The Principles state:
deconstruction of sex to create two separate realities of sex and gender, wherein the latter is not determined by the former. The Yogyakarta Principles buy into this very particular form of post-structuralist philosophy (albeit not as much as some post-structuralists would like), the establish intelligible cultural life, confounding the very binarism of sex, and exposing its fundamental unnaturalness.'

‘Cultural configurations of sex and gender might then proliferate or, rather, there present proliferation might then become articulable within the discourses that operates as an act of cultural inscription. And yet gender is not written on the body as the torturing instrument of writing in Kafka’s “In the Penal Colony” inscribes itself unintelligibly on the flesh of the accused. The question in not: what meaning does that carry within it, but what interventions into this ritualistic repetition are possible? The “real” and the “Sexually factic” are phantasmatic constructions – illusions of substance – that bodies are compelled to approximate, but never can.’

She concludes her book by saying that if the world was to adopt her post-structuralist, anti-foundationalist philosophy:

‘Cultural configurations of sex and gender might then proliferate or, rather, there present proliferation might then become articulable within the discourses that establish intelligible cultural life, confounding the very binarism of sex, and exposing its fundamental unnaturalness.’

The Yogyakarta Principles buy into this very particular form of post-structuralist philosophy (albeit not as much as some post-structuralists would like), the deconstruction of sex to create two separate realities of sex and gender, wherein the latter is not determined by the former.

The Principles state:
Concerns have been raised in the press that decisions taken in some of these cases have had adverse impacts on, and may risk the safety of, other prisoners occurring. Single sex establishments (e.g. prisons) are already struggling to manage sexual offenders who claim to be transgender or who have transitioned.

The fact that the impact assessment suggests that people with a new legal gender without surgery will greatly outnumber those who have had gender reassignment surgery, means that the intrusion of biological males into women only spaces will become much more common as a result of the proposed reassignment surgery, means that the intrusion of biological males into women only spaces will become much more common as a result of the proposed reassignment surgery, means that the intrusion of biological males into women only spaces will become much more common as a result of the proposed reassignment surgery, means that the intrusion of biological males into women only spaces will become much more common as a result of the proposed reass. In this context the idea that one can only have one’s preferred gender recognised if one goes through gender reassignment surgery makes no sense because freedom is not found by trying to bring one’s biology into line with one’s gender but in freeing one’s gender from one’s biology. The idea therefore that one should have to go through gender reassignment surgery, or be on a medical pathway, and be approved by a government appointed panel, is completely unacceptable to this worldview. In the first instance it perpetuates the idea that one should be seeking to bring one’s biology into line with one’s gender which they argue is not necessary. In the second instance rather than being their own choice their gender has to be approved by a government body.

At this point the question arises as to whether the change to self-declaration might be of benefit to those experiencing gender dysphoria who wish to go through gender reassignment.

In the first instance, the point has to be reaffirmed that the law already allows people in that situation to go through gender reassignment and to legally change their gender and the proposed change in the law will not change that.

In the second instance, it is important to be aware that some transsexuals who have been through gender reassignment are very much opposed to self-declaration because it effectively cheapens the process that they have been through. It says that you can just as easily change your gender by not going through surgery and/or another medical process. The Scottish Government should listen to these voices. For example, Miranda Yardley states:

“I am not anti-transgender, I am transsexual: but I acknowledge the need to recognise the material reality of biological sex. Self-declaration negatively impacts upon the freedom, safety and protection of girls and women. As a transsexual, self-identification removes my own protection of ‘gender reassignment’.”

In the third instance, the Scottish Government’s impact assessment shows that the balance between those who have been through gender reassignment surgery, because of gender dysphoria and had their gender legally changed, on the one hand, and those who have not been through gender reassignment surgery and yet have still been able to adopt a new gender legally, on the other, will be such that the latter will greatly outnumber the former. Specifically, the impact assessment states that the number of people obtaining legal gender recognition will increase from around the current 20 or so (based on the figures given for 2016) to between 250 and 400 people per year.

It is not CARE for Scotland’s purpose to argue that people should not have the academic freedom to develop these ideas.

However, it is vital that the Scottish Government understands what is driving self-declaration and that it is entirely different from what informed arguments for the Gender Recognition Act in 2004. In that context the change in law was proposed to help vulnerable people who had suffered from an illness, gender dysphoria, who had undergone gender reassignment surgery, to be recognised in their new gender. The drive towards self-declaration by contrast is about accommodating a particular philosophy. If there was an academic consensus that post-structuralist, anti-foundationalist philosophy was the only philosophy and that it was embraced by Scottish culture, there would be an argument for changing the law to accommodate its claims. In reality, however, post-structuralist philosophy is hotly debated. In this context CARE for Scotland believes that the case for self-declaration simply has not been made.

