

What improvements to the Marriage and Civil Partnership (Scotland) Bill are we seeking for trans and intersex people?

Scottish Transgender Alliance and Equality Network

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1. Spousal consent

Many trans people and their allies are extremely concerned by the inclusion of the spousal consent requirement within this bill. The spousal consent provision in the Marriage (Same Sex Couples) Act generated a great deal of criticism from trans people during the passage of the Act at Westminster and has led to many trans people feeling deeply unhappy about the legislation as enacted.

Across the UK the concept has been described as a “spousal veto” as it effectively enables the spouse of a trans person to prevent their partner from obtaining gender recognition, unless the trans person is able to obtain a divorce; if the non-trans spouse is unwilling to cooperate divorce proceedings can take many years.

Our main objections to the spousal consent requirement are that:

- Although the couple have been parties to an ostensibly mixed sex marriage, the trans person must have been living in their acquired gender for at least 2 years prior to applying for gender recognition, and so the non-trans spouse has already remained in a socially same sex marriage for at least 2 years.
- In the time preceding the gender recognition application the non-trans spouse could have, if they had wanted, initiated divorce proceedings on grounds of unreasonable behaviour.
- The granting of the gender recognition certificate has no practical impact on the non-trans spouse because their pension, inheritance, parenting and all other rights remain unchanged.
- Under the current provisions of the bill, if the non-trans spouse withholds consent then urgent divorce is the only option left available to the trans person in order to access their human right to have the gender they identify as legally recognised. This government inflicted pressure to urgently divorce could cause unnecessary disruption and harm to the non-trans spouse and any children. Separating the conflicting interests of the couple’s marriage and the trans spouse’s

gender recognition enables the couple to fully consider their options without external pressures and so arrive at the best settlement for their particular circumstances.

- Under the current provisions of the bill, even if the trans spouse urgently initiates divorce proceedings once their interim certificate has been issued, if the non-trans spouse decides to be uncooperative they can take a number of steps to delay proceedings and so deny the trans spouse access to gender recognition for an indeterminate length of time.

We understand that there may potentially be some non-trans spouses who could feel strongly that they want their marriages to remain as they were originally solemnised and might be distressed by the thought that they would be re-registered and a new marriage certificate issued showing new details for the trans spouse following gender recognition. At present, however, we have not heard of any such spouses requesting protection from the re-registration of their existing marriage. If such spouses exist, we agree that they should be able to block the re-registration of the existing marriage but consider it to be highly disproportionate for them to be able to block their trans spouse from the right to access gender recognition.

We view it as important to ensure that the rights of both the trans and non-trans spouse are appropriately balanced and therefore the solution we are suggesting below enables a trans spouse to be granted a full gender recognition certificate but does not enable the marriage to be re-registered if spousal consent is withheld.

We suggest this could be achieved by amending the bill as follows:

- As is currently the case a person applying to the Gender Recognition Panel (GRP) without a statutory declaration of consent from their spouse will receive an interim gender recognition certificate.
- An interim gender recognition certificate holder is able to make an application to the Sheriff Court for a full gender recognition certificate to be issued.
- Such an application must be made within 6 months of the date of issue of the interim certificate.
- The application will be granted as long as it is made within the time limit.
- Once the full gender recognition certificate has been issued the applicant will be able to obtain a new birth certificate.
- As there has been no spousal consent the marriage will not be re-registered and a new marriage certificate will not be issued.
- If, once full gender recognition has been granted, the non-trans spouse consents then the marriage will be able to be re-registered.

- As the law currently stands either party will continue to be able to use the granting of the interim gender recognition certificate as grounds for divorce.

Our suggested improvement to the bill is a distinctly Scottish solution. The Sheriff Court in Scotland is well placed to issue full gender recognition certificates because it already does so when a divorce is granted on grounds of a party to the marriage having been issued with an interim certificate. It has the advantage of not requiring any alternative procedures to be used by the GRP for Scottish applicants. Due to the wording of Part 2, Schedule 2 of the Gender Recognition Act 2004 either spouse will continue to be able to rely on the fact that an interim gender recognition certificate has been issued as grounds for a divorce.

