

FiLiA

Questions

1 Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Yes

If yes, please outline these comments.:

FiLiA contests that anybody can live “in a gender” without recourse to sexist stereotypes. We do however agree that a period of social transition (not just reflection) is a good indication of the commitment an applicant is making prior to taking medical or legal steps. We think that the current period of two years is reasonable.

FiLiA would welcome clear guidance on what type of evidence would meet the requirements, so that applicants are sure of what is needed. At present it is far from clear as to what the Scottish government would regard as satisfactory evidence of living “in a gender,” which is crucial as there are criminal penalties attached to making a false declaration. The Scottish government will need to clarify exactly what is meant by this, without endorsing regressive stereotypes.

2 Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

Yes

If yes, please outline these comments.:

FiLiA is conscious that there are a group of 'detransitioners' currently pursuing judicial review proceedings on the basis that they were encouraged into transition too quickly and too young. This scenario is distressing to those who experienced it, and to a lesser degree, to the medical practitioners who find they have inadvertently done harm and face scrutiny through the courts. A three month reflection period is inadequate and will only lead to more people in this situation.

Three months is very little time for a person to reflect beyond the initial euphoria that may attach to finding a perceived solution, and this is particularly so when the age limit is reduced to sixteen.

3 Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

No

If you wish, please give reasons for your view.:

Research suggests that it is not until a person is 25 that they reach full brain maturity, and that adolescents are particularly prone to risk-taking or impulsive decisions which may not be in their long term interests. FiLiA is also aware that the majority of those who experience gender difficulties in adolescence go on to be lesbian, gay or bisexual rather than transgender, and their interests must also be taken into consideration.

Young people struggling with gender identity should be supported through measures which guarantee access to the best possible health care, support through education and in employment, and facilitated in preparing for successful and fulfilling adulthood, which may or may not include a legal change of sex as an adult. The immediate challenges of young people across the transgender spectrum are more likely to be met by proper funding for CAMHS than a new birth certificate. A change of legal sex is an administrative measure which is not a substitute for opportunities in employment, education, health and social care.

4 Do you have any other comments on the provisions of the draft Bill?

Yes

If yes, please outline these comments.:

1. The Gender Recognition Act (“GRA”) was designed for those with dysphoria. It emerged from the case of Christine Goodwin, who took the UK government to the European Court of Human Rights, arguing that the government's failure to recognise her in law as a woman breached Article 8 ECHR. She had suffered discrimination, including being unable to marry her male partner, difficulties caused by an unequal pension age, and detriment caused by her birth certificate showing her as male, which outed her as trans whenever she was compelled to show it. The government maintained that the interference with her private life was proportionate. The Court upheld the complaint, pointing out at §87 that there was no threat of “overturning the entire system” given that the number of transsexuals in the UK was estimated at only 2,000 – 5,000, and at §91 that although there would be legal repercussions these were not insuperable “if confined to the case of fully achieved and post-operative transsexuals.”

2. What is proposed now is some considerable distance from Goodwin. Applying the Stonewall glossary definitions, the term transgender describes anybody whose innate sense of their own gender does not correlate to the culturally determined expressions associated with their sex at birth. In other words, anybody who does not feel affinity with the gender expectations attached to their sex can be understood as transgender. It is not restricted to those who experience dysphoria and wish to make a complete transition, meaning that those who make no changes would still be entitled to be treated as a member of the opposite sex. The consequences of this would be to elide the protected characteristic of sex and replace it, in practice if not in theory, with an internal, unseeable, unknowable sense of gender.

