

Reform of the Gender Recognition Act 2004: Options and opportunities

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December 2021

This blog sets out a range of options for reform of the Gender Recognition Act (GRA) that meet the high level aims of several political parties, that is, to simplify the process and reduce its intrusiveness, particularly in relation to the required medical evidence. The package of options complements the findings of opinion poll we commissioned last month. The polling data shows where majority support lies in relation to gender recognition reform, and identifies areas for building consensus.

Introduction

In 2019 the Scottish Government [consulted on a draft GRA Reform Bill](#) to amend the existing Act to allow for a person to change their sex in law based on self-declaration alone, without any medical gatekeeping. The analysis of the response to the consultation is [here](#). Work on reform was then paused due to the Covid pandemic.

Ahead of the 2021 Scottish Parliamentary election, the SNP [manifesto](#) reiterated its commitment to reform, albeit in relatively general terms:

‘In the next parliament we will work with trans people, women, equality groups, legal and human rights experts to identify the best and most effective way to improve and simplify the process by which a trans person can obtain legal recognition – so that the trauma associated with that process is reduced. We remain committed to making necessary changes to the Gender Recognition Act that arise from this work at the earliest opportunity.’ [SNP Manifesto 2021: 31](#)

Appearing to recognise at least the potential for a conflict of rights and avoiding any clear commitment to reform based on self-declaration, the Manifesto continued “We will ensure that these changes do not affect the rights or protections that women currently have under the Equality Act”.

Following the Scottish Government and Scottish Green Party coalition agreement, the publication of [Shared Policy Programme](#) on 1 September 2021 also took a general position, stating that reform would “ensure the process by which a trans person can obtain legal recognition is simplified, reducing the trauma associated with that process”.

Until this point, the Scottish Government position appeared relatively open in terms of both the scope of reform and the space in which to develop this. As the pre-election manifesto commitment put it, to “work with trans people, women, equality groups, legal and human rights experts to identify the best and most effective way to improve and simplify the process”.

However, just one week later after issuing the Shared Policy Programme, in a move that significantly reduced the space for proper deliberation, the Scottish Government Programme for Government 2021-22 set out a commitment to reform based on self-declaration alone:

‘While the COVID-19 pandemic delayed our work to establish a more straightforward system for obtaining legal gender recognition, trans people should not have to go through a degrading, traumatic and intrusive process to be legally recognised in their gender. Within the next year we will bring forward the Gender Recognition Reform (Scotland) Bill, removing the current medical requirements and reducing the time that applicants for gender recognition need to have lived in their acquired gender from two years to three months. The changes will improve the lives of trans people, while ensuring the legislation doesn’t affect the rights and protections that women currently have under the Equality Act.’

[Scottish Government Programme for Government 2021-2022: 50](#)

The narrowing of reform options in this way is detrimental to consensus building in this heated and contested area of law. As we and others have previously argued, the self-declaration model proposed by the Scottish Government will open up [complex unresolved issues](#). It will also take the GRA process well beyond what currently commands public support. As polling data consistently shows, public support for retaining a medical approval for changing sex in law is far stronger than for a system based on self-declaration.

Ahead of the forthcoming Bill, and in the spirit of the original SNP manifesto commitment ‘to identify the best and most effective way to improve and simplify the process by which a trans person can obtain legal recognition’ this blog sets out an alternative package of options for simplifying the application process, without moving to a model of self-declaration. We suggest that some of parts of the current process could be removed in the interests of simplification, that some elements need to be retained for safeguarding purposes, and that in one area, there is scope to simplify further than the government has proposed.

More generally, the Act being brought forward for amendment is a chance to revisit its detailed provisions for the first time in nearly two decades, and an opportunity for MSPs to scrutinise the ramifications of legislation that at the time, passed quietly, with little public attention.

We understand that there will be those who oppose any reopening of the Act. The material below is offered against the current political background in Scotland, namely that: the Scottish Government has committed itself to bringing in legislation in this session; that [most parties](#) at Holyrood are committed to some sort of reform of the Act; and that under Section [29\(2\)\(d\) of the Scotland Act 1998](#), legislation passed by the Scottish Parliament cannot be “incompatible with any of the Convention rights”, meaning rights under the European Convention on Human Rights (ECHR).

Background: the Gender Recognition Act 2004

At the time of passing, the [Gender Recognition Act 2004](#) (GRA) was a completely new piece of legislation. It allows a person to change what sex they are regarded as having for most legal purposes, subject to certain exceptions, by acquiring a Gender Recognition Certificate (GRC). **To be entitled to a GRC, a person must meet certain criteria, mainly that they have a medical diagnosis of gender dysphoria and have lived in their “acquired gender” for at least two years. No surgery or other physical change is needed.**

Applications for a GRC are submitted to the Gender Recognition Panel (GRP). Scrutiny of applications by the panel is entirely paper based and does not involve any interview.

