

Consultation Response: Reform of the Gender Recognition Act

Advance HE, October 2018

About Advance HE:

Advance HE was formed in March 2018, following the merger of the Equality Challenge Unit, the Higher Education Academy and the Leadership Foundation for Higher Education. Our purpose is to **advance the professional practice of higher education to improve outcomes for the benefit of students, staff and society**. We are a registered charity (England and Wales: 1101607, Scotland: SC043946). Further details can be found at www.advance-he.ac.uk. This consultation response represents the views of Advance HE and not necessarily those of our individual member institutions, nor our legal owners Guild HE and Universities UK.

We provide advice and guidance on the full range of protected characteristics under the Equality Act 2010 and their interactions and intersections. This includes **supporting trans inclusion in higher education across the UK, and in the College sector in Scotland**. Building on our original [research into LGBT+ experiences](#), we have supported institutions on their strategic and practical implementation of trans inclusion with our [sector-leading guidance on supporting trans staff and students](#), as well as training and consultancy (including co-delivery with Gendered Intelligence).

We also offer a confidential policy advice line to our member institutions, giving us **unique insights into the challenges faced by institutions** in providing inclusive environments for all their students, staff and service user (including where different rights and experiences may be perceived as coming into conflict).

Key challenges for our sector in regards to the current GRA:

1. Impact of not having a GRC

Advance HE is aware of dissatisfaction with the current process of application for a GRC with feedback from staff and students in post-16 education finding it overly intrusive and too lengthy resulting in negative impacts on many individuals' **dignity and mental health**.

With the exception of pensions and certain occupational requirements, a trans person does not need to produce evidence of legal recognition of their gender to work or study in the HE sector.

However, in the post-16 education sector record systems predominantly rely on name and gender/sex as identity markers. Records systems are complex for students and **interact with important 'third party' systems for example** (student funding, visas, certificates of accreditation, registration with Professional and Regulatory Statutory Bodies, pension providers, HMRC and Disclosure and Barring Service). Therefore, while an HEI can change the record to reflect a person's self-identified gender, other organisations have requirements which make this problematic where a person has not got a GRC.

Advance HE has been working with the sector to implement processes to support trans staff and students based on self-identification of gender (and name, where applicable) to reduce these administrative burdens and barriers - see [ECU \(2016\) Trans staff and students in HE and colleges: improving experiences](#). This is to assist HEIs in fulfilling their obligations under public sector equality duty of the Equality Act 2010. Our efforts would be **greatly supported by a GRC process** which is also based on self-identification.

2. Non-binary inclusion

We also note that non-binary people – particularly non-binary staff – are facing difficulties with institutional employee records systems, some of which still maintain binary sex identifiers due to third party requirements (eg HMRC, pension).

3. Support and stability

We also highlight the **difficulties many students and staff experience in living in their acquired gender for a defined period** in order to be considered for a GRC. We know that some individuals face greater barriers than others in accessing medical support particularly when transferring between educational contexts. Some students may also be living in environments which are unsupportive (at best) of their living in their acquired gender. Note for example the role that trans identity has in student family estrangement-see for example [NUS \(2010\) Evaluating Estrangement: a report into the estrangement application process in HE student finance](#); [University of Cambridge and Standalone \(2015\) Hidden Voices: Family Estrangement in Adulthood](#)). Sadly, we also acknowledge that even within university settings, many individuals may not feel able to live safely or consistently in their acquired gender ([Stonewall \(2018\) LGBT in Britain: Universities report](#)).

4. Differential experiences and equality in education

Supporting trans staff and students in higher education and employment is of national concern and urgency as noted in the UK government’s national [LGBT Action Plan](#). This has tasked the Office for Students (our sector’s regulatory body) to “investigate and tackle gaps in participation, experience, safeguarding and success for LGBT students in higher education”. There are increasingly pockets of excellent practice in the sector, but whilst Advance HE and partners work to further this work and ensure equality of experience for all regardless of institution, we must seek to remove as many barriers as possible for our students and staff.

Summary

Advance HE therefore supports a GRA process which aims to:

- Recognise the rights of individuals to self-identify their preferred gender without providing medical evidence with appropriate safeguards.
- Reduce time and procedural barriers to attaining gender recognition which can subsequently lead to delays and complications in institutional record systems (detrimentally affecting individual wellbeing, as well as potentially access to support systems)
- Recognise the identities of non-binary people.