3. It also presumes that everybody does have an innate gender identity – which FiLiA disputes.

4. This is extremely different to the purpose envisaged in Goodwin which was to address the needs of a small group of those with dysphoria.
5. The proposals upon which the Scottish government is consulting therefore envisage that a GRC, and thereby the protected characteristic of sex, should be granted through simple statutory declaration, to a vastly wider group than was contemplated by the original GRA, including to those who are not transsexual but may be cross dressers or gender fluid.
6. Human rights analysis involves the balancing of competing rights. What is considered a proportionate means of achieving a legitimate aim for a small, identifiable group will not always be the same as one for a larger, more elusive group.
7. Statutory declarations are treated with inadequate respect: for example, motorists who use a statutory declaration to maintain they did not receive a NIP for speeding. The archaic format of the Statutory Declarations Act 1835 relies upon the signatory being afraid of divine consequence or earthly justice for perjury, neither of which always apply in a more cynical age. It is unlikely that public confidence in the integrity of the system would be maintained through a statutory declaration.
8. While sexism persists, single sex spaces are not obsolete. They must be provided for those who need or want them. It would be reasonable for shelters, refuges, rape crisis centres and other women's sector providers to choose whether to provide a single sex service, and for a proportion of funding to be ring-fenced for those who provide a single sex service.
9. The Scottish government endorses single sex services and maintains that no changes will be made to them. It must be made explicit within the revised Act that the acquisition of a GRC will not change sex 'for all purposes' and that the single sex exemptions provided by ss.27 – 28 to Schedule 3 of the Equality Act are retained. At present this is not clear and it is unfair both to service users who may feel wrongfully excluded and to service providers who lack confidence in exercising perfectly lawful exemptions.
10. We are strongly in favour of protections in law for gender expression. Nobody should be penalised for presenting outside the social conventions attached to gender. However, we are also conscious that from a women's rights perspective, gender is a tool of oppression.
11. We are aware that many respondents to this consultation are working from the starting point that everyone has an innate sense of gender, which is the determining force in a person's identity as a man or woman (or neither).
12. If gender identity is innate, then the cultural norms attached to the female sex, which we call gender, and which have historically served to oppress women, are innate. A philosophy which seeks to ascribe women's oppression globally and historically to something innate within them – whether that is wandering wombs, or phrenology, or evolutionary psychology – has never ended well for women. We should be extremely slow to codify in law such a perspective.

13. We would make the following suggestions

a) That the status quo be maintained as regards the acquisition of a new legal sex;

b) That the concept of an innate gender identity be protected within the scope of Articles 9 or 10 HRA, in that all must be free to believe or disbelieve that they have such an internal sense of gender, and to express that identity. This must be taken seriously, if necessary through separate law or guidance guaranteeing the rights of the gender-non-conforming and all of those within the broad transgender umbrella, as well as those who feel that they have no gender;

c) That single sex provision is guaranteed to those women who want or need it. Our suggestion is that service providers in the women's sector are able to choose whether their provision is available as a single sex service, and that government ring-fence a certain amount of that provision for single sex services;

d) That public confidence in the process is not undermined by the increase in sex offenders identifying as transgender. FiLiA would suggest that a suitability requirement is introduced (akin to the citizenship application process). This would mean that applicants who have a conviction for a specified crime of male violence against women falling within the CPS definition of VAWG would be barred from acquisition of a GRC until the end of the rehabilitation period specified in the Rehabilitation of Offenders Act 1974;

e) That any revision of the GRA recognises that sex and gender are not coterminous.

5 Do you have any comments on the draft Impact Assessments?

Yes

If yes, please outline these comments.:

1. The EIA in its current form is inadequate.

2. In terms of age, younger and older people with intimate care needs must be entitled to a same sex carer if that is their wish (or that of their parent, in the case of a child). Any reform to the GRA must make explicit that a GRC does not change a person's sex for the purposes of a Genuine Occupational Requirement in such a context.

3. In terms of disability, intimate care needs arise. People with learning disabilities may struggle to cope with social conventions around misgendering. Women with PTSD arising from male violence must retain a right to a single sex recovery space. The needs of young people on the autistic spectrum must be properly considered and their vulnerability to social pressure taken into account.

4. In terms of race, religion and belief, the rights of cultural groups for whom single sex spaces / modesty are important, must be upheld. While many people believe

that they have an innate gender identity, many others have an equally deeply held belief that they do not have such an innate identity and that gender is a social construct which is harmful especially to women. Those beliefs must both be protected and one should not be given primacy over the other.

5. In terms of sex, the Scottish government maintains that there will be no impact on sex based protections because these will be maintained in the Equality Act 2010. At the moment the Scottish government considers that exclusion of trans service users from single sex services is permissible under the Equality Act on a user by user basis. (It is unclear whether this is legally correct but given the relatively small number of those with a GRC, it is currently workable.) However, the EIA also confirms that the overwhelming majority of those trans respondents who did not have a GRC said that the reason they did not have one was they did not meet the requirements. If the Scottish government proposes to abolish those requirements in order to bring those people within the scope of the GRC regardless, the user-by-user approach is no longer proportionate, and services must be permitted to take a service-by-service approach instead.

6. In terms of sexual orientation it is fundamentally homophobic to deny that sex based attraction exists. While some in the LGBT community will regard themselves as being attracted to multiple genders (not sexes) it is crucial that the rights and needs of those who experience same sex attraction are not overlooked or disdained as old-fashioned. It is inadequate for the EIA simply to dismiss this concern as it does, with "Government does not lay down who a person should enter into a relationship with. That is a personal matter for the couple." The Government must proactively protect homosexuals from discrimination and victimisation.