Law Society of 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?

Yes

If yes, please outline these comments.:

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership. Our Public Policy committee, having consulted its various sub-committees, including Child and Family, Criminal Law, Equality Law and Mental Health and Disability Law, welcomes the opportunity to consider and respond to the Scottish Government consultation, Gender Recognition Reform. We highlight that we have responded to two previous consultations on gender recognition, to the Scottish Government consultation in March 2018 and to the UK Government consultation in October 2018 . In line with our previous responses, our committee has the following comments to put forward for consideration.

General comments

Our approach to policy issues is directed by our statutory aims under the Solicitors (Scotland) Act 1980, namely to represent the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession, and by the regulatory objectives of the Legal Services (Scotland) Act 2010, namely:

• supporting the constitutional principle of the rule of law and the interests of justice
• protecting and promoting the interests of consumers and the public interest generally
• promoting access to justice and competition in the provision of legal services
• promoting an independent, strong, varied and effective legal profession
• encouraging equal opportunities within the legal profession
• and promoting and maintaining adherence to professional principles

Integral to the constitutional principle of the rule of law is that the law must afford adequate protection of fundamental human rights . The European Court of Human Rights has considered issues around gender recognition on numerous occasions and its case law has developed over time.

The current legislation providing for gender recognition, the Gender Recognition Act 2004, was prompted by a case before the European Court of Human Rights, Goodwin v United Kingdom . The court held that the lack of provision for gender recognition breached Article 8 of the European Convention – the right to respect for private and family life, home and correspondence" - stating:

"Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings… In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

In its judgment, the court highlighted the need for a dynamic and evolutive approach: "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases… However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved… It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement."

The potential for change around gender recognition was recently raised in England and Wales, with the Court of Appeal decision in Elan-Cane v Secretary of State for Home Department . This case involved the policy of Her Majesty's Passport Office to issue passports either marked F (female) or M (male) but not X (not identifying as either gender).

"Looking at the totality of approach to gender identity issues world-wide and the information made available to the court, it seems to me that, whilst the direction of travel, or "trend", is undoubtedly moving towards the recognition of the status of non-binary people, there is, as yet, nothing approaching a consensus in relation to either the broad and indeterminate issue of the recognition of non-binary people, or the narrow and precise issue of the use of "X" markers on passports which is before this court… If, as here, Article 8 is engaged, there is a respectable argument that we are approaching a time when the consensus within the Council of

Europe's Member States will be such that there will be a positive obligation on the State to recognise the position of non-binary including intersex individuals if and when that time comes. It follows that when the time comes, notwithstanding that there is a wide margin of appreciation as to how such a positive obligation is effected, the State will then have to take steps towards implementing that obligation."
In terms of the rights of individuals around gender recognition, we believe that the law currently, and as proposed under the draft Bill, meets human rights obligations. As jurisprudence develops across Europe, it will be important to keep issues around gender recognition under review, particularly if other jurisdictions in the UK adopt a different approach to that in Scotland.

Question 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?
In our previous responses on these issues, we supported the establishment of a two-stage process, involving application and then reflection. We also supported a self-declaration system with a significant reduction in the evidence required to be presented in an application for gender recognition. The provisions of the draft Bill largely follow this approach.

The adequacy of the timescales, first, living in an acquired gender for at least three months before applying for a gender recognition certificate and, second, a three month period for reflection before obtaining a gender recognition certificate, should be considered in the light of best evidence, whether from the lived experience of trans people, from medical practitioners or from other jurisdictions. We highlighted in our previous consultation responses the need for a formal process that recognised the consequences of a declaration with lifelong intent.
If it were thought, in light of the feedback from the current consultation process, that a more gradual approach in lowering the timescales from the current 24 month period was more suitable, a longer period could be included in the primary legislation, with the ability to amend by regulations at a later stage.

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.:

Question 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?
As for question 1, we believe that the timescale set for the period of reflection should be considered in light of best evidence.

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

Yes

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

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

In our previous consultation responses, we supported change to the minimum age to apply for a gender recognition certificate, though subject to safeguards for people in the 16-17 age group.

As the consultation paper notes and as we highlighted, 16 is an age at which people can marry, consent to sexual activity, consent to medical procedures and the like, decisions with potentially life-long consequences for which the law considers people to have the maturity to determine at that age. Applying for and obtaining a gender recognition certificate would be a decision of similar gravity, so would be consistent to allow an application from the age of 16. As the NHS Scotland Gender Reassignment Protocol notes, a person of 16 or 17 can consent to treatment "if it is thought that they have enough intelligence, competence and understanding to fully appreciate what is involved in their treatment. " A situation in which consent could be provided for gender reassignment treatment, but not to have the capacity to apply for a gender recognition certificate appears anomalous.

The United Nations Convention on the Rights of the Child considers any person below the age of 18 to be a child, though there are specific provisions relating to people aged 16 or 17. For instance, section 3 of the Age of Legal Capacity (Scotland) Act 1991 permits persons under the age of 21 to set aside prejudicial transactions entered into when they were 16 or 17. A person can remain a looked after child under the Children's Hearings (Scotland) Act 2001 until they attain the age of 18, meaning that restrictions can be placed on their private life (for example, where they live), beyond the age of 16; this is in recognition of the additional vulnerabilities of and complexities in the lives of such young adults.

The application of laws to people aged 16 or 17 is an area where wider consolidation could be beneficial, though in the context of gender recognition we suggested that an approach providing additional safeguards for young people may be the most suitable approach. We highlighted in our previous responses some of the ways that this could be achieved for people aged 16 or 17, by making the reversal of any gender recognition process easier, requiring a court process rather than a self-declaration, having formal requirements around medical or psychological support through the process or additional notification requirements for looked after young people. A hybrid approach could be considered either allowing an application from the 16 or 17 year old, accompanied by with parental consent and a supportive opinion from an expert such as a psychologist or other relevant medical practitioner, or an alternative court based process should the parental consent approach not be available.