II] Impact of Self-Declaration on Vulnerable Groups

The case against self-declaration, however, is made even stronger by considering its negative impact on other groups, quite apart from the transsexuals who oppose the change, see above.

Women and girls in particular will be placed in an uncomfortable, vulnerable and potentially risky situations.

Public bodies, charities and businesses will be unable to provide women-only spaces without biological males who have a philosophical commitment to being female and have self-declared to that effect. Individuals with male genitalia will be able to access female changing rooms in leisure centres and schools, female toilets in shopping centres and women’s refuges.

The fact that the impact assessment suggests that people with a new legal gender without surgery will greatly outnumber those who have had gender reassignment surgery, means that the intrusion of biological males into women only spaces will become much more common as a result of the proposed introduction of the self-declaration system. This proposed change must surely increase the likelihood of voyeurism and perhaps other more serious sexual crimes occurring. Single sex establishments (e.g. prisons) are already struggling to manage sexual offenders who claim to be transgender or who have transitioned. Concerns have been raised in the press that decisions taken in some of these cases have had adverse impacts on, and may risk the safety of, other prisoners and staff.

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?

Not Answered
If you want, you can give reasons for your answer or make comments.:
Since we do not believe that a self-declaration system should be introduced, we have decided not to answer this question.

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

Yes

If you want, you can give reasons for your answer or make comments.:
Although CARE for Scotland does not think that people should be encouraged to transition away from their original birth gender, we recognise that a system which facilitates such transition is already established in law. In those circumstances, it would be wise for reasons of administrative practicality and in order to prevent frivolous applications to limit the number of times a person can transition away from their original birth gender to one occasion. However, a person should always be allowed to transition back to their original birth gender in recognition of their actual biological sex. We suggest that there should be a limit of two (i.e. once away from biological gender and once back) on the number of times a person can get legal gender recognition.

4 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?

If you want, you can give reasons for your answer or make comments.:
The Scottish Government should not take forward this legislation.

It is not for the Scottish Government to seek to undermine the laws of other countries by allowing nationals from those states to travel to Scotland in order to obtain gender reassignment. Option B opens up the possibility for gender reassignment tourism with accompanying costs for the NHS in Scotland which would be better spent on other aspects of healthcare.

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

If you want, you can give reasons for your answer or add comments.:
We disagree strongly with this proposal. It is not helpful to make legal provision for children and young people to change their gender. The act of the state making legal provision for this constitutes state sanction and is likely to have the effect of making people consider the option when otherwise they would not. Young people’s brain development continues up to the age of 25. They are more susceptible to peer pressure and less likely to make effective risk assessments than adults. To make provision for them to undergo gender transition either by taking hormone treatment, gender reassignment surgery or simply by self-declaring as a different gender from their birth sex is likely to lead to some coming to regret their decision later in life. Young people are more susceptible to peer pressure and less likely to make effective risk assessments than adults.

Additionally, in allowing young people aged under 18 to legally change their gender, the Scottish Government will facilitate considerable difficulties for schools, youth clubs, other public services, businesses and the voluntary sector in accommodating those young people who choose this option. Such unintended consequences should not be overlooked. By allowing young people to legally change their gender, legal obligations are likely to be placed (especially should the Equality Act be amended to include gender identity as a protected characteristic) on schools and youth clubs to accommodate the young people concerned. Failure to do so may lead to threats of legal action for failure to recognise and accommodate subjective and unverifiable identities, especially where no gender reassignment surgery has occurred. This may place an unreasonable administrative and logistical burden on schools and youth clubs as they seek to balance the rights of the young people concerned with the much larger body of young people who would be uncomfortable sharing changing rooms or other intimate facilities with those who claim to have transitioned – especially in cases where no gender reassignment surgery has occurred.

