

EXPLANATORY MEMORANDUM TO
THE GENDER RECOGNITION (APPROVED COUNTRIES AND TERRITORIES
AND SAVING PROVISION) ORDER 2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This instrument revokes the Gender Recognition (Approved Countries and Territories) Order 2011 (“the 2011 Order”)¹ and remakes it with amendments. The purpose of this instrument is to prescribe those countries that have recognition criteria which are at least as rigorous as those in the Gender Recognition Act (GRA), remove from the list of approved countries and territories those that no longer have gender recognition processes at least as rigorous as the United Kingdom, and add any countries and territories that have since introduced measures at least as rigorous as the UK’s. This is in line with previous periodic updates.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England, Wales, Scotland and Northern Ireland.
- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Business and Trade and Minister for Women and Equalities, Kemi Badenoch MP has made the following statement regarding Human Rights:

“In my view the provisions of the Gender Recognition (Approved Countries and Territories) (Saving) Order 2023 are compatible with the Convention rights.

6. Legislative Context

- 6.1 The Gender Recognition Act 2004 (GRA) allows an individual to apply for a gender recognition certificate, which has the effect of legally changing their sex (subject to certain exceptions). There are two main routes to this application: a standard route (section 1(1)(a)), subject to a set of requirements set out in the Act, and an overseas route (section 1(1)(b)), allowing a person who has changed their gender in an

¹ <https://www.legislation.gov.uk/ukxi/2011/1630/schedule/made>

approved country or territory abroad to access a streamlined process to receive UK gender recognition.²

- 6.2 The Gender Recognition Panel (GRP) must grant an application under the overseas route if satisfied that the applicant has changed their legal sex under the law of an “approved country or territory.”
- 6.3 Section 2(4) of the Act provides for the Secretary of State to prescribe by order a list of approved countries or territories. The current list is set out in the 2011 Order, and was set out in the 2005 Order³ prior to that. This Order will replace the 2011 Order.
- 6.4 Applicants under the overseas route are required to provide evidence that they have changed gender under the law of an approved country or territory under section 3(5) of the GRA. They need not meet the evidentiary requirements in sections 3(1) to (4), which apply to applications under the standard route, and involve two medical reports, including one confirming a diagnosis of gender dysphoria, and evidence that the applicant has lived in their gender for the last two years.
- 6.5 Section 24(2) provides that an order under the GRA must be made by statutory instrument, and section 24(3) provides that an order under section 2 must be made using the affirmative procedure. Section 24(1) contains the power to make savings provision in secondary legislation under the GRA.

7. Policy background

What is being done and why?

- 7.1 The policy behind the overseas route is to reduce the evidentiary burden on transgender people who have already met at least as rigorous requirements elsewhere. It also means that doctors and psychologists in the United Kingdom will not be asked to provide evidence for these applications.
- 7.2 We committed to streamline and update the gender recognition process as part of the Government's response to the Gender Recognition Act consultation in 2020⁴. We have followed up by reducing the application fee and digitising the process, and more recently have been preparing to update the approved countries and territories list.
- 7.3 There remains significant Parliamentary and public interest in work surrounding the GRA. The intention to make these changes was announced by the Minister for Women and Equalities on 9 January 2023⁵.
- 7.4 This Statutory Instrument will remove countries and territories where there is a clear indication that they no longer have a system at least as rigorous as the UK, and add any countries and territories that have since introduced measures at least as rigorous as the UK. The list of proposed additions and removals has been developed with input from the Foreign Commonwealth and Development Office.

Explanations

- 7.5 Our thorough analysis has sought to identify countries and territories with at least as rigorous systems, based on the requirements set out in the UK GRA. Systems vary

² There is also a third route, the ‘alternate route’ Separate requirements for this are set out on the GRC application pages: <https://www.gov.uk/apply-gender-recognition-certificate>

³ <https://www.legislation.gov.uk/ukxi/2005/874/schedule/made>

⁴ <https://www.gov.uk/government/collections/gender-recognition-act-consultation-and-response>

⁵ <https://questions-statements.parliament.uk/written-statements/detail/2023-01-09/hcws482>

widely and there are no exact matches for the UK GRC system so this involves an element of evidence-based judgement. As committed to in the Written Ministerial Statement in January, we will continue to regularly update the list to ensure it continues to reflect systems that are at least as rigorous as our own.

