

Consultation on Reform of the Gender Recognition Act

Women's Budget Group response to the Government Equalities Office

October 2018

INTRODUCTION

The Women's Budget Group is an independent network of leading academic researchers, policy experts and campaigners. Our vision is for a caring economy that promotes gender equality. We produce robust analysis and aim to influence people making policy. Our membership is open to all.

WBG believes that everyone should be able to live their lives with dignity and free from discrimination, harassment, abuse or violence. Both women and trans people face unacceptably high levels of discrimination, harassment, abuse and violence. WBG believes that it is the responsibility of all of us to challenge this.

WBG does not have policy or expertise on the Gender Recognition Act (GRA) or the process needed to obtain a Gender Recognition Certificate (GRC). However, we do have a long history of supporting the funding of specialist women's services, particularly for the survivors of domestic and sexual violence, including specific services for BME and disabled women. We think that the Equality Act exemptions are important in allowing such services to be provided; changes to the Gender Recognition Act need to be considered in relation to these provisions.

We are therefore confining our submission to the relationship between the GRA and the exemptions in the Equality Act which allow for single sex services (questions 13 and 14 in the consultation) and the ways in which changes to the GRA might affect these provisions. We also highlight the importance of data in action to tackle in equality. Our submission ends with some concerns about the way in which the public debate on this consultation has sought to limit women's participation in it.

We think that the relationship between the Gender Recognition Act and the Equality Act requires clarification. Under the Equality Act single-sex services (including communal accommodation) are legal in a number of specific circumstances where this is a proportionate means of meeting a legitimate aim (for example if survivors would not access a service if it was not single sex). Employment of someone of a specific sex may be legal where it is an occupational requirement and a proportionate means of meeting a legitimate aim.

The Equality Act allows for discrimination on grounds of gender reassignment in provision of single sex services if this is a 'proportionate means of meeting a legitimate aim'. However, it is not currently clear if this exemption applies where a trans person has a Gender Recognition Certificate.

The WBG recommends that the Government considers the relationship between the Gender Recognition Act and the Equality Act carefully and in making any changes to the GRA is mindful of the need to reduce ambiguity and provide clear guidance (with examples) on how the two interact.

WHY SPECIALIST WOMEN'S SERVICES ARE IMPORTANT

Research by the Women's Resource Centre found that the majority of women valued women only services. In a survey of 1000 women:

- 97% said that women should have a choice of women only support services if they had been a victim of sexual assault
- 90% believed that women should have the right to report sexual or domestic violence to a woman.
- 87% thought it was important to be able to see a female health professional about sexual or reproductive health matters;
- 78% thought it was important to have the choice of a woman professional for counselling and personal support needs¹

A study of women only services commissioned by the Equality and Human Rights Commission found that for the majority of service users the women only aspect of the service was important in their decision to attend. Reasons for this included safety and security, building trust and confidence, peer support and the ability to talk freely about the issues facing them. These were particularly important for ethnic minority service users.²

Some women's organisations provide services to trans women. In addition, there are organisations that provide a universal service but retain women only space. Some women's organisations do not but refer onto specialist organisations. Of those organisations that do support trans women many offer some services, but not all, in order to ensure that other survivors feel safe accessing services. This might include providing support in the community and self-contained accommodation to trans women survivors of domestic violence, but not accommodation in shared refuges; or providing help line support and one to one counselling to trans women survivors of rape or sexual abuse, but not group therapy. This balances the needs of trans women with the needs of other survivors. The law allows for this.

THE LAW

Gender Recognition Act

The Gender Recognition Act allows for a transgender person to be granted a Gender Recognition Certificate (GRC) if they are: over 18, diagnosed with gender dysphoria, have lived as their new gender for 2 years and intend to continue to do so and apply successfully to the Gender Recognition Panel. There is no need for the transgender person to have had surgery. In such cases:

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman (GRA 2004 9.1)

This means that there are two ways to be a woman in law: to be born female, or legally through being granted a GRC.

¹Women's Resource Centre, 2007, Why Women Only? Available on line at <http://thewomensresourcecentre.org.uk/wp-content/uploads/whywomenonly.pdf>

² EHRC, 2012, The impact of changes in commissioning and funding on women only services, <https://www.equalityhumanrights.com/sites/default/files/research-report-86-the-impact-of-changes-in-commissioning-and-funding-on-women-only-services.pdf>

Equality Act

The Equality Act protects people with the protected characteristic of gender reassignment, with or without a GRC, from discrimination, victimisation or harassment. A person has the protected characteristic of gender reassignment if the person 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. (Equality Act 2010 7.1)

This means that it is illegal to discriminate against someone because they are trans. However, a trans person without a GRC remains legally their biological sex. That means that a trans woman without a GRC remains legally a man and a trans man without a GRC remains legally a woman. This was clearly established in the case of Green (a trans woman without a GRC) where the High Court ruled that the correct comparator for discrimination on grounds of gender reassignment under the Equality Act was a man since Green did not have a GRC (*R (Green) v Secretary of State for Justice* [2013] EWHC 3491). This only applies to discrimination. The two other prohibited behaviours under the equality act, harassment and victimisation, do not require a comparator.

