



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to

the Consultation on the review of the Gender Recognition Act 2004

Introduction

The Faculty of Advocates welcomes the opportunity to comment on the Scottish Government consultation on the review of the Gender Recognition Act 2004.

General Comments

We are acutely aware as to the highly sensitive and political nature of this consultation. We consider that issues of policy are matters for the Scottish Government and the Scottish Parliament. The Faculty proposes therefore only to offer comment on issues of law.

Question 1(Paragraphs 3.01 - 3.29)

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaration system for legal gender recognition instead.

Do you agree or disagree with this proposal?

The Faculty of Advocates acknowledges that the Gender Recognition Act 2004 has been overtaken by certain international developments and that it uses phrases and terminology that are no longer considered acceptable. Moving to self-declaration is however a legally complex and challenging proposal, requiring careful balancing of disparate rights and interests.

It is acknowledged that each of us at birth is observed to have a sex (male or female), based on our physical characteristics. Most people's gender identity (the gender with which they associate themselves) and gender presentation (the gender they outwardly show) will not differ from that typically associated with their sex. It is acknowledged that transgender people have a gender identity which differs from that of their birth sex. It is also acknowledged that transgender identities take a wide diversity of forms.

We note that the present legal position is that a person with a gender recognition certificate should be treated in their acquired gender for all purposes. We acknowledge that this means that anyone who identifies themselves as a member of the opposite sex can already access single sex facilities such as changing rooms, hospital wards, refuges, toilets and single sex gyms. Those who provide single sex services do not contravene the Equality Act 2010, so far as gender reassignment discrimination is concerned, if the conduct in question is a proportionate means of achieving a legitimate aim. The Consultation Paper does not refer specifically to this provision, but does mention the possibility of discussing with the UK government whether changes are required to the 2010 Act, which is largely reserved. We consider that the protection set out above should remain.

We note that references are made to the success of self-identification in Ireland and in other jurisdictions. Changes to the regime in Ireland were only made in 2015. We are also conscious that self-identification laws in the other jurisdictions referred to are all relatively new and their operation in practice may not yet be easily assessed..

It will be important to any transgender person to ensure that his or her status is consistently recognised at least within the United Kingdom. It is not yet clear whether proposals for self-identification are being taken forward elsewhere in the United Kingdom. The Scottish Government acknowledges that certain aspects of identity are reserved matters. A passport and a driving licence in one gender but Scottish recognition in another will cause difficulties for the person concerned and for others who rely on such documents for identification

purposes. It may be considered desirable that there is consistency among the jurisdictions of the UK in relation to gender recognition.

Question 2 (Paragraphs 3.30 – 3.34)

Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Answer:

Yes.

Question 3(Paragraphs 3.35 – 3.39)

Should there be a limit on the number of times a person can get legal gender recognition?

Answer:

Yes. The potential to “detransition” should be provided for and it is submitted that the process for doing so should be easier for young people who may have since changed their position on their gender identity. Limiting the number of times that a person can change their gender identity, or the period within which there may be a further change, is consistent with the seriousness of the matter.

Question 4(Paragraphs 3.40 – 3.47)

If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

(A) only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?

or

(B) to everyone?

or

(C) Don't know

Answer:

Option A, subject to our comments in response to Question 1 as to the difficulty of differences in gender recognition if different parts of the UK have different provisions and if reserved legislation has the result that the same person is treated as having a different gender for different purposes.

Question 5(Paragraphs 4.04 - 4.07)

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16).

The Scottish Government proposes that people aged 16 and 17 should be able to apply and obtain legal recognition of their acquired gender. Do you agree or disagree?

Answer:

We acknowledge that 16 and 17 year olds in Scotland can vote in elections and marry and that there is a general consensus that 16 and 17 year olds have legal capacity to make decisions that affect their lives. The Age of Legal Capacity (Scotland) Act 1991 expressly provides that a person over the age of 16 has legal capacity to enter into any transaction. Moreover, 16 and 17 year olds are likely to be embarking on new chapters in their lives either through further or higher education or employment. We acknowledge that having a gender recognition certificate would afford the young person protection, as at present they would have to disclose their transgender status. To that end we support this proposal.

We observe that there are regimes where the safeguarding of young people aged 16 and 17 leads to their continuing to be within the definition of 'child', for example the Protection of Vulnerable Groups (Scotland) Act 2007. We do consider that it should be more straightforward for a young person to be able to reverse the process should they no longer wish to live in their new gender. We note that the Age of Legal Capacity (Scotland) Act 1991 contains express protection for young people ,who can apply up to the age of 21 for transactions undertaken when they were 16 or 17 to be set aside by the court. There should be similar protection for young people who obtain legal recognition of an acquired gender,

but seek reversal of that recognition, at least while they are under 21 and possibly older, having regard to the lifelong implications of gender change. There is as yet little data about outcomes for young people who have sought gender change.