Further details under specific consultation questions are addressed below.

Contact

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Detailed responses to consultation questions

Q1-2

Not applicable

Question 3

Do you think there should be a requirement in the future for a diagnosis of gender dysphoria?

- Yes
 No

Please explain the reasons for your answer.

No.

Our answer is given noting the scope of the consultation exercise which is limited to addressing the process to attain a GRC, and is not concerned with access to healthcare treatment.

We recognise that there will be many trans, non-binary and intersex individuals who do not experience gender dysphoria, but who wish to have their identities affirmed in law. We note that gender dysphoria is no longer considered as a mental illness by the UK government (s.24) or by the [World Health Organisation](#), but rather a medical condition. However some individuals may still be adverse to conceiving their identity and experiences through a medical lens or labelling.

Removal of the requirement for a medical diagnosis may help to promote understanding of diverse trans experiences and promote good relations between different groups within the public sector and higher education (supporting institutions in meeting their Public Sector Equality Duty), and remove barriers for those who do not identify as experiencing gender dysphoria.

Question 4

Do you also think there should be a requirement for a report detailing treatment received?

- Yes
 No

Please explain the reasons for your answer.

No

Further to Q3 response, we note that **individuals may experience differing levels of access and support** where they have wished to seek 'treatment' (for example, geographical barriers, cultural barriers, fear of discrimination). Requiring such information as part of the process to acquire a GRC may then compound inequalities.

Question 5

Under the current gender recognition system, an applicant has to provide evidence to show that they have lived in their acquired gender for at least two years.

(A) Do you agree that an applicant should have to provide evidence that they have lived in their acquired gender for a period of time before applying?

- Yes
 No

Please explain the reasons for your answer.

Advance HE supports UK higher education institutions and colleges in Scotland with practice around inclusion. Through our work, we have a unique position of understanding the diversity of views, and we are not in the position to answer 'yes' or 'no' to this question. However, we consider the following to be important considerations.

A requirement to have lived in one's acquired gender for at least two years (full time or part time) **may discriminate against those who have had differing levels of support to do so, or experienced differing levels of harassment and unfair treatment from the people or structures around them (family, community, or in their employment or education).**

Many individuals may not have been able to live in their acquired gender due to fear of prejudice, discrimination, or fears for personal safety. Stonewall 2018 [research](#) showed that even within a higher education environment a substantial number of non-binary and trans students feel: unable to wear clothes representing their gender expression at university (24%, and 16% respectively), to use preferred toilet facilities (17%), or, have been being encouraged to hide their gender identity (20%), and harassed or even assaulted when their identity is known (60% from other students). These figures are exacerbated in universities and colleges in small/medium towns and cities.

For our sector there are **wider equality impacts** here for a range of protected characteristics (and intersections) beyond that of 'gender reassignment'

- For many students in higher education, and particularly **younger people** leaving secondary education, the two year period may have involved several other transitions which could affect continuity of gender expression for example: geographical moves to university or for placements/internships; changing from school or employment environments to a university environment (wholly or partly depending on whether full-time or part-time study; living arrangements between different residences). **There is a risk that the student population, particularly the younger student population, could therefore face particularly challenges in demonstrating the two year requirements when seeking recognition of their gender.**
- Many staff working in higher education institutions may face similar challenges around continuity of environment and support: for example, our annual [Equality in Higher Education Staff statistical report](#) shows that 23.9% of staff in higher education are on fixed term contracts (FTC). Academic staff on FTCs are more likely to be **aged 40 or under**, (66.8% of staff on FTCs were aged 40 and under), and a greater proportion of UK **BME** (Black and Minority Ethnic) staff are on FTCs than white staff (23.7% of UK BME staff compared to 19.1% UK White Staffs).
- **There are therefore intersectional equality implications (age, ethnicity) for the two year requirement for trans individuals in higher education.**

(B) If you answered yes to (A), do you think the current evidential options are appropriate, or could they be amended?

(C) If you answered yes to (A), what length of time should an applicant have to provide evidence for?

- Two years or more;
- Between one year and two years;
- Between six months and one year;
- Six months or less.