Single sex services

The Equality Act allows for the provision of single sex services where it is a proportionate means of meeting a legitimate aim and one or more of a series of conditions are met. These are: only one sex has need of the service, a joint service would be less effective, the service is in hospitals or for people requiring special care, supervision or attention, the service is provided for more than one person at the same time and a person of one sex would reasonably object to the presence of a person of the other sex, or the service requires physical contact and the person receiving that service would reasonably object if the other person was of the other sex (Equality Act, Schedule 3, part 7, 27).

The Equality Act allows for discrimination on grounds of gender reassignment in provision of single sex services if this is a 'proportionate means of meeting a legitimate aim' (Equality Act, Schedule 3, part 7, 28). The explanatory notes to the Act give the following example:

A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.³

The Equality Act also allows for certain jobs to be restricted to one sex if this is a genuine occupational requirement. (Equality Act, Schedule 9, 1) This can include specifying a women-only job is not open to transwomen as one of the examples in the explanatory notes for the Act makes clear:

A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.⁴

³ Explanatory notes to the Equality Act Schedule 3

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/20/7/5>

⁴ Explanatory notes to the Equality Act Schedule 9

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1>

How does the GRA relate to the Equality Act?

At present the law covering single sex specialist services and gender transition is complex and not well understood, being interpreted by campaigners and service providers in widely differing ways. This is partly because situations that need to be clarified are covered by two Acts. In addition, what people believe the law says can be as important as what the law says: it is important that clear guidance is produced and widely circulated and that inconsistencies between Equality and Human Rights Commission (EHRC) guidance and the Government Equalities Office (GEO) position are addressed.

The Government should aim to make legal responsibilities clear in the legislation and guidance they produce, rather than expect case law to iron out the ambiguities. Although the WBG recognises the difficulties of determining – in law and in practice – the boundaries for single sex services given the process and stages involved in transitioning, expecting small organisations, and individuals needing services to test the law through time-consuming, costly and distressing court cases is not a good way to proceed. Where at all possible, ambiguities should be ironed out within the text of the Acts themselves.

When the Minister, the Rt Hon Penny Mordaunt MP, launched the Government's consultation on reforming the Gender Recognition Act she said that the Government 'have no intention of reforming the Equality Act or the rules around women's spaces'⁵.

However, the WBG has found through its network contacts that there is widespread confusion and lack of information about the Equality Act exemptions, meaning that many service providers and commissioners do not know what the law does and does not allow. Some commissioners do not believe that single sex services are lawful at all. Many do not appear to be aware of the exemptions for gender reassignment.

Campaign groups on all sides of the debate around reform of the GRA have widely differing interpretations of the law. Government and EHRC guidance for service providers do not include the examples given in the explanatory notes to the Schedule 3 exemptions and Schedule 9 exemptions; this means that many people are not aware of the sort of situation that the exemptions were intended to cover. **Issuing new guidance that included these examples would help clarify the current legal situation.**

In addition, it is not clear whether the Equality Act exemptions for single sex services apply to trans people with a Gender Recognition Certificate. (The example given in the explanatory notes to Schedule 9 makes it clear that the exemption for genuine occupational requirements apply whether or not a person has a GRC).

The GRA states that someone with a GRC legally becomes their acquired gender and that if that gender is female that person's sex becomes that of a woman. Arguably this would mean that a trans woman with a GRC should be permitted into a single sex women-only service. Until this month, this was the advice of the EHRC in their guidance on the Equality Act:

Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes and therefore should not be excluded from single sex services.⁶

⁵<https://www.gov.uk/government/speeches/launch-event-lgbt-action-plan-2018>

⁶EHRC, 2014, What Equality Law Means for your Business, (p15) available on line at:

https://www.equalityhumanrights.com/sites/default/files/what_equality_law_means_for_your_business.pdf

Clearly if the Equality Act exemptions do not apply to trans people with a GRC and the Gender Recognition Act is changed to make it easier to get one, then this will have an impact on how women's organisations provide single sex services.

The EHRC has very recently updated their guidance, removing the paragraph above and replacing it with:

Transsexual people should not be routinely asked to produce their Gender Recognition Certificate (if they have one) as evidence of their legal sex. If a business requires proof of a person's legal sex, then their birth certificate should be sufficient confirmation.⁷

EHRC guidance now contains no reference to whether or not the Equality Act exemptions apply when someone has a GRC. The earlier guidance is still available on the EHRC website, which is likely to create confusion among businesses and service providers.

