluid - liable to change or fluctuate over time. It is difficult to imagine a legal process for gender change in such an environment that could be both fit for purpose and resistant to frivolous abuse. What is certain is that to remove all medical or social prerequisites for legal transition will trivialise what is a complex human developmental process.

Question 1 N/A

Question 2 N/A

Question 3: Do you think there should be a requirement in the future for a diagnosis of gender dysphoria?

Yes.
Self-declaration makes gender identity simply a matter of a person's subjective feelings about themselves. There is evidence[6] that amongst those who present with gender incongruence there is an elevated prevalence of co-morbid psychopathology, especially mood disorders, anxiety disorders and suicidality.[7] In one study [8] of 579 patients with gender dysphoria, 349 (60.3%) were the female-to-male (FTM) type, and 230 (39.7%) were the male-to-female (MTF) type. Concurrent psychiatric comorbidity was 19.1% (44/230) among MTF patients and 12.0% (42/349) among FTM patients. The lifetime positive history of suicidal ideation and self mutilation was 76.1% and 31.7% among MTF patients, and 71.9% and 32.7% among FTM patients. A Dutch study[9] also reported the co-occurrence of autistic spectrum disorders (ASD) and gender dysphoria. The incidence of ASD in a sample of 204 children and adolescents (mean age 10.8) was 7.8%.

Self-declaration would deprive these people of contact with mental health professionals at the time when their assessment and advice could be crucial. There is a real risk that individuals who require psychological support and specialised psychiatric treatment will not receive it.

This is of particular concern for teenagers, especially girls, struggling with the turbulent effects of puberty, social transition and identity issues in general. Pursuing legal gender transition may harmfully distract a young person from addressing psychological issues (such as anxiety and depression) with the help and support of mental health professionals and others.

Simplifying legal transition by removing the need for medical diagnosis will also expose the process to frivolous abuse. How can any legal process for gender recognition accommodate the notion that

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[6] Dhejne C et al. Mental health and gender dysphoria: A review of the literature. *Int Rev Psychiatry* 2016; 28(1):44-57

[7] Zucker KJ et al. Gender Dysphoria in Adults. *Annu Rev Clin Psychol*, Vol 12, 2016:217-247.

[8] Masahiko Hoshiai et al. Psychiatric comorbidity among patients with gender identity disorder, https://doi.org/10.1111/j.1440-1819.2010.02118.x (accessed 30.07.2018)

[9] Annelou L. C. de Vries et al. Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents. *Journal of Autism and Developmental Disorders*, Vol 40, Issue 8, 2010: 930–936.

gender identity is deemed to be fluid? How many changes of gender will a single person be permitted over a lifetime?

Question 4: Do you also think there should be a requirement for a report detailing treatment received?

Yes.
The consultation document insists that gender dysphoria is not a mental health issue. It takes an ideological stance for which there is no medical support. Until very recently gender dysphoria was known as Gender Identity Disorder and required specialist expertise to make a correct diagnosis.[10] Many in the medical profession believe that the change from disorder to dysphoria was ideologically driven, not evidence-based.

Requiring a report that details treatment received guards against whimsical self-referrals. It is a sensible 'barrier' to overly-easy transition that would result in more people embarking on early medical transition with insufficient thought, more people living to regret irreversible changes to their bodies, and/or wanting to de-transition later, and an overall increase in co-morbid mental health issues including suicidality.

Question 5: (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.

(B) Evidential options might better be provided by individuals who have personal knowledge of the applicant and who enjoy their confidence. For example, the applicant's family doctor, faith community leader or lawyer. Two such pieces of evidence should suffice.

(C) The current two-year requirement may be arbitrary but removing it would have the effect of 'trivialising' the referral process and overwhelming the appraisal process.

The Government is to be commended for seeking to reduce the burden of the process, and It might indeed be possible to improve aspects of the existing law, but removing sensible 'barriers' to overly-easy transition will result in more people embarking on early medical transition with insufficient thought, more people living to regret irreversible changes to their bodies and an overall increase in co-morbid mental health issues including suicidality.

Question 6: (A) Do you think this requirement – to sign a statutory declaration that you intend always to live as trans - should be retained, regardless of what other changes are made to the gender recognition system?

[10] DSM-5. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders*, 5th edn. Washington DC: American Psychiatric Publishing, 2013, 302.85:455.

Whatever system is introduced must discourage frivolous abuse. However, transgender ideology no longer recognises gender identity as fixed but as fluid.[11] This is clearly at odds with a declaration of intent to live in an acquired identity until death.