In short, we believe that it is important and consistent to extend the right to obtain a gender recognition certificate to those aged 16 or 17 but believe that additional safeguards would be merited for this group. We also believe that protections should be considered for vulnerable persons more widely. The only protection for people deemed incapable of applying is that the certificate would be issued and then, under proposed section 8S(1)(iii), to have it revoked, upon application by any person "who has an interest". Even for that procedure, the qualification to apply is at the high and undefined level of having an interest, rather

than claiming an interest. It is left open as to whether the person themself (or a representative such as a guardian, appointee under an intervention order, or attorney) would be able to apply for revocation. The point is relevant because, by way of comparison, in the Incapacity Act where appropriate, and for the avoidance of doubt, the words "(including the adult himself)" are included.

Similarly, the draft Bill does not cover the converse situation where a person with some degree of impairment of capacity or vulnerability seeks to apply with the involvement of a supporter; or where a guardian, appointee under an intervention order, or attorney acting in accordance with the principles of the Adults with Incapacity (Scotland) Act 2000 proposes to make the application for such an applicant. We believe that these areas merit further consideration.

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

Yes

If yes, please outline these comments.:

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

Written confirmation

Section 3 of the draft Bill inserts a new clause 8B into the 2004 Act and this inserted sub-section 8B(3) states: "The Registrar General must not determine the application unless, after the expiry of the reflection period, the applicant confirms by notice in writing that the applicant wishes to proceed with the application." We assume that this notice in writing would not be a statutory declaration requiring witnessing, though it may be helpful to clarify this. Similarly, in the following sub-section, 8B(4), the Registrar General is to treat the application as withdrawn if the applicant has not responded in writing within a two year period, or the applicant has withdrawn the application. It would be helpful to clarify whether withdrawal by the applicant would need to be made in writing or orally, or any other formalities required.

Revocation

We note that that, following confirmation by the applicant and decision by the Registrar General under sections 3 and 4 of the draft Bill, there are no provisions for the applicant to change gender recognition at a later stage. We believe that it is important that there is a degree of formality and finality to the gender recognition process. A statutory declaration is required that the person intends to continue to live in their acquired gender permanently. A specific criminal offence is established in case a fraudulent declaration is made. However, we believe that there should be the capacity to allow for reversal of gender recognition in limited circumstances. The number of people, evidence suggests, would be very small . At section 9 of the draft Bill, inserting section 8S into the 2004 Act, there is the power for an interested person to apply to a sheriff to revoke a gender recognition certificate. The grounds for doing so are that the wrong type of certificate being issued, or that application was fraudulent, or that the applicant did not understand

the effect of obtaining the certificate or that the application had not been made validly. Amending these provisions to allow, in exceptional circumstances, the applicant for a gender recognition certificate to apply to revoke that certificate, could allow a mechanism for such small number of cases.

Overseas gender recognition

At section 8 of the draft Bill, sections are inserted into the 2004 Act around overseas gender recognition. At the proposed section 8N and at 8P, it is provided that overseas gender recognition would not be recognised where it was "manifestly contrary to public policy" to do so. We did highlight the need for such provision in our previous consultation responses, stating that overseas recognition should be subject to the general private law exception based on public policy, which would act as a safeguard in cases where, for example, an acquired gender were inappropriately attributed to a person. We added that a list of recognised authorised authorities may be helpful to ensure that the process in other jurisdictions is considered appropriate to recognise in Scotland. Specifying factors that might make overseas gender recognition manifestly contrary to public policy in primary legislation (amendable by regulations, if needed) could provide greater clarity to individuals seeking gender recognition and to those discharging functions under the Act.

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

Yes

If yes, please outline these comments.:

Question 5. Do you have any comments on the draft Impact Assessments? Regarding the Equality Impact Assessment (EQIA), we have highlighted the potential for human rights caselaw developments in the area of non-binary identification, though believe that the current law, and the draft Bill, meet the requirements of caselaw.

We note the volume of people who have obtained full gender recognition certificates in Scotland being around 30 people annually and also the evidence from the Republic of Ireland, where 3 of 517 people who have obtained a gender recognition certificate have subsequently asked for this to be revoked under the procedure in this jurisdiction. We believe that this data supports our recommendation for a revocation process in exceptional circumstances.

The EQIA considers the interaction of gender recognition provisions and the exemptions allowed under the Equality Act 2010 (and we note that the latter legislation involving a reserved area outside the scope of the Scottish Parliament). The draft Bill will not change the law in this regard, though if a larger number of people apply for gender recognition certificates as a result of the revised process, there may be more situations in which issues around exemptions will arise. For instance, exemptions from the discrimination provisions of the 2010 Act are permitted around service provision under paragraph 28 of part 7 of Schedule 3 of the Act where "a proportionate means of achieving a legitimate aim". This can be a difficult and sensitive judgment, and there is a statutory Code of Practice from the

Equality and Human Rights Commission to assist service providers and others . Just as the rule of law requires respect for human rights, it also requires the law to be clear, publicised, stable, just and applied evenly. Recognising the responses of service providers to previous consultations in this area, including many operating on a volunteer or not-for-profit basis, additional clarity and support may be required.

Though outside the scope of this draft Bill and this consultation, consideration could be given to amendment of the 2010 Act, for instance, by providing specificity around legitimate aims and the proportionate means of achieving these; alternatively, looking at revision to the statutory code that supports the operation of these provisions to ensure that we respect the rights of all involved around the proposed changes.