(D) If you answered no to (A), should there be a period of reflection between making the application and being awarded a Gender Recognition Certificate?

We recommend an evidence-based approach to this question, taking into account, for example, any research which is available on appropriate reflective periods around making decisions with legal

repercussions. However we recommend that any reflection period is not overly burdensome and acknowledges the challenges that students and staff may experience with further delays.

Question 6

Currently applicants for a gender recognition certificate must make a statutory declaration as part of the process.

(A) Do you think this requirement should be retained, regardless of what other changes are made to the gender recognition system?

Yes

No

Please explain the reasons for your answer.

Yes.

We recognise that where an individual is seeking to be recognised in one particular gender through the GRC process there are benefits to ensuring the integrity of that system. We recognise therefore that there may be benefits to requiring a serious and considered self-declaration, both for administrative purposes, and for the purposes of preventing and monitoring sex discrimination under the Equality Act 2010. If a statutory declaration process is as accessible as possible, and does not unfairly disadvantage particularly groups, we support a system which is in line with international best practice. We acknowledge that some people will also use statutory declaration for change of name, and it may be advantageous to consider how these processes could work together in ways that supports efficiency of process, and so reduces delays to users.

(B) If you answered yes to (A), do you think that the statutory declaration should state that the applicant intends to 'live permanently in the acquired gender until death'?

Yes

No

No

We hold concerns about the statement 'live permanently in the acquired gender until death'. For some individuals, their understanding of their gender identity will change over time, and this may go beyond current gender 'binaries' in UK legislation. Some countries legally recognise more than two genders and the UK may do so in future. We continue to receive anecdotal evidence that this statement may adversely affect **younger** adults many of whom who are increasingly understanding gender as a developing, fluid and non-binary concept.

(C) If you answered no to (A), do you think there should be any other type of safeguard to show seriousness of intent?

We recommend a process whereby applicants are clearly informed of the legal implications of their decision, particularly as individuals may face unequal access to specialist support network or sources of information. A subsequent declaration by the applicant that they understand these implications and undertake the declaration on that basis would help to support the applicant and the integrity of the GRC system.

Question 7

The Government is keen to understand more about the spousal consent provisions for married persons in the Gender Recognition Act. Do you agree with the current provisions?

- Yes
- No

Please explain the reasons for your answer. If you think the provisions should change, how do you think they should be altered?

This question is considered beyond the scope/expertise of Advance HE

Question 8

Currently, applicants must pay £140 to apply for a Gender Recognition Certificate.

(A) Do you think the fee should be removed from the process of applying for legal gender recognition?

- Yes
- No

(B) If you answered no to (A), do you think the fee should be reduced?

- Yes
- No

The Government is keen to understand more about the financial cost of achieving legal gender recognition, beyond the £140 application fee.

(C) What other financial costs do trans individuals face when applying for a gender recognition certificate and what is the impact of these costs?

Detailed commentary on this is beyond the scope of Advance HE.

However we note that our sector is increasingly aware of the everyday financial burdens faced by many students, even with a system of student loans and institutional support packages. Costs can include increasing rents, travel, equipment, books, and travel (see eg [NUS 'Hidden Costs' campaign](#) (2012)).

In this context students – many of whom are young people – may potentially be further **disadvantaged by high administrative costs for the GRC application itself**, and for any subsequent third-party costs (for example, amending banking records or tenancy contracts). Many higher education institutions charge students and alumni fees for re-issuing student ID cards, transcripts and degree certificates: although Advance HE is working with many institutions to recommend that these charges are waived in the instance of name/title/gender change for trans individuals, we cannot guarantee that this is the case across the sector.

We also again highlight the potentially high overlap between students who are estranged from their families and who identify as trans: estranged students are particularly likely to face financial challenges, as noted in both [NUS](#) and [University of Cambridge/Standalone research](#).

Question 9

Do you think the privacy and disclosure of information provisions in section 22 of the Gender Recognition Act are adequate?

- Yes
- No

If no, how do you think it should be changed?

