

## SRA response

### *Reform of the Gender Recognition Act 2004*

Published on 31 October 2018

View the consultation on Reform of the Gender Recognition Act 2004

[<https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004>] .

The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales. We work to protect members of the public and support the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. We are the largest regulator of legal services in England and Wales, covering around eighty percent of the regulated market. We oversee some 184,000 solicitors and more than 10,400 law firms.

We welcome this consultation on the Gender Recognition Act 2004 and are pleased to have the opportunity to contribute based on our own experience of this issue as an organisation. Over the last four years we have made real progress in the work we have done to encourage and promote trans inclusion to those we regulate.

We have an inclusive approach to engaging with people and recognise we are all different. We treat everybody with dignity and respect, including in relation to trans inclusion. This sits alongside one of our regulatory objectives, as set out by the Legal Services Act 2007(LSA), which is to encourage 'an independent, strong, diverse and effective legal profession'. The SRA is also covered by the public sector equality duty set out in the Equality Act 2010 and this means we are proactive in taking steps to make sure our approach is fair to trans people.

Over the last four years we have taken forward our work in this area, to meet both the legal requirements as set out by government, but also to meet the objectives set out in our Equality Diversity and Inclusion Strategy 2014 to 2017 [<https://www.sra.org.uk/sra/equality-diversity/archive/edi-progress-2014-2017/>] and our Corporate Strategy 2017 to 2020

[<https://www.sra.org.uk/sra/equality-diversity/diversity-work/>] .

We produced a body of work [<https://www.sra.org.uk/solicitors/diversity-toolkit/lesbian-gay-bisexual-transgender-inclusion/>] for law professionals and law firms in 2017 and 2018, including a:



1. trans inclusion policy statement [<https://www.sra.org.uk/sra/equality-diversity/diversity-policies/>]
2. guidance for law firms on creating a trans inclusive workplace
3. case studies showing how some firms are supporting and promoting trans inclusion
4. videos about why firms should be trans inclusive and why this matters
5. practical tips for law firms to help promote a trans-positive workplace.

This work was developed with input from trans individuals and experts in the field. It provides information for all law firms we authorise and regulate about trans inclusion and explains why it matters. The guidance is clear about why law firms should engage with trans inclusion and provides information on ways in which law firms can do this. For example, talking about terminology, producing a trans specific statement, drafting a policy, using inclusive language, engaging with staff, looking at facilities and diversity monitoring.

Our policy statement and guidance is also clear on the preferred terminology people choose to use, including those who identify as non-binary:

Trans is an inclusive term for people who may identify themselves as transgender or transsexual, but also includes identities such as agendered, non-gendered, non-binary or gender queer.

As part of this programme of work, we have reviewed our processes for when a solicitor wants to change their name, including solicitors who identify as trans. People we regulate can manage their own electronic records and make a change to their title and name if they wish to do so. We recognise a person may wish to make these changes at different times in their transition and we accommodate this whether or not a person has undergone or intends to undergo any process for gender reassignment. In line with this approach, we do not ask for a Gender Recognition Certificate (from solicitors) as evidence for a change in name or other personal details.

We monitor the diversity of those we regulate and we collect diversity data from law firms every two years. All regulated firms have to collect, report and publish data about the diversity make-up of their workforce. Our most recent collection was in August 2017, when ninety-two percent of law firms reported their data. This data covers just over seventy percent of solicitors who hold a practising certificate. In 2017, we introduced a question about gender identity asking about whether a person's gender identity is different from that registered at birth.



In our first set of diversity data about trans [<https://www.sra.org.uk/sra/equality-diversity/archive/law-firms-2017/>] , we found two percent of solicitors, two percent of other staff and one percent of partners confirmed their gender identity was different to that assigned to them at birth. This estimate is higher than that provided by the Gender Identity Research and Education Service who estimated that approximately one percent of the population are transgender.

We understand some law firms are reluctant to collect data on trans staff for fear of disclosing sensitive and confidential information. We recognise that good quality statistical data is needed to better understand the needs and requirements of trans people. In relation to consultation question 9, about privacy and disclosure, we are concerned that the wording of section 22 is unclear and does not recognise the need of regulators such as ourselves to process information about people who identify as trans. This is of concern to us given that a breach of section 22 is a criminal offence and suggest that this opportunity be taken to amend it.

We fully support the intention behind this section and take steps ourselves to protect the identify of all people who identify as trans, whether or not they have a gender recognition certificate or intend to apply for one. The challenges we face with the current terms of section 22 are set out below:

The protection is limited in that it extends only to those who have a GRC or are intending to apply or are in the process of applying for the certificate. We have the same approach to privacy for everyone we come across in the course of our work who identifies as trans, regardless of their intention or status in relation to the GRC as required by data protection and equalities legislation. However, given the serious consequences for our employees (criminal liability) if there is a disclosure, we feel obliged to ask people we deal with if they have a GRC (although we do not request a copy) so that we are aware of the cases where there is potential criminal liability. To discharge our role as a regulator, it is not usually necessary for us to know a person's intention in relation to the gender recognition process afforded by the Act.

Section 22(1) of the GRA states: "It is an offence for a person who has acquired protected information in an official capacity to disclose the information to **any other person**" [emphasis added]. There is no definition of 'person' in the GRA, and we rely on the definition in the Interpretation Act 1978 - person" includes a body of persons corporate or unincorporated'. We understand this provision to mean that there is no disclosure of information in circumstances in which an employee processes protected information which may include disclosing such information to a colleague in the proper performance of their work. It is our understanding that in these circumstances there is no disclosure under section 22 as the person holding and processing the information is the regulatory body rather than

the individual employee. However, the fact that there is no clarification or definition of 'person' for the purposes of this section, in our view introduces a lack of clarity. Given the potential criminal consequences we believe this should be rectified to make it clear that this is the position.

There are exemptions to the prohibition against disclosure in the GRA which are potentially relevant to our work as a regulator, for example where disclosure is:

- for the purpose of proceedings before a court or tribunal including instituting such proceedings - S22(4)(e)
- is for the purpose of preventing or investigating crime - S22(4)(f)
- is made in accordance with a statutory provision or provision made by virtue of an enactment (which could include some of the SRA's regulatory requirements) - S22(4)(j)
- is made for the purpose of obtaining legal advice - S22(4)(i) (The Gender Recognition (Disclosure of Information) (No 2) Order 2005 - S3).

However, the exemptions do not fully cover the work that we do in our role as a regulator. For example, although the exemptions may cover work we carry out for the purpose of proceedings at the Solicitors Disciplinary Tribunal, it may not cover work undertaken in the early stages of an investigation where the matters being investigated are not classed as a crime. It is also unlikely to cover the work we do in relation to the authorisation of individuals or firms. We would welcome an additional exemption that recognises the work that regulators such as ourselves need to undertake in the proper performance of the full range of their regulatory functions.

In summary, on this aspect of the consultation we would hope that a high level of protection continues to apply in these cases but we would welcome:

- further clarity about the extent of liability so we have certainty about the scope of that liability
- a review of the scope of the exemptions so as to properly consider the role of regulators such as the SRA.

A diverse legal workforce is important for both the public and the firms themselves. Diverse firms can attract the best talent from every walk of life and there is evidence that decision making and competitiveness improves with diversity. And it is a matter of public confidence that the public can see that lawyers and the judiciary reflect the communities they service.

In line with our commitment to the objectives set out in the LSA, and to the better regulation principles that regulation must be accountable, transparent, proportionate, consistent and targeted, we support a review of

the GRA that ensures a clear, up to date and transparent approach to trans inclusion.