An alternative view is that there are two grounds on which a women-only service can exclude or offer a separate service to certain groups so long as it is a proportionate means of meeting a legitimate aim. The first is sex (Equality Act, Schedule 3, part 7, 27). This would apply to men and transgender women without a GRC since they remain legally male. The second is gender reassignment where a service is lawfully single sex (Equality Act, Schedule 3, Part 7, 28). This would apply whether or not someone has a GRC. This appears to be the position of the GRA consultation document which states that:

Trans people with a GRC can still be excluded from single sex services, or provided with a different service if it is proportionate to do so on the facts of the individual case.⁸

The different advice from the EHRC and the GEO and the absence of case law in this area means that providers are uncertain about what a change to the GRA would mean for single sex services. Concerns from some women's organisations and feminist groups about reform of the GRA centre on this uncertainty and greater clarity in this area could help address these concerns.

If the Government's intention is to retain the Equality Act exemptions for single sex services when reforming the GRA, the most straightforward way to do this would be to specify that these exemptions still apply when someone has a GRC in the actual text of the revised GRA.

The Women's Budget Group urges the Government to spend sufficient time in drafting both the changes to the Gender Recognition Act and the accompanying guidance to minimise the room for uncertainty and further confusion over these matters.

DATA

Both sex and gender reassignment are protected characteristics under the Equality Act 2010 in recognition of the disproportionate discrimination, harassment and violence faced by both women and trans people. The Equality Act includes an obligation on public bodies to collect data on protected characteristics so that these bodies can meet their obligations under the Public Sector Equality Duty.

⁷ EHRC 2018, What Equality Law Means for your Business (p17)

<https://www.equalityhumanrights.com/sites/default/files/what-equality-law-means-for-your-business-2018.pdf>

⁸ GEO, 2018, Reform of the Gender Recognition Act - Government Consultation (p45), available on line at https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/user_uploads/gra-consultation-document.pdf

WBG relies on sex disaggregated data in order to be able to carry out our analysis of the economic and social impacts on women of public policy and economic developments. Our experience is that progress on equality has been built on the collection and analysis of data that can identify patterns of discrimination faced by specific groups.

There is a lack of robust data on the number and situation of trans people in the population. WBG therefore welcomes the proposal from the ONS to include a question about gender identity in the 2021 census which will go some way towards filling this gap. We also believe that it is important for public bodies to collect data on trans service users or employees as part of their wider data collection in order to meet their obligations under the Equality Act. This needs to be done in a way that respects people's right to privacy and is sensitive to the reasons why people might not choose to disclose this information.

It is also essential for public bodies to continue to collect data on sex, as a protected characteristic under the Equality Act. For example, health authorities, education authorities and other public bodies require data on the number of female people of childbearing age in the population in order to predict demand for maternity, education and children's services, regardless of how those people identify. There is still a shortage of sex disaggregated data in many areas, and of intersectional data. For example, a majority of incidents reported to Tell Mama are perpetrated by white men against visibly Muslim women and offer evidence of both sexist and racist attitudes. Data on violence show that disabled women suffer five times the rate of sexual violence in comparison with disabled men.^[1] This indicates that disabled women suffer more significant levels of harm. Without statistics that are routinely disaggregated by sex and other characteristics (for example, disability, race and age) we cannot know the full extent of discrimination or harm in order to tackle it.

Some public bodies have combined questions relating to sex with questions relating to gender identity, for example asking 'what gender do you identify as?' and then giving the choice of male, female, transman, transwoman etc. This does not allow for accurate data to be collected on either sex or gender identity. Without this data it is difficult to make visible the discrimination faced by either women or trans people, which is important if discrimination is to be tackled.

The GEO should publish guidance for public bodies on the need to collect data on both sex and gender reassignment.

WOMEN'S VOICES IN THE GENDER REASSIGNMENT DEBATE

The Women's Budget Group has been dismayed by the manner in which debate in this area has become increasingly polarised since the Government announced it was reviewing the GRA. We are pleased that the GEO has acknowledged this in the consultation document and stated that "abuse or hurtful comments are not acceptable".

We believe that it is important in a democratic society that everyone should be able to take part in political discussion without facing harassment or violence for stating their views. Both women and trans people regularly suffer harassment, particularly on-line, when taking part in political discussions and we agree with the GEO that this is not acceptable.

In addition to the on-going harassment experienced by both women and trans people there have been concerted attempts from some activists to prevent meetings to discuss the potential impact of

^[1]Women with a long-term illness or disability are more likely to be victims of sexual assault in the last 12 months than those without (5.3% compared with 2.7%). There was no significant difference among men (1.0% compared with 0.8%).

changes to the GRA from taking place. This has included harassment of venues until meeting bookings are cancelled, pickets blocking access to venues and both on-line and real-world harassment of those organising, speaking or attending meetings. The Women's Budget Group believes that any person should be able to take part in discussion about proposed changes to legislation without fear of harassment or violence. We are especially concerned about attempts to silence women's voices on this matter and fear that divisions are being created that will hamper achieving progress on tackling discrimination in all its forms.

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For more information about our work visit our website at wbg.org.uk

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