(B) For there to be integrity in the process, we think the applicant should be willing to demonstrate the *intention* to 'live permanently in the acquired gender until death'. But we don't think it can be made a criminal offence if at some later point the applicant has a change of mind or identity, for such is the likelihood when gender identity is regarded as fluid. The question demonstrates the impossibility of drafting a law in response to an ideological imperative that ignores objective biological facts and makes identity rest on subjective feelings.

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.

To apply for and obtain legal gender recognition without any need for spousal consent would undermine the value of marriage. This is recognised in the current Gender Recognition Act which states that to have hidden the fact of gender reassignment from a spouse renders the marriage null and void. In a similar way, it should not become possible for one partner unilaterally to convert an existing marriage into something approximating legally to a same-sex marriage. No spouse should be left in the dark about their partner's change of legal gender – it should be a legal requirement to gain the consent of the spouse for any such change.

Consideration should be given to the rights and needs of spouses and children affected by the transition of a married partner and especially to the vulnerability of a mother and her children where her marriage to a trans woman breaks down.

If the requirement be reduced from 'gaining consent' to 'simply informing', then the award of a GRC to the applicant should be treated as sufficient reason for the spouse to be granted a divorce, should they request it.

Question 8: (A) Do you think the fee should be removed from the process of applying for legal gender recognition?

The fee should cover associated administrative costs.

[11] International Gay and Lesbian Human Rights Commission, *Institutional memoir of the 2005 Institute for Trans and Intersex Activist Training,* 2005:7-8.

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

It should be set at a level sufficient to act as a deterrent against frivolous applications, but not so high as to disqualify *bona fide* applicants. Those in receipt of benefits should be able to apply for a fee waiver or reduction, as at present, but the attendant bureaucracy should be simplified

Where wider costs are incurred, for example in acquiring medical reports or statutory declarations, a simple means of reclaiming such costs should be available to poorer applicants.

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

No response

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?

The document is not clear about whether or not someone awarded a GRC automatically satisfies the gender reassignment characteristic for protection under the Equality Act. The Act states that 'a person has the protected characteristic of gender reassignment if that person is *proposing* (my emphasis) 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'. With gender self-declaration, a person may be awarded a GRC without undergoing any reassignment processes. Presumably, the gender reassignment protected characteristic will apply to all with a GRC?

The credibility and authenticity of sport depends upon the fairness of the contest. It is clear that trans women have an advantage over other women in many sporting activities. Sport needs to be protected from the mismatch. The Government intends to make it easier for transgender people to be legally recognised in their acquired gender. It is inevitable that this will increase pressure on sporting bodies to include trans women in women-only events, to the detriment of sport as a cisgender female competitor and/or as a spectator. At the same time, it would hopefully increase the pressure on the Sport's Council, Sport England, sporting associations and facility-providers to improve sports provision for trans athletes.

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?

The consultation document is at pains to emphasise that the government is 'not proposing to amend the existing equality exceptions relating to single- and separate- sex services in the Equality Act' and this is reassuring.

However, the 'trajectory of travel' in the proposed legislation is clear and will make it harder to protect single-sex and separate -sex exceptions under the Equality Act. The bias in interpretation of the law will move in favour of the trans community. In seeking to correct one imbalance it is clearly important not to create another that is open to exploitation, whether by ideologues or predators.

Self-declaration will make it easier for men, including some with a history of physical or sexual abuse of women, to identify as women and thus gain access to 'safe spaces' for women, for example in hospitals, prisons and women's refuges.

Questions 14-18:

The operation of all the exceptions in relation to gender reassignment in the Equality Act 2010 will be affected to some degree by the trajectory of the proposed reforms. Those reforms would mean more people apply for and receive GRCs. The possession of a GRC legitimises trans identity. In settings where the rights of trans people compete with those of other groups, the point of balance will shift in favour of the trans community. Incremental extension of those rights through subsequent case law is likely to follow. The ability to operate the exceptions will be progressively constrained in a trans-affirming environment. The phrase 'proportionate means of achieving a legitimate aim' is open to a range of interpretation. Under the proposed reform of the GRA excluding, or treating differently, people with the protected characteristic of gender reassignment under the Equality Act will be seen increasingly as a disproportionate means and/or an illegitimate aim.

It is inevitable that the rights of people with different protected characteristics under the Equality Act (EA) will at some point clash, as illustrated by the recent case of Dr Mackereth[12] whose contract to train as an assessor for the DWP was terminated when he claimed his belief that gender is biologically determined meant he would be unable on the grounds of conscience to refer to a transgender person by their chosen pronoun. Dr Mackereth's own protected characteristic under the EA – religion and belief – was clearly trumped by gender reassignment, an example of the trajectory of preference already referred to.