While the full question of legal enforcement and understanding of Section 22 is beyond the remit of Advance HE, we note the following from our experience with the higher education sector in the UK and Colleges in Scotland:

Further to paragraph 94 of the consultation and the GIRES evidence ‘that organisations may be overly and unnecessarily cautious as a result of the provisions and therefore may not record data on their systems about trans people for equality monitoring purposes’, we do receive **many queries from institutions asking for technical and policy support on ensuring confidentiality** whilst undertaking equality monitoring. Practical suggestions here have included:

- providing an **additional layer of security** to ‘trans’ identity responses in records systems (particularly where there are large HR teams) to ensure individualised data is only available to those who specifically need to do so.
- Ensuring each institution has a designated **‘point of contact’** for handling data and processes relating to gender transition. This could be named individuals, or potential a confidential enquiries service (for example, a specific email address or contact number) . Such points of contact would have additional levels of training on both data and legal aspects of trans inclusion, but also a source of signposting for support.
- **Increase confidence and disclosure rates in equality monitoring** by clearly explaining to data subjects in monitoring questionnaires the reason behind asking questions related to ‘gender reassignment’ and how that data will be stored, handled, and used. Our guidance on possible different monitoring questions includes a number of options and institutions: <https://www.ecu.ac.uk/guidance-resources/using-data-and-evidence/monitoring-questions/>. We advise institutions to consult widely with their staff and students on preferred wording (we know for example that some have set up specific task and finish groups to address this question).
- There is a continuing tension in the sector **as to how to collect data that allows institutions to further inclusion and meet legal requirements**. For example, how to collect data relating to *gender* (as a wider, non-binary concept), and the protected characteristics of ‘sex’ as defined by the Equality Act 2010 (in a binary form), and ‘*gender reassignment*’ (trans status, identity or history). Advance HE continues to work with organisations like the Higher Education Statistics Agency to try and address some of these challenges but acknowledge that some requirements will be reliant on legal developments around gender.

Further to paragraph 97 request for “insight into how the needs of the individual to protect their gender history can be balanced against the needs of an employer – in order to check their qualifications, ability to practice, etc.” we advise that institutions:

- i) Provide a **confidential point of contact** for applicants (students or staff) who wish to provide information as to why previous histories (qualifications, references, and – particularly for academic staff – academic publications) may be under a different name, title, or gender or imply a different gender (for example, attending a particular single-sex school). The point of contact would (as above) be trained on specific data protection issues as well as signposting for support. The point of contact can undertake to ensure a smooth application process for applicants without unnecessary sharing of information about gender identity history. For example, they could prevent the triggering of any fraud/verification processes prompted by misalignment of historic and current records.
- ii) We also advise that institutions **train their wider staff** to be sensitive to the particular challenges of trans individuals in providing historic records, as well as being able to signpost to any relevant support or information particularly to the institution.
- iii) Where institutions require applicants to undertake **third party checks or verifications** they should highlight to all applicants if there are any specific confidential routes suited to trans applicants. For example, where criminal record checks are required for staff or students, all applicants should be made aware of the route via the [DBS Sensitive Applications Team](#)

Question 10

Not applicable

Question 11

Is there anything you want to tell us about how the current process of applying for a GRC affects those who have a protected characteristic?

Further to Question 5 we highlight that for our sector there are potentially **wider equality impacts** here for a range of protected characteristics (and intersections) beyond that of ‘gender reassignment’

- Potential disproportionate burden of the ‘two year living in acquired gender’ requirement on **young people** entering and progressing through education, and **young**, and **BAME staff** with a high proportion of short term contracts .
- The burden on those with **mental health difficulties** of a long and intrusive process which affects dignity and wellbeing. This especially has the potential to interact with **age** in the higher education sector: approximately 2.5% of all students (undergraduate and postgraduate) disclosed a mental health condition in academic year 2016-7 ([Advance HE Equality and Higher Education Students Statistical Report 2018](#)). Even though this is a significant increase (equivalent to an additional 20, 000 students) since academic year 2014-5, it is still suspected to be an underestimation. Amongst the LGBT+ population there are indication of higher rates still.
- There is developing evidence that **LGBT+** students may be overrepresented for non-continuation (dropping out) of their studies. Research and data in this area is still at early stages– for example we do not yet know with certainty whether rates of non-continuation are more prevalent in *trans* individuals (regardless of sexual orientation), or whether we can clearly identify an attainment gap in final degree classifications. We also do not know with certainty whether there is a causal link between differential outcomes and experiences related to lack of recognition of **gender**, of **sexual orientation**, and/or **mental health**. There are increasingly urgent questions to be asked though as to how we can ensure the inclusion and wellbeing of trans students in higher education. We note that the Office for Students has been asked to “investigate and tackle gaps in participation, experience, safeguarding and success for LGBT students in higher education” as part of the national LGBT Action Plan.