- 7.6 The criteria used to make these decisions are listed below. Countries/territories must be considered to have systems overall meeting the following requirements to be retained or added to the list. Systems vary widely and there are no exact matches for the UK GRC system so this involves an element of evidence-based judgement. As committed to in the Written Ministerial Statement in January, we will continue to regularly update the list to ensure it continues to reflect systems that are at least as rigorous as our own.
- 7.7 Criteria:
- 7.7.1 A relevant clinical diagnosis which is similarly rigorous to the UK system.
- 7.7.2 Evidence of living in the acquired gender. Where a timeframe is specified, a minimum of 12 months must be required and should be part of a 24+ month period in total. If no timeframe is specified then evidence must demonstrate permanence and come from a reliable source, such as a clinician.
- 7.7.3 A report detailing any medical treatment, if any has been undertaken (treatment is not required);
- 7.7.4 A declaration or evidence of permanence, e.g. a statutory declaration or affidavit;
- 7.7.5 If the country or territory includes options for under 18s to apply, but otherwise meets the criteria, it may be retained or added to the list but noting that under 18s cannot apply for a UK GRC;
- 7.7.6 If the country or territory includes options for recognition of non-binary genders, but otherwise meets the criteria it may be retained or added to the list, but noting non-binary people could only apply for a binary identity on their UK GRC.
- 7.7.7 Element of third party verification in the system e.g. Government department administration, court, clinician or judicial sign-off.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 The Order revokes and re-makes the 2011 Order, with amendments.

10. Consultation outcome

- 10.1 Any update to the list of approved countries and territories is a periodic administrative task that does not require formal public consultation. A consultation on reforming the GRA was conducted in 2018 by a previous administration. As announced in 2020, we believe the current provisions in the GRA are effective and allow for those who wish to legally change their sex to do so. We also committed to reduce the fee, digitise the application process and streamline and update the GRA where appropriate.
- 10.2 As required under section 2(4) of the GRA, the Scottish Government and Northern Ireland Executive have also been formally consulted in advance of laying this SI.

11. Guidance

- 11.1 The Equality Hub will publish the reviewed list of approved countries and territories, following the passage of this Statutory Instrument. Further advice and guidance on the Gender Recognition Certificate application process, for both the overseas and main routes, can be found at: <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply> and the content will be updated when the SI comes into force.

12. Impact

- 12.1 We have conducted an Equality Impact Assessment. The impact of these changes is expected to be minimal. Overseas applications make up a very small proportion of all applications - 345 (5%) applications were received by the Panel from 2009/10 to 2022/23, compared to 5,917 (94%) on the UK standard route over the same period. The change will not have a retrospective effect and people who have previously received certificates on the basis of their country or territory being on the list will not be affected. Further, anyone will still be able to apply on the standard route. We also want to enable transgender citizens/residents of newly added countries/territories to access the overseas route. We therefore anticipate that there would be a very limited impact on a small subsection of people who share the protected characteristic of gender reassignment who could have used the overseas route to apply for a GRC, and will use the standard route after the commencement of this Act.
- 12.2 The impact on the public sector is minimal. The NHS may see a small increase in demand for appropriate UK practitioners (e.g. psychologists) to provide evidence in line with the requirements of the standard route for applicants who might otherwise have gone through the overseas route.⁶ There may also be increased demand on the Gender Recognition Panel, with applications coming from people with legal gender recognition from countries or territories that are new to the list.
- 12.3 A full regulatory Impact Assessment has not been prepared for this instrument because this SI relates to a periodic administrative change in line with existing legislation.
- 12.4 There is no impact on businesses, charities or voluntary bodies.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the Foreign, Commonwealth and Development Office, the Equality Hub in the Cabinet Office and the Ministry of Justice⁷ will keep changes to other countries' gender recognition systems under review.

15. Contact

- 15.1 The LGBT team at the Equality Hub can be contacted with any queries regarding the instrument via public.correspondence@cabinetoffice.gov.uk

⁶ a gender dysphoria diagnosis will only be accepted from UK practitioners as set out at www.gov.uk/apply-gender-recognition-certificate/what-documents-you-need

⁷ As HM Courts and Tribunals Service manage the Gender Recognition Panel.

- 15.2 Oliver Entwistle, Deputy Director for International LGBT Policy and operations at the Equality Hub can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Women and Equalities, Kemi Badenoch MP can confirm that this Explanatory Memorandum meets the required standard.