There will be health professionals who will refuse to refer patients for gender reassignment surgery, or prescribe puberty blocking agents or cross-sex hormones, on conscience grounds believing that it cannot be in their patients' best interests. Their freedom of conscience should be respected and built in to any new law as a statutory right.

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.
Accurate record keeping and statistical analysis provide the basis for much medical research and health programming. Increasing the number of people whose biology does not match their registered gender will distort those data.

Civil partnership will now become available to opposite sex couples meaning that same sex partners could legally remain together following the decision by one of them to change their legal gender. In the event that the trans partner wishes to de-transition at some later stage, the partnership would

[12] Steve Bird. Government drops doctor who says gender given at birth. *The Telegraph,* 8 July 2018 https://www.telegraph.co.uk/news/2018/07/08/government-drops-doctor-says-gender-given-birth/ (accessed 30.07.18)

simply revert to the original civil partnership. Such partnerships should not be recognised as marriage which, in our opinion, is the lifelong, exclusive commitment to one another of a biological male and biological female.

Question 20: Do you think that there need to be changes to the Gender Recognition Act to accommodate individuals who identify as non-binary?

No.
Creating a single, third gender for 'non-binary' folk will not adequately represent what is a variety of perceived non-binary gender identities. (At one point new Facebook users were given a choice of over seventy gender options to choose from when they registered. It would be a step further away from the cultural binary norm of male and female that is written in to so much marriage law and other sex/gender specific legal provisions. The ramifications would be far-reaching.

Also it is unlikely that this will stop at only one non-binary category, as others will seek recognition of more and more of the expanding number of gender self-identifiers.

Of course, people who self-identify as non-binary should be treated with the same respect and dignity as any other, and enjoy the same individual rights and freedoms. We respect the government's intention to show solidarity with those who suffer from gender dysphoria but do not believe it is best served by attempting to create a separate, non-binary gender status.

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

Yes.
It may be possible to improve aspects of the existing law but the proposal to reform it based on self-declaration would, in our view, generate more problems than it might solve. Until very recently gender dysphoria was known as gender identity disorder[13] and required specialist expertise to make a correct diagnosis. Many in the medical profession believe that this change in label was ideologically driven rather than evidence-based and should not have been made. We are also concerned that:

- The GRA 2004 recognises that gender dysphoria often co-exists with other mental health issues. A specialist assessment is a sensible precaution. De-medicalising the process would deprive people of access to assessment and treatment of psychological problems that may complicate gender dysphoria or even be at the root of it
- removing the requirement for a minimum period lived in the acquired gender would have the effect of 'trivialising' the referral process and overwhelming the appraisal process
- the proposed self-declaration application process is effectively a registration process - self-declarations would be taken on trust and it is expected that such a process would reduce the potential for applications to be refused
- removing sensible 'barriers' to overly-easy transition will result in more people embarking on early medical transition with insufficient thought, more people living to regret

[13] The US Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-4, 1994) and the International Statistical Classification of Diseases (ICD-10, 1993), referred to cross-gender identification as 'Gender Identity Disorder'. In the Fifth Edition (DSM-5, 2013) the same phenomenon is described as 'Gender Dysphoria'.

irreversible changes to their bodies and seeking to de-transition or to litigate, and an overall increase in co-morbid mental health issues including suicidality. A review[14] of over 300 people who completed sex-reassignment surgery in Sweden over a 50-year period revealed suicide mortality almost 20-fold above the comparable non-transgender population. This already alarming figure would only increase under a self-declaration system

- a self-declaration system is more open to abuse by:

  i) biological males seeking to gain access to female-only safe spaces

  ii) predatory male paedophiles seeking more socially acceptable access to children as women[15]

  iii) those who would exploit it to gain unfair advantage in sport

  iv) those claiming a gender change in order to draw a pension earlier

- a self-declaration system would undermine the basis of good medical practice, namely that treatments should be evidence-based. Long term, high quality studies of treatment with puberty hormone blockers, cross-sex hormones and reassignment surgery have not been carried out. A generation of children is being exposed to treatment that is, in effect, experimental. The possible repercussions in terms of their health and litigation against the NHS are serious. Since Montgomery[16] the duty of doctors to ensure understanding and fully-informed consent by their patients has been further emphasised. This is clearly impossible to achieve in the absence of reliable evidence.

[14] McHugh P. Transgender surgery isn't the solution. *The Wall Street Journal*, June 12, 2014.
[15] Saunders K and Bass C. 2011. Gender reassignment: 5 years of referrals on Oxfordshire. *Psychiatric Bullentin,* 35:325-327.
[16] Montgomery (Appellant) v Lanarkshire Health Board (Respondent) [2015] UKSC 11 On appeal from [2013] CSIH 3