Question 6(Paragraphs 4.08 – 4.41)

Which of the identified options for children under 16 do you most favour? (Please select only one answer).

Option 1 – do nothing for children under 16

Option 2 - court process

Option 3 - parental application

Option 4 – minimum age of 12

Option 5 – applications by capable children

None of these options

Answer:

Option 2 – Court Process

It is submitted that any gender reassignment application for a child under the age of 16 years should be made by court process. We are aware of the English case of *In Re J* [2016] EWHC 2430 (Fam) where a four year old male child was “living in stealth” as a girl due to his mother’s insistence that he had gender dysphoria. The local authority was supportive of his transition without any medical or psychological evidence. The court held that J was pressed into a gender identification that had far more to do with his mother’s needs and little, if anything, to do with his own. J now lives as a boy with his father. It is acknowledged that this case is highly unusual but it highlights an issue should a parent or child seek to change the child’s gender and make a poorly informed choice for their child.

We consider that in the case of a child aged under 16 independent scrutiny is appropriate and that the courts are best placed to deal with this issue. The Scottish Courts are well equipped to deal with such applications and any assessment of the application would be governed by the child’s welfare as the paramount consideration.

Question 7(Paragraphs 5.01 – 5.08)

Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Answer:

We consider that a balance must be struck between the rights of the transgender person to seek official recognition of their acquired gender and the rights of their spouse to decide whether they want to remain in the marriage. It may be a concern that spousal consent gives the spouse too much power in the transgender person's ability to access their legal rights. We consider that this is a difficult issue. Under the present system, a spouse cannot veto a person's application for a gender recognition certificate. We are not persuaded that that should change.

Question 8(Paragraphs 5.10 – 5.16)

Civil partnership is only available to same sex couples. This means that civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

Answer:

As matters currently stand, no. It is submitted that this should not be possible whilst civil partnerships are only available to same sex couples. We consider that this matter should be addressed in review of the Civil Partnership Act 2004. We are however aware permission to appeal to the UK Supreme Court has been given in the case of *Steinfeld and Keidan v Secretary of State* [2017] EWCA Civ 81. This case challenges on human rights grounds the non-availability of civil partnerships to opposite sex couples. If the appeal succeeds then the non-availability of civil partnership in these circumstances will require to be reconsidered.

Question 9(Paragraphs 5.17 – 5.21)

Should legal gender recognition stop being a ground of divorce or dissolution?

Answer:

No. The proposals, if enacted, will render ineffective the provision for divorce on issue of an interim gender recognition certificate, but will then leave a spouse who seeks immediate divorce having to rely on a claim that the transgendered spouse has behaved in such a way that they cannot reasonably be expected to continue to cohabit. Unless relying on that ground, and in the absence of consent, the spouse seeking divorce will have to wait for two years. There must be consideration as to how to provide a ground that is not critical of either spouse for not remaining in a marriage after one of them has transgendered. The solution may be simply to allow legal gender recognition to be a ground for divorce that is open to either party.

Question 10(Paragraphs 6.01 – 6.06)

Are any changes to section 22 (prohibition on disclosure of information) necessary?

Answer:

We consider this to be a matter for the current Data Protection Bill. Data protection issues are reserved to Westminster in any event.

Question 11(Paragraphs 6.23 – 6.31)

Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Answer:

Yes, if the person is habitually resident in Scotland, and subject to the suggested public policy exception. A public policy exception is a standard provision in the context of international private law and acts as an ultimate safeguard in extreme circumstances (for example were a child or mentally incapacitated person to have been attributed an unwanted or unwarranted acquired gender).

Question 12(Paragraphs 7.01. – 7.06.)

Should Scotland take action to recognise non-binary people?

Answer:

We consider this to be a policy issue rather than a legal one and accordingly make no comment.

Question 13(Paragraphs 7.08. – 7.41.)

If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? (You can select more than one option).

Option 1: Changes to administrative forms

Option 2: Book of Non-binary Identity

Option 3: Limited document changes

Option 4: Full recognition using proposed self-declaration system

Option 5: Incremental approach

Option 6: Amendment of the Equality Act 2010

Answer:

We consider this to be a policy issue rather than a legal one and accordingly make no comment.

Question 14

At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Are you aware of other impacts we have not identified?

Answer:

We consider this to be a policy issue rather than a legal one and accordingly make no comment.

Question 15(Paragraphs 8.01. – 8.06.)

Do you have any comments about, or evidence relevant to:

(a)the partial Business and Regulatory Impact Assessment;

(b)the partial Equality Impact Assessment;

(c)partial Child Rights and Wellbeing Impact Assessment; or

(d)the partial Privacy Impact Assessment?

Answer:

We consider this to be a policy issue rather than a legal one and accordingly make no comment.

Question 16

Do you have any further comments about the review of the Gender Recognition Act 2004

Answer:

We have nothing further to add.