Question 12

Do you think that the participation of trans people in sport, as governed by the Equality Act 2010, will be affected by changing the Gender Recognition Act?

- Yes
 No

Please give reasons for your answer.

The National Union of Students (NUS) has identified low participation rates of LGBT+ students in sport at university or college and many institutions have focused on improving LGBT+ inclusion in sporting contexts, such as with the ‘Rainbow Laces’ campaign and with student society diversity awards. Whilst no student should be expected to provide a GRC to participate in amateur sport, it is acknowledged that the potential knock-on effect of having a GRC (a new birth certificate, updated details in student records systems, potentially greater institutional support in living in one’s affirmed gender) could benefit confidence in participating in sport.

We are also aware that at present sporting bodies’ interpretation of Section 19 of the Gender Recognition Act has resulted in many trans people being excluded from sport. This was highlighted as being a particular issue within universities in the [Women and Equalities Committee 2016 report on transgender equality](#). A review of section 19 of the GRA to be more inclusive, and a clearer definition of what is meant by ‘competitive sport’ where any requirements are in place should also be given could assist in tackling underrepresentation for trans people, and so public sector equality duties.

Question 13

(D) Do you think that the operation of the single-sex and separate-sex service exceptions in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes
- No

Please give reasons for your answer.

We acknowledge the current rights under the Equality Act 2010 of trans people to utilise single-sex and separate-sex spaces and services in their affirmed gender. We support any improvements to the GRC system which removes unnecessary barriers and burdens to trans people.

We do still receive queries from service providers in our sector seeking clarification and advice about trans, intersex, and non-binary people's access to single-sex and separate-sex space. While the GRC amendments make no impact on existing rights, it may be that any changes to the GRC process would benefit from refreshed guidance for service providers on meeting their legal duties and providing an inclusive spaces.

(E) If you provide a single or separate sex service, do you feel confident in interpreting the Equality Act 2010 with regard to these exemptions?

- Yes
- No

Please give reasons for your answer.

Not applicable

(F) If you are a trans person who has experienced domestic abuse or sexual assault, were you able to access support?

- Yes
- No

Please give reasons for your answer.

Not applicable.

Question 14

Do you think that the operation of the occupational requirement exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes
- No**

Please give reasons for your answer. 70

We note the existing protections and rights for trans people in the Equality Act 2010, and welcome any amendments to the GRA which remove unnecessary barriers for trans people to utilise those protections. More generally we note that we are aware of very few occasions where occupational requirements limitations are in place relating to gender reassignment. We note that students could potentially encounter occupational requirements while on work placements as part of their courses (or

potentially on optional internship or work experience placements. We already encourage institutions to discuss occupational requirements with placement providers and students and to only apply them if essential, and proportionate means to a legitimate aim, within the guidelines of the existing Equality Act 2010 exemptions (Schedule 3, Section 7)

Question 15

Do you think that the operation of the communal accommodation exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes
- No

Please give reasons for your answer.

See our response to 13 (d). We support a GRC application system which removes disproportionate burdens on users and supports the dignity and self-identification of trans, non-binary and intersex people

Question 16

Do you think that the operation of the armed forces exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes
- No

Please give reasons for your answer.

Beyond Advance HE's scope/expertise

Question 17

Do you think that the operation of the marriage exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes
- No

Please give reasons for your answer.

Beyond Advance HE's scope/expertise

Question 18

Do you think that the operation of the insurance exception as it relates to trans people in the Equality Act 2010 will be affected by changing the Gender Recognition Act?

- Yes**
- No

Please give reasons for your answer.

At present some insurance companies require HEIs and student work placement providers to declare if they have trans staff or students. This seems an unnecessary and overly intrusive process especially as a higher education provider, college, or placement provider may not be aware of all of their trans staff and students. Advance HE recommends that HEIs seek insurers that do not have these limitations in place. The justification for which are unclear.