

## Howard League Scotland

### 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?**

No

**If yes, please outline these comments.:**

**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?**

No

**If yes, please outline these comments.:**

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

Don't know

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

Howard League Scotland (HLS) does not wish to answer this question, which falls outwith the scope of its work.

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

Yes

**If yes, please outline these comments.:**

The Bill mainly deals with the process of obtaining a Gender Recognition Certificate (GRC): Howard League Scotland (HLS) does not wish to comment on that issue, which falls outwith the scope of its work. HLS's concern is not with the process of obtaining a GRC, but with the legal effects and implications of having a GRC that bear on penal policy and practice - in particular, with the implications for the way in which the Scottish Prison Service (SPS) can decide on the treatment of transgender people in prison.

The Equality Act 2010 forbids discrimination on the grounds of a 'protected characteristic': protected characteristics include, inter alia, 'gender reassignment' and 'sex'. However, the 2010 Act also allows a number of 'exceptions'. Thus Schedule 3 para. 28 allows trans people to be treated differently in relation to the provision of services (e.g. single sex services), and Schedule 23, para. 3 allows them to be excluded from 'communal accommodation ... which for reasons of privacy should be used only by persons of the same sex' - in both cases so long as this is a proportionate means of achieving a legitimate aim.

The SPS relies on such exceptions in its decisions about the accommodation and treatment of transgender people who are imprisoned. Its declared Policy is that '[t]he accommodation provided must be the one that best suits the person in custody's needs and should reflect the gender in which the person in custody is currently living' (footnote 1.) However, the Policy also recognises that 'for reasons of safety and risk management, a decision [might need to] be taken which differs from the person in custody's preferences in regard to their gender identity or gender reassignment status': decisions on where to accommodate prisoners are therefore based on individual risk assessments.

The Scottish Government's consultation on the new Bill advises that '[t]he 2010 Act exception for single sex services will not change due to the proposals to reform the process for applying for a GRC' (para 5.16), and that '[t]he 2010 Act exception for communal accommodation will not change following GRA reform' (para 5.42). The Cabinet Secretary accordingly said, in answer to a Parliamentary Question, that:

"[a]cquiring a Gender Recognition Certificate does not and will not give a prisoner any new legal rights regarding the decisions that are made by the Scottish Prison Service about their accommodation" (footnote 2).

This implies that the SPS will be able to continue its current practice when the Bill becomes law - and it plans a public consultation on the 'Gender Identity and Gender Reassignment Policy' for prisoners in Scotland.

However, it could be argued that that policy and practice could not survive a legal challenge; and, if there is a problem here, it will become significantly more serious as the number of those obtaining GRCs, under the new simplified process, increases. The problem arises from the fact that the risk assessments that the SPS makes may take account not just of the acquired gender of a prisoner who holds a GRC, but of that person's transgender status itself (footnote 3). However, according to the Gender Recognition Act 2004 (s. 9(1)), which the draft Bill does not seek to alter, "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)."

It could therefore be argued that people who have obtained GRCs are legally men or women, not transgender, and that therefore any exceptions under the Equality Act 2010 on the basis of gender reassignment do not apply. If such an argument succeeded, the SPS's policy would become inoperable: the SPS would have to allocate prisoners to accommodation in line with the gender recognised on their GRC, and would not be allowed to make risk assessments that paid any attention to their being transgender. This would create serious concerns about the safety both of transgender prisoners, and of those with whom they are accommodated.

It is certainly not clear that such a challenge would succeed if brought to court (footnote 4): but it is also not clear that it would fail, which creates a serious uncertainty about the implications of the Equality Act 2010 for the SPS's policy - and thus about how the SPS can effectively protect the safety, and the rights, of

people in prison.

(In attempting to get clear about the legal implications of a GRC, matters are not helped by the fact that exemptions to the 2004 Act, provided for in the Equality Act 2010, are on the basis of 'sex' and 'gender reassignment', not 'gender'. No definitions of "woman", "man", "sex", "gender", "male" or "female" appear in the 2004 Act, the 2010 Act, or the Gender Recognition Reform (Scotland) Bill; nor is any use made of the commonly drawn distinction between 'sex' and 'gender', which might have helped to clarify the position.)

Accordingly, HLS believes that the Gender Recognition Reform (Scotland) Bill ought to address this issue, by clarifying the effect of section 9 of the Gender Recognition Act 2004 for the purposes of the protections and exceptions provided under the Equality Act 2010.

Against this background, the SPS's planned consultation on the 'Gender Identity and Gender Reassignment Policy' for prisoners in Scotland will clearly be important: there is an urgent need to clarify, and to consult the public about, the processes involved in that policy and the considerations to which the SPS should attend in making its risk assessments. HLS hopes that the consultation will be initiated as soon as the Bill has been passed.

#### Footnotes

1. Scottish Prison Service, Gender Identity and Gender Reassignment Policy for those in our Custody 2014 (March 2014; available at: <https://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx>), para. 1.3.
2. Johann Lamont, S5O – 04001, 16 January 2020.
3. See, eg, R (C) v Secretary of State for Work and Pensions [2017] UKSC 72, [2017] 1 WLR 4127.
4. See R (C) v Secretary of State for Work and Pensions [2017] UKSC 72, [2017] 1 WLR 4127, at paras 22 – 23.

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

Yes

**If yes, please outline these comments.:**

Please see answer to Question 4.