Our strong view is that the fact that the trans person is issued with full gender recognition causes no actual detriment to the non-trans spouse, as their marriage remains as it was originally recorded. Conversely, the trans spouse can suffer a great deal of discrimination and other detriment while their birth certificate does not reflect the gender they live as.

This proposal achieves the objective of the legislation, that being to ensure that a non-trans spouse does not find themselves in a registered same sex marriage against their wishes, because the marriage is not re-registered, while ensuring that the trans spouse is able to access their human right to have the gender they identify as legally recognised.

We are unaware of any spouses of trans people who feel strongly that their consent should be sought prior to their spouse obtaining gender recognition. We therefore believe that it would be wrong for the committee to retain the “spousal veto” of gender recognition without having heard compelling evidence from the spouses of trans people that they would wish to make use of it.

2. Long-term transitioned people

Trans people who transitioned a long time ago find it difficult to assemble the same level of medical evidence for the gender recognition panel as a recently transitioned person because long-term transitioned people are no longer in contact with the gender specialists who treated them. The Gender Recognition Act provided (in section 27) a two-year temporary arrangement for long-term transitioned people, which was available between 2005 and 2007. This enabled those who had lived in their acquired gender for at least six years to obtain gender recognition with only one medical report, rather than two, from a medical practitioner who did not have to be a specialist

practising in the field of gender dysphoria. The temporary arrangement also enabled applicants to apply based on evidence of having undergone treatment to modify sexual characteristics as an alternative to providing evidence of a diagnosis of gender dysphoria.

This provision was extremely valuable because obtaining confirmation of a diagnosis of gender dysphoria can be extremely difficult after a long period of time. The specialist who provided the original diagnosis will often have retired, or may even have died, and applicants would therefore have to be re-diagnosed by another specialist. Patients wait for between one and three years to be referred to a specialist practising in the field of gender dysphoria, and it is extremely difficult for patients who have been out of the system for a considerable period to be re-referred.

Since 2007 it has become clear that long-term transitioned people are still coming forward for gender recognition who had not previously heard about it. The longer a person has been transitioned, the less likely they are to have heard about the availability of gender recognition, because the less likely they are to be in contact with trans organisations.

Why re-introduce this process?

The temporary arrangement expired in 2007. However, there will be some trans people who transitioned a long time ago who were unable to take advantage of the 2005–2007 temporary arrangement, because they did not want to dissolve their marriage. Other trans people missed the opportunity to take advantage of the temporary arrangement because they were unaware of gender recognition. These applications are causing the Gender Recognition Panel delays because it is much harder for the applicants to assemble the two medical reports required.

It is our understanding that there are also a significant number of trans people who would have been able make use of the temporary arrangements but chose not to on a point of principle because they felt it unjust that others could not, simply because they were married or in a civil partnership.

Overall, therefore, there would be advantages for married long-term transitioned people, and other long-term transitioned people, and for the Gender Recognition Panel itself, in reinstating the alternative rules for obtaining gender recognition which were in operation for the first two years following the introduction of the legislation. Those alternative rules operated perfectly well without problems during that period.

In light of this the UK government introduced Paragraphs 17 to 20 of Schedule 5 to the Marriage (Same Sex Couples) Act 2013, which provides alternative grounds for granting a gender recognition application, similar to those formerly contained within section 27 of the Gender Recognition Act.

We therefore suggest that the Scottish Bill should include a provision similar to Paragraphs 17 to 20 but remove the rather arbitrary requirement for the applicant to be, or have been, married or in a civil partnership prior to making the application. This will ensure that long-term transitioned people who had not heard in time about gender recognition and those who refused to use the discriminatory process as a matter of principle will finally be able to access the process.

The provision in the UK Government Act requires the applicant to provide evidence of having undergone surgical treatment. However a number of applicants may not be able, or may not wish, to undergo surgery (for example because they have another medical condition which means it would be dangerous for them to do so or because they were unable to access funding for surgery) but will nonetheless have fully transitioned to live as the gender they identify as for the requisite amount of time.

