



Our Reference: 202000011206

21 February 2020

Dear Lucy Hunter Blackburn, Kath Murray and Lisa Mackenzie,

Thank you for your letter of 6 January 2020 addressed to Shirley-Anne Somerville, the Cabinet Secretary for Social Security and Older People, about the proposed reform of the Gender Recognition Act 2004. She has asked me to respond. I will take each of your questions in turn.

Q1. Is it Ministers' policy position to widen the range of people who will be entitled to have a GRC compared to the current position, and if so, in what ways?

A. In one respect, yes. The current minimum age for applying is 18 and the Scottish Government is proposing to reduce that to 16. There is a specific question on that in the consultation.

More generally, and as set out in the Ministerial foreword <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/1/> to the current consultation, since the Gender Recognition Act 2004 was put in place, trans people across the UK have had the right to legally change their gender through applying for a Gender Recognition Certificate.

The Scottish Government is proposing to amend the way in which a trans person can obtain that Certificate.

The eligibility criteria for applicants under the proposed new arrangements are set out under the draft Bill: <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/11/>.

The applicant will be required to make a statutory declaration that they have lived in their acquired gender before applying and intend to continue to live in their acquired gender permanently. This is along similar lines to current requirements on applicants to make a statutory declaration that they have



lived in their acquired gender and intend to do so until death: please see section 3(4) of the current Gender Recognition Act 2004: <http://www.legislation.gov.uk/ukpga/2004/7/section/3>.

The factsheet we prepared when the consultation issued outlined where the proposals differ from and where they are the same as the current system for obtaining legal gender recognition: <https://www.gov.scot/publications/proposals-to-reform-the-gender-recognition-act-2004/>.

Q2. Does acquiring a GRC give a person new legal rights of access to single sex services and occupations under the Equality Act 2010 (before any consideration is given to making specific arrangements to exclude GRC holders from these, as discussed in Chapter 5)?

A. A person who obtains a full GRC acquires a new gender and a new sex: section 9(1) of the 204 Act refers <http://www.legislation.gov.uk/ukpga/2004/7/section/9>. The exceptions in the Equality Act 2010 can be used to exclude trans people from single sex services and occupations, when this is a proportionate means of achieving a legitimate aim, as set out in Chapter 5 of the consultation.

Q3. Specifically, what is Ministers' understanding of the relevance of a person holding a GRC to the ability of the prison service to exercise its discretion over the accommodation of transgender prisoners, in the light of the outcome of R (on the application of AB) v Secretary of State for Justice (2009)?

A. The Cabinet Secretary for Justice answered an oral question in the Scottish Parliament on the housing of prisoners with a GRC on 16 January 2020. This can be found at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12459&mode=pdf> (columns 44 and 45).

Q4. What is the view of Ministers of the implications for third parties who are referring to a person who has a GRC of the judgment last month in the case of Forstater vs the Centre for Global Development?

A. It is not appropriate for Government to comment on a case which may be appealed.

Q5. What criteria do Ministers envisage the courts would use to decide whether a person has made a false declaration about having lived and/or intending to live in their acquired gender?

A. The judiciary are independent and the Scottish Government does not give guidance to the courts.

There are a variety of scenarios which might indicate that a false declaration has been made. These include:

- Where evidence is provided by a spouse or a civil partner that a false declaration has been made.
- Where the applicant boasts of having made a false declaration.

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Q6. What courses of action do Ministers understand would be open to a notary public who suspected someone was seeking to make a false declaration and do Ministers intend it to be possible to refuse to grant a GRC based on reported concerns about a possible false application?

A. The draft Bill provides (at section 14) that it is an offence to knowingly make a false statutory declaration. A notary public or justice of the peace who suspects a person is seeking to make a false declaration could draw the person's attention to the offence provisions and report the matter to the police. The notary public or the justice of the peace could also write to the Registrar General.

It would be possible for the Registrar General to refuse to grant a GRC if the Registrar General considered the application to be false. The draft Bill contains review and appeal mechanisms against a rejection of an application by the Registrar General.

Q7. How do Ministers envisage that cases of de-transition would interact with the provisions criminalising a false declaration?

A. The draft Bill provides that an applicant must make a statutory declaration that the applicant "intends to continue to live in the acquired gender permanently". Whether or not an offence has been committed would depend on the applicant's intention at the time of making the declaration.

The Scottish Government's understanding is that de-transitioning is rare. Evidence in this area is included in the draft EQIA included with the consultation: <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/18/> (please see points 7 to 9 under "Gender Reassignment" in Stage 2).

Q8. How do Ministers intend that "ordinarily resident" will be defined for the purpose of the Act, including whether they intend this to require any minimum period of residence in Scotland?

A. The term "ordinarily resident" is often used in legislation and is already used in the 2004 Act: please see, for example, section 3C(6) in relation to the alternative track: <http://www.legislation.gov.uk/ukpga/2004/7/section/3C> In general terms, to be "ordinarily resident" in a jurisdiction, a person must live in the jurisdiction, with only reasonably short periods (eg for holidays) away. There is no requirement to be resident for a fixed period of time, but the residence must be voluntary, for settled purposes and lawful.

Q9. Have Ministers undertaken any detailed analysis of the law, and its application in settings such as hospitals, schools and prisons in Ireland and other jurisdictions it considers to represent 'international best practice', including how far the GRC equivalent in these countries confers the same legal rights as a GRC in the UK?

A. On 29 November 2019, the Irish Minister for Employment Affairs and Social Protection laid a statutory report in the Irish Parliament on the operation of their 2015 Act and published the Irish Government's response to the recommendations of a Review Group: <http://www.welfare.ie/en/pressoffice/Pages/pr29112019.aspx>

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The report of the Review Group is at

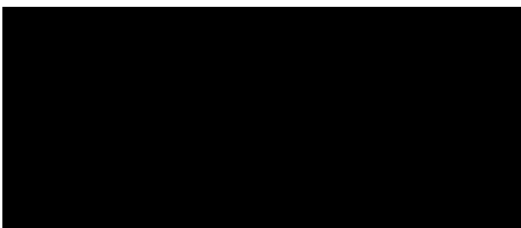
<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>. This report notes that “Once a gender recognition certificate is issued, the person’s preferred gender becomes the legal gender for all purposes, including dealings with the State, public bodies and civil and commercial society.” (See paragraph 1.1 of the report).

As paragraph 2.3 of the report notes, the initial model proposed for obtaining legal gender recognition in Ireland “was similar to the system operating in the UK at the time (Gender Recognition Act 2004) and which continues to operate there.” Changes were then made before the Bill was introduced and during the Parliamentary passage of the Bill so that in Ireland “For those aged 18 years or over an application for a gender recognition certificate is made on the basis of a statutory declaration.”

Therefore, the system in Ireland is modelled on the current system in the UK but is based around statutory declarations: that is similar to what is proposed for Scotland.

Ireland decided to use the concept of gender recognition certificates. Practice in other jurisdictions varies but it is common for legal gender recognition in other countries to involve changes to the entry in the birth register (ie changes to the birth certificate) with rights and responsibilities flowing from that.

Yours sincerely,



CLLS : Family Law

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