

Scottish Government

Consultation on Review of the Gender Recognition Act 2004

Closing Date – 1 March 2018

Submission by Rick Thomas on behalf of the Christian Medical Fellowship

Introduction

The consultation document lays out the Scottish government's view of how a person who does not identify with their birth sex should be able to change their legal gender. They suggest that a non-medicalised, self-declaration model should replace the current 'assessment' model. A minimum period living in the preferred gender would no longer be a requirement.

The approach proposed by the Scottish government is in line with the recommendations of the House of Commons Women and Equalities Committee report on Transgender Equality (December 2015). This report was itself influenced by the 'Yogyakarta Principles' (November 2006) and Resolution 2048 of the Parliamentary Assembly of the Council of Europe (April 2015) that, the consultation document claims, together represent 'best practice'.

Neither of these documents is legally binding and justification of the claim that they represent best practice is nowhere offered by the authors of the consultation document. The Yogyakarta Principles were drawn up by an *ad hoc* body that did not include clinicians with expertise in gender dysphoria. We also note that the European Court of Human Rights (Garçon and Nicot v France [2017] ECHR 338), in a judgement which is legally binding, held that an 'assessment model' is compatible with human rights and thus with best practice.

CMF represents some 5,000 medical practitioners in a wide variety of clinical settings across the UK. We oppose the move to a self-declaration model, not because we wish to endorse the current assessment model, but because we believe the proposed changes would lead to a worse outcome. We agree with the consultation document authors that a change to a 'medical' model (where legal gender change would be conditional upon having 'treatment' with cross gender hormones and/or reassignment surgery) would be harmful – in effect forcing people to undergo ill-considered, radical and largely irreversible forms of treatment with implications that include infertility and disfigurement.

We should take note of the accounts¹ of people seeking to 'de-transition' and re-identify with their birth gender. Self-declaration would make it both easier and quicker to change legal gender and thus encourage earlier medical transition. This would increase the possibility that people make choices they later come to regret.

¹ <http://www.telegraph.co.uk/health-fitness/body/gender-reversal-surgery-rise-arent-talking/> (accessed 13.02.2018)

Self-declaration, we believe, would be harmful for individuals, their families and society as a whole. It makes gender identity simply a matter of a person's subjective feelings about themselves and changing legal gender simply a matter of personal choice. It encourages the view that gender identity defines reality and that biological sex is but a social construct, something 'assigned' at birth. This new ideological dogma has no evidence-base in science but self-declaration would appear to reinforce it as if proven fact.

The transgender community has moved away from a simple 'binary' view of gender, preferring to see gender identity as fluid - liable to change or fluctuate over time. It is difficult to imagine a legal process for gender change in such an environment that could be both fit for purpose and resistant to frivolous abuse. What is certain is that to remove all medical or social prerequisites for legal transition will trivialise what is a complex human developmental process.

Question 1

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-declaratory system for legal gender recognition instead.

Do you agree or disagree with this proposal?

Disagree.

There is evidence² that amongst those who present with gender dysphoria there is an elevated prevalence of co-morbid psychopathology, especially mood disorders, anxiety disorders and suicidality.³ The proposed changes would deprive these people of contact with mental health professionals at the time when their assessment and advice could be crucial. There is a real risk that individuals who require psychological support will not receive it.

This is of particular concern for teenagers struggling with the turbulent effects of puberty, social transition and identity issues in general. Pursuing legal gender transition may harmfully distract a young person from addressing psychological issues (such as anxiety and depression) with the help and support of mental health professionals and others. In our opinion, it is not wise to encourage young people under the age of 18 to make permanent decisions on issues as important as gender identity. According to the DSM-5, rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary. In biological males, persistence has ranged from 2 to 30 percent. In biological females, persistence has ranged from 12 to 50 percent.⁴ It's clear that, for the majority of gender-confused boys and girls, gender dysphoria desists over time as they enter adolescence.⁵

² Dhejne C et al. Mental health and gender dysphoria: A review of the literature. *Int Rev Psychiatry* 2016; 28(1):44-57

³ Zucker KJ et al. Gender Dysphoria in Adults. *Annu Rev Clin Psychol*, Vol 12, 2016:217-247.

⁴ DSM-5. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn. Washington DC:American Psychiatric Publishing, 2013, 302.85:455.

⁵ Zucker KJ. Measurement of psychosexual differentiation. *ArchSex Behav* 2005;34(4):375-388.

Question 2

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?

Yes. Whatever system is introduced must discourage frivolous abuse. However, transgender ideology no longer recognises gender identity as fixed but as fluid.⁶ This is clearly at odds with a declaration of intent to live in an acquired identity until death.

Question 3

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

Yes, but the move to self-declaration in itself defers to the notion that gender identity is a matter of personal choice. In a culture that prizes personal autonomy so highly, limiting the number of times a person can change their fluid gender identity, will prove indefensible philosophically and legally.

Question 5

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

Disagree.

The UN Convention on the Rights of the Child defines children as those under the age of 18 years. Teenagers are vulnerable to the turmoil of puberty, peer pressure, social media etc, from which most will emerge over time with a clear sense of their own identity. Meanwhile, they should be protected from taking far-reaching decisions.

About 80 percent of children who present with gender confusion will desist naturally during the course of adolescence.⁷ Across various studies, persistence in biological males has ranged from 2 to 30 percent and in biological females, from 12 to 50 percent.⁸ To encourage children to transition early ignores the evidence that most will emerge from puberty and adolescence with their gender identity resolved in favour of their natal sex.