We therefore suggest that a similar Scottish provision should instead require evidence of *medical* treatment. This would mean that a long-term transitioned person who had not had surgery but had received hormone treatment to enable them to live as their acquired gender will also be able to make use of this route to gender recognition.

3. Gender neutral ceremonies

In order for religion and belief marriage ceremonies to be sex/gender neutral where the couple wishes, we are of the opinion that an amendment to the bill is required. It is vital to allow gender neutral ceremonies because a person's overseas gender recognition is not automatically recognised in the UK. For example, an American trans woman who has fully transitioned and received gender recognition as female in her home state would still be regarded as legally male under UK law. When she and her lesbian partner get married in Scotland, they would regard their marriage as a lesbian same sex marriage but legally it would be a mixed sex marriage. It would be highly offensive and inappropriate to call her a husband during a marriage ceremony when she lives permanently as a woman. Furthermore, where someone is born with an intersex physical variation in their biological sex or is a trans person who lives in an androgynous manner rather than simply as either a man or a woman, they should not be forced to be called a husband or a wife against their wishes.

Currently section 11(2)(f) of the bill provides that where a marriage is between a legally mixed sex couple the ceremony must include a declaration that the parties “accept each other as husband and wife,” and a declaration by the celebrant that the parties are “husband and wife”.

Section 11(2)(g) however alternatively provides that where a marriage is between a couple of the same legal sex the ceremony must include a declaration that the parties “accept each other in marriage,” and it is therefore gender neutral. We suggest that the bill be amended to accommodate mixed sex couples who would prefer to use this gender neutral wording, and provide that the ceremony for a mixed sex couple, be in one or other form.

We agree that religious organisations should be able if they wish to conduct all their mixed-sex marriages using the gender-specific terms husband and wife. And those terms should also continue to be available for all couples who want to use them. But it is wrong to impose those terms where the couple would prefer to use the gender-neutral language and the organisation conducting the marriage agrees to do that.

4. Lowering the age for gender recognition

Currently one of the requirements for obtaining gender recognition is that applicants be at least 18 years of age. We suggest lowering this to 16 for the following reasons:

- The Gender Recognition Act 2004 as it applies to Scotland would be harmonised with both the Age of Legal Capacity (Scotland) Act 1991 (providing that people of 16 can enter into any transaction) and the Marriage (Scotland) Act 1977 (providing that people can marry at 16 without parental permission) and so accurately reflect the legal position in Scotland rather than that in the rest of the UK;
- Under the current provisions of the Marriage and Civil Partnership (Scotland) Bill, a young couple, where one person is legally male and the other person is a 16 or 17 year old trans woman who identifies and lives as female but is still legally male due to not being old enough to access gender recognition, would be discriminated against compared to other couples. This is because, as they are unable to access gender recognition to change their relationship from a legally same sex couple to a mixed sex couple, they would be unable to marry in a church which does not conduct same sex marriages. If the trans person was able to have their gender legally recognised at 16 they would be able to have a mixed sex marriage in their church, like any other mixed sex couple of their age. The same discrimination would apply to a couple where one person is legally female and the other person is a 16 or 17 year old

trans man who is still legally female due to not being old enough to access gender recognition;

- Due to the Age of Legal Capacity (Scotland) Act 1991 young people in Scotland are able to consent to medical treatment as soon as they are able to fully understand the nature and consequences of the treatment and therefore increasing numbers are receiving a diagnosis of gender dysphoria, undergoing transition and beginning hormone blockers in early puberty. We are in contact with several young people who have already been living as their acquired gender for over the 2 years required by the Gender Recognition Act by the age of 16. LGBT Youth Scotland is in contact with even more young people in this situation. It is unfair to require young people to wait a further two years for gender recognition and the ability to marry in accordance with their gender identity, particularly at a time when they are at risk of facing a great deal of discrimination in education and employment due to the sex on their birth certificate not reflecting their gender.

For more information about these issues, please contact the Scottish Transgender Alliance:



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The Scottish Transgender Alliance is based within the Equality Network and is a founding partner in the Scottish Equal Marriage Campaign.

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