A GRC is sometimes described as simply enabling a change of birth certificate. This understates its effect. A GRC changes a person’s sex in any legal context where sex is relevant to a person’s rights or treatment, except in contexts where the law explicitly provides that a GRC has no effect or allows a GRC to be ignored under certain conditions. It also provides strong privacy protections. It is a criminal offence for someone who has become aware through any official role they have that a person holds a GRC to disclose this, except under limited conditions.

Over the course of several consultations, neither the UK nor the Scottish governments have set out clearly and fully what granting a person a change of sex in law means in practice. The two governments even disagree with each other about this. For example, [the UK government](#) believes prisoners identifying as transgender have a stronger right to be held in a prison matching their transgender identity if they have a GRC than if not, while the Scottish government thinks all transgender prisoners have the same right to this, subject to individual risk assessment, whether or not they have a GRC. Some of the tension round GRA reform comes from ongoing disputes over exactly what a GRC does.

Why does the GRA exist?

The European Court of Human Rights (ECtHR) has made a series of judgments in this area which place certain obligations on states signed up to the European Convention on Human Rights (ECHR). An updated list of relevant rulings is [here](#). **ECHR compliance matters more in Scotland than at UK level, because the Scottish Parliament is explicitly prevented from making law which does not comply with the ECHR.**

The GRA was brought in in response to ECtHR judgments related to the ability of a person to be recognised officially as a different sex from the one registered at birth. What obtaining such a change means in practice varies between countries. In some countries, unlike the UK, an official change in law is needed *before* changing any documents; in a few, it is needed just to change from using one first name to another (in Iceland until 2019, for example, there were separate approved lists of names for men and women).

At the time it was passed, the GRA went further than the ECtHR rulings required, by covering people who had made no physical changes. Since then, the ECtHR has ruled that access to a change of sex as officially recognised cannot be restricted to

those who have had surgery. It has however upheld the right of states to require a diagnosis of gender dysphoria (Nicot vs France, 2017).

Because of different legal starting points between nations, it is not always obvious what particular ECtHR judgements in this area related to one jurisdiction mean for the law in another. As a broad principle, however, the ECHR requires states to have in place certain arrangements to protect rights to family life and privacy in certain cases where a person wishes to be treated as if they had been born the other sex. It allows states to limit legal recognition to those who can show a medical basis, as long as that does not interfere with a person's right to 'physical integrity'. **The Scottish Government's last consultation stated that it believes the GRA as currently drafted meets the requirements of the ECHR.**

What is the evidence base for reform?

The evidence base for reform is very limited. During the last consultation, the Scottish Government confirmed it had not undertaken any systematic work to gather the views of those who had been through the GRC process. [An analysis of minutes of the user group](#) submitted to the Scottish government consultation did not find supporting evidence for the critical analysis of the process on which plans for reform were based. The government referred to other countries which had introduced systems for legal sex change based on self-declaration, but was shown to hold no information or evidence as to the practical effects and impacts of change elsewhere. FoI and PQ responses also showed that the Scottish government had not looked in any detail at how far aspects the current system might be deterring bad-faith actors from applying or screening out such applications.

Awareness and knowledge of the legal gender recognition process

A large scale non-representative [survey](#) undertaken by the UK Government in 2017-18 did however find substantial confusion and misunderstanding about the requirements of the GRC application process among respondents who identified as transgender and did not have a GRC. Of this group, 81% said they "were aware" of how to apply for a GRC, although this was often incorrect. For example, of those who stated that they were aware of the process, 15% wrongly thought surgery was required, and 43% wrongly thought it required an interview with the panel. Most but not all (80%) correctly identified the gender dysphoria diagnosis, 77% correctly identified the evidence of two years lived in the acquired gender, and 68% correctly identified the statutory declaration. The Scottish Government presented some figures for the Scottish responses to this survey in its consultation (p161). Though nothing was provided on levels of understanding, the main three reasons for not applying for a GRC were reported. These were it being "too bureaucratic", cost and respondents not meeting the requirements.

Ten options for modernising the Gender Recognition Act

Looking at how the Act might be modernised, a system based on self-declaration is not the only option, nor indeed should it be. Good law-making requires legislators and officials to scrutinise different options and to weigh up the respective risks and advantages. Approaching reform in this way may also help to diffuse some of the tension in this area and to build consensus.

We think that some elements of the current scheme could be removed, in the interests of simplification, and that some elements need to be retained. Crucially we also think that compensating new safeguards are needed, to reduce risks in the scheme's operation, and to help build public confidence in the legislative process. Lastly, we suggest options around cost and improving knowledge and understanding of the application process.