Question 6

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

⁶ International Gay and Lesbian Human Rights Commission, *Institutional memoir of the 2005 Institute for Trans and Intersex Activist Training*, 2005:7-8.

⁷ Hembree WC et al. (2009), Endocrine Treatment of Transsexual Persons: An Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab.* 94: 3132-54.

⁸ DSM-5. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn. Washington DC: American Psychiatric Publishing, 2013, 302.85:455.

Option 2 – court process

Option 3 – parental application

Option 4 – minimum age of 12

Option 5 – applications by capable children

Option 6 - None of these options

Our answer is 'None of these options'.

A succession of early studies, ten in all, consistently found that about 80 percent of children who are confused about their gender will emerge from puberty with a gender identity that is congruent with their birth sex.⁹ Two, more recent studies put that figure at 64 per cent¹⁰ and 87 per cent.¹¹ In any event, it is clear that a majority of children will desist during adolescence and 'watchful waiting' is therefore the best evidence-based strategy to adopt.

Question 7

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

No. To do so would undermine the value of marriage. The sex of a partner is an essential ingredient in the intention to marry. This is recognised in the current Gender Recognition Act which states that to have hidden the fact of gender reassignment from a spouse renders the marriage null and void. In a similar way, it should not become possible for one partner unilaterally to convert an existing marriage into something approximating legally to a same-sex marriage. No spouse should be left in the dark about their partner's change of legal gender – it should be a legal requirement to inform the spouse of any such change. Consideration should be given to the rights and needs of spouses and children affected by the transition of a married partner and especially to the vulnerability of a mother and her children where her marriage to a trans woman breaks down.

Question 8

Civil partnership is only available to same sex couples. This means that the 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.

Strictly speaking, were they permitted to remain in their existing legal partnership it would mean that a woman and a *trans man* would be in a civil partnership. If both partners wish to remain together following the transition of one of them, then the Scottish government should consider

⁹ <https://www.transgendertrend.com/children-change-minds/> (accessed 27.02.2018)

¹⁰ Steensma T et al, Factors Associated With Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study. *J. of the Amer Acad of Child and Adolescent Psychiatry*, Volume 52, Issue 6, June 2013, pp 582-590.

¹¹ Singh, D. (2012). *A follow-up study of boys with gender identity disorder*. Unpublished doctoral dissertation, University of Toronto.

recognising their partnership as now between a woman and a trans man, by creating a new category of opposite sex civil partnerships. But this should not be recognised as marriage.

In the event that he wishes to de-transition at some later stage, the partnership would simply revert to the original civil partnership.

Question 9

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

No. With some reluctance (because we believe in the permanence of marriage) we suggest this ground for divorce should remain in order to protect the spouse, who might well doubt the integrity and viability of the continuing marriage especially if their transgender marriage partner had kept secret their dysphoria at the time when their marriage took place. If the couple choose to stay together after the transition of one partner, then we suggest this is best treated simply as a continuity of the original marriage, rather than celebrated as a 'new', same-sex marriage.

Question 10

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

No. We strongly suggest that the exception to the ban on revealing protected information to obtain legal advice be retained.

Question 12

Should Scotland take action to recognise non-binary people?

No. Creating a single, third gender for 'non-binary' folk will not adequately represent what is a variety of perceived non-binary gender identities. It would be step further away from the cultural binary norm of male and female that is written in to so much marriage law and other sex/gender specific legal provisions. The ramifications would be far-reaching. Also it is unlikely that this will stop at only one non-binary category as others will seek recognition of more and more of the expanding number of gender self-identifiers.

Of course, people who self-identify as non-binary should be treated with the same respect and dignity as any other, and enjoy the same individual rights and freedoms. We respect the Scottish government's intention to show solidarity with those who suffer gender dysphoria but do not believe it is best served by attempting to create a separate, non-binary gender status.

Question 16

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

Yes. It may be possible to improve aspects of the existing law but the proposal to replace it with another based on self-declaration would, in our view, generate more problems than it might solve. Until very recently gender dysphoria was known as gender identity disorder and required specialist expertise to make a correct diagnosis. Many in the medical profession believe that this change was ideologically driven rather than evidence-based. We are also concerned that:

- de-medicalising the process would deprive people of access to assessment and treatment of psychological problems that may complicate gender dysphoria
- removing the requirement for a minimum period lived in the acquired gender would have the effect of ‘trivialising’ the referral process and overwhelming the appraisal process
- extending legal gender transition to children fails to take sufficient account of the ‘normal’ turmoil of adolescence and the weight of evidence that natural desistance occurs in about 80 percent all cases of childhood gender confusion as puberty progresses¹²
- removing sensible ‘barriers’ to overly-easy transition will result in more people embarking on early medical transition with insufficient thought, more people living to regret irreversible changes to their bodies and an overall increase in co-morbid mental health issues including suicidality
- the proposed self-declaration application process is effectively a registration process – no scrutiny beyond confirmation of identity is required. Self- declarations would be taken on trust and it is expected that such a process ‘would reduce the potential for applications to be refused’ (Appendix H, section 15). In seeking to remove barriers to gender recognition, the Scottish government is in danger of introducing a system that is arbitrary and open to abuse
- self-declaration will make it easier for men, including some with a history of physical or sexual abuse of women, to identify as women and thus gain access to ‘safe spaces’ for women, for example in hospitals, prisons and women’s refuges.

¹² Hembree WC et al. (2009), Endocrine Treatment of Transsexual Persons: An Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab.* 94: 3132-54