1. Simplification: remove the Gender Recognition Panel

Removing the panel from the process would simplify it. The panel was originally included as a safeguard against bad-faith actors and to protect those who might be harmed by acquiring a GRC prematurely. It is not clear how far in practice the panel has added value in either respect, as neither the UK nor the Scottish Government has done any work to evaluate this. Case law has however shown the Panel to have limited powers to prevent a person receiving a GRC: [in one case](#) where the panel rejected an application because it was not happy with the evidence provided, this decision was overturned in the courts, on the grounds that the panel had acted beyond its powers.

2. Simplification: remove evidence of physical medical treatment

No physical treatment is required in order to obtain a GRC. However, section 3(3) of the 2004 Act requires applicants to provide a detailed description of any treatment making physical changes or any such treatment planned: we have written about this at more length [here](#). This is the most obviously intrusive evidence required. It is also an illogical requirement, given that no physical changes are needed to obtain a GRC.

Removing this requirement would substantially simplify and de-medicalise the application process.

3. Simplification: remove “Living in acquired gender” requirement

The Act currently requires a person to have “lived in the acquired gender” for at least two years. This was included in 2004 as a way for people to demonstrate their long-term commitment. In practice, this is interpreted by the panel simply as needing to produce documents that show that a person has changed their name (and where relevant M/F marker) in contexts where no GRC is required. Examples suggested include driving licences, passports, bank accounts, pay slips, utility bills and personal correspondence: applicants are encouraged to provide 5 or 6 examples (see Section 5 [here](#)). The earliest document must go back at least two years (see [here](#)).

The idea that people “live” in a specific “gender” is objectionable to many women as reinforcing stereotypes and reducing what is meant to be female to clothes,

appearance, names and pronouns (some of those in favour of reform criticise it on the same basis).

The proposal set out in the Programme for Government states that a person would need to self-declare that they had lived in their acquired gender for three months; it would be left to individuals to decide what counted as doing so. There would then be a 3-month waiting period to formalise the change, in which they were expected to continue to live in the acquired gender, again as they defined. During the last consultation, the Scottish government was unable to explain further what this meant or how a false declaration about this would be evidenced. A similar problem of inability to provide a definition of “living as a woman” has become apparent in relation to the Gender Recognition on Public Boards Act 2018.

The reduction to a three-month period removes any value this provision previously might have had in showing serious prior commitment, as does leaving applicants to determine what living in the acquired gender means. As a safeguard against bad-faith actors, this is unlikely to be any obstacle.

As a separate issue, some people may make rushed decisions they later regret. To reduce that risk, there could still be a delay between initial application and granting the change, in the form of a single period of delay of some length, perhaps the overall six months in the Scottish government model, between application and granting a GRC.

4. Safeguard: retain diagnosis of gender dysphoria

The Act requires applicants to demonstrate they have a diagnosis of gender dysphoria. As stated in the Programme for Government, the Scottish Government plans to remove this in its forthcoming bill.

Retaining the need for a diagnosis respects the rationale for the 2004 Act, which was introduced to provide practical assistance to people with a specific, objectively assessed need and who were expected to feel the need to make significant practical changes to how they present. Self-declaration would by contrast open a change of legal status to a much larger and more varied group. A FoI response during the last consultation showed the Scottish Government had done no modelling of the potential impact of removing this criterion on the number and nature of GRC holders. Keeping this element also removes cross-border issues raised by the last consultation, which would follow from GRCs being much more easily obtained in Scotland, including by those living here only for a short period and those born here but living in other parts of the UK. Retaining an objective third party input also provides the most substantial check against abuse of the process by bad-faith actors.

A new criminal offence of providing fraudulent evidence of a diagnosis (by the applicant or the provider) could be considered as a new safeguard. This could offset the hard-to-assess effect of removing the role of the panel and the two-year prior period of name and document changes. It is only possible to add this counter-balancing safeguard if the diagnosis element is retained.

5. Safeguard: remodel the statutory declaration

The 2004 Act requires a solemn oath of intent to live in acquired gender until death. The Scottish Government's previous draft bill kept this and proposed making a false declaration a criminal offence.

The statutory declaration is problematic on several grounds. First, it is not clear how false intent would be demonstrated. The Scottish Government has not provided any direction on this, other than to suggest that this could be directly disclosed. The declaration also hinges on the 'acquired gender' requirement, which as outlined above is controversial and could be feasibly dropped from the application process (see no. 3 above). The idea of living in an acquired gender until death raises legal questions in relation to detransition and how a person who wishes to detransition would not be liable to having made a false declaration (see further no. 8 below).

The declaration could be remodelled as a statutory commitment, under which a person must change the sex marker (and name if applicable) on existing identity documents (such as a passport or driving licence) to match their new legal identity within a specified period (for example, within 12 months). This would demonstrate commitment to the gender recognition process, without the complication of a statutory declaration based on subjective identity, and help to safeguard against bad-faith actors by lowering the risk of a person taking advantage of acquiring a new legally protected and documented identity while also retaining some identity documents with the original sex markers/names unchanged.

6. Safeguard: review privacy provisions

The current Act has extensive privacy protections. Criminal offences are created for revealing that a person has a GRC, if that information was obtained in an official role. There are some limited exceptions. A change recently passed for England and Wales using regulation making powers in the Act has added the management of offenders to the range of purposes for which information can be shared. This change has not so far been made for Scotland.

The Scottish Government has previously acknowledged that the scope of these provisions is misunderstood and suggested some further guidance might be offered. The law and guidance both need re-examining, to be sure of avoiding indefensible situations and undermining confidence in the Act. These provisions have been reported to have been used, for example, to tell prison staff that they must deny to women prisoners that another prisoner who they accurately perceive to be male is male. [NHS Lothian](#) has advised that it is not possible to guarantee a female healthcare provider to someone who requests one, with reference to these provisions. The current provisions were designed for a situation where GRC holders were expected mostly to "pass" unless their GRC status was revealed. This is not a legally enforceable expectation, however, and increasingly it is rejected by campaigners for GRA reform as a reasonable social one.

There are no criminal penalties for false declarations in relation to the possession of a GRC. Introducing these would be a protection against individuals falsely claiming this status, as a further means of protecting public confidence in the law here.

Even reviewed, these provisions are still likely to leave obtaining a GRC attractive to some individuals wanting to conceal their identity for any purpose. This could include

those with a history of serious fraud or bankruptcy. The wide attraction of these privacy protections to those wishing to conceal their identity for any reason is a further reason to retain the requirement for an objective medical diagnosis as a safeguard.

7. Safeguard: introduce criteria for ineligibility

The Act does not place any restrictions on who can obtain a GRC, as long as they meet its general requirements, nor were any such restrictions proposed in the previous draft Bill.

As a protection against bad-faith actors, and a way to provide public reassurance, those currently on the [sex offenders register](#) could for example be precluded from applying for a GRC. This would provide a straightforward safeguard against abuse of the process by a high-risk group, increasing public confidence about safeguards in relation to misuse.

8. Safeguard: provide for detransition

There is no provision in the existing Act for detransition, nor did the Scottish Government previous draft Bill contain any such provision. This feels like a significant omission that fails to account for vulnerability within the potential pool of applicants.

The Irish Gender Recognition Act includes a provision for undoing a GRC, which involves a further formal process. Some provision on these lines could be added in Scotland. It would however also need some safeguard against encouraging impulsive applications (if the process is seen as too easily reversible) and against deliberate temporary switching for identity concealment, or other ill-intention.

9. Fair access: retain cost at £5 or remove entirely

The cost of applying for a GRC is set in regulations made under the 2004 Act. Since the last Scottish Government consultation the cost has been reduced across the UK, from £140 to £5, which appears to already have prompted a doubling in the number of applications.

‘126 more applications were received by the [Gender Recognition Panel] GRP this quarter, compared to April to June 2020, and the 212 applications is the highest number seen in any one quarter since 2009... GRP receipts have increased annually since 2017/18 and we expect this trend to continue following a reduction in the application fee in May 2021.’

[\(Tribunal Statistics Quarterly, April to June 2021\)](#)

As anticipated, this trend continued from July to September 2021, with a further rise:

‘GRP applications received this quarter rose to 222, an increase of 73 compared to July to September 2020. This is the highest number seen in any one quarter since 2009.’ [\(Tribunal Statistics Quarterly, July to September 2021\)](#)

The Scottish Government may wish to retain the current £5 fee or remove this entirely.

10. Fair access: improve understanding of the application process

Good law should be sufficiently accessible and easily understood. Given strong evidence that the current system is often misunderstood, a new duty could be placed on the Registrar General to take appropriate steps to promote understanding of how the system works.

Conclusion

There is scope to develop a package of reform which simplifies the GRC process, removes the most intrusive medical evidence requirement and avoids cross-border complexities. It would also be consistent with public opinion, which in repeated polling over several years has persistently shown much stronger support for retaining a medical approval element for obtaining a GRC than for moving to self-declaration. Our own recent polling shows this to be the case even among those who agree that people should be able to freely express their transgender identity.

Conversely, the approach proposed in the last Scottish Government consultation would open up the process well beyond its original intended purpose, remove all existing substantial safeguards against misuse, and take the law in this area well past the point of commanding solid public support.