6 Which of the identified options for children under 16 do you most favour?

Option 1 – do nothing for children under 16

If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views.:
As stated in answer to Question 5, it is not helpful to make legal provision for children and young people to change their gender. The act of the state making legal provision for this constitutes state sanction and is likely to have the effect of making people consider the option when otherwise they would not. Children and young people’s brain development continues up to the age of 25 and to encourage them to undergo gender reassignment surgery is likely to lead to some coming to regret their decision later in life. Moreover, to allow some children to change their gender will cause considerable confusion and concern for other children. Children should be protected from having to consider the issue of transgenderism before they reach an appropriate age. Evidence suggests that the overwhelming majority of gender confused children (up to 98% for boys and 88% for girls) find a resolution of this discrepancy between their subjective feelings of gender identity and their objective biological sex as they get older and pass through puberty. As there is little certainty about the ability of clinicians to correctly identify the small minority for whom their feelings of gender confusion will persist into adulthood. It would be wholly inappropriate, therefore, for the Scottish Government to allow self-declaration, to facilitate the prescription of puberty blockers, hormone treatment or the provision of gender reassignment surgery to children aged under 16.

There have been dramatic rises over recent years in the numbers of children and young people being referred to gender clinics. For example, it is reported that referrals to the Sandyford Clinic in Glasgow rose from 34 in 2013 to 150 in 2015 and referrals to the Tavistock Centre in London of children aged between 3 and 7 rose from 20 in 2012/13 to 84 in 2013/14. It is likely that these increases are due in part to the increased profile being given to transgenders issues in the media and public life - often as a result of government funding. This raises the concern that many of these young people are experiencing social pressure to question their gender identity when they would not otherwise have done so. Within that context, the Scottish Government’s estimate that self-declaration will lead to at
least a tenfold (and possibly up to a sixteen times) increase in the number of people transitioning is particularly concerning. How many of these people will be aged under 16? Of these how many will come later in life to regret their decision to transition?

In addition to the harm likely to be caused to some children and young people who choose to transition or take puberty blockers inappropriately, there is also a danger that the proposed changes may open up doctors, other health professionals and health boards up to legal action and medical negligence claims. The potential for adverse impacts on health professionals and the diversion of scarce financial resources away from front line healthcare into fighting and settling legal claims should be considered very seriously by the Scottish Government. An analysis of the risk of legal cases being brought against doctors and other health professionals should be published prior to any further steps being taken to proceed with the review of the Gender Recognition Act.

**Marriage and Civil Partnership**

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

No

**If you want, you can give reasons for your answer or add comments:**

It is important that the spousal veto remains in order to protect the principle of freely given consent being a pre-requisite to, and the preservation of, a marriage. By removing the spousal veto some people will be forced into a same-sex ‘marriage’ against their will. Others will perceive themselves to be being forced into a heterosexual marriage against their will. To undermine the consent principle in this manner would potentially be in breach of Article 8 of the European Convention of Human Rights (ECHR). Moreover, the removal of the spousal veto would potentially breach Article 9 of the ECHR as religious communities would not be able to annul same-sex ‘marriages’ arising because one spouse has made a self-declaration even in the circumstances where that denomination is unwilling to ‘marry’ same sex couples. This would go against the spirit of the assurances given by Scottish Ministers where the Marriage and Civil Partnership (Scotland) Act 2014 was passed that no minister or religious denomination would be forced by law to perform same-sex marriages.

In 2013, the Scottish Parliament’s Equal Opportunities Committee recommended removal of the spousal veto. In response to that recommendation, during the Stage 1 debate the then Cabinet Secretary for Health and Wellbeing (Alex Neil MSP) expressed the Scottish Government’s concern about the need to protect spousal consent by stating:

“… we have concerns about the committee’s recommendation on spousal consent. It is spousal consent to decide to stay in a marriage—and it takes two to stay in a marriage.”

He went on to quote the committee’s own statement that “spouses of people seeking gender recognition may find themselves in circumstances that are very difficult to face”.

CARE for Scotland sees no reason for the Scottish Government to change its position regarding the issue of spousal consent. If it wishes to do so, it should provide new empirical evidence that this change is necessary, whilst also taking into consideration the potential detrimental impact on the spouses of transitioning persons. We note that the Equal Opportunities Committee did not take evidence from the spouses of transitioning persons during its evidence sessions on the Marriage and Civil Partnerships (Scotland) Bill.

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.**

No

**If you want, you can give reasons for your answer or add comments:**

This would have the effect of introducing perceived heterosexual civil partnerships. To do so could open up the Scottish Government to a legal challenge under Articles 8 and 14 of the ECHR.

CARE for Scotland opposes the introduction of heterosexual civil partnerships as we believe that these would undermine marriage.

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

No

**If you want, you can give reasons for your answer or add comments:**

In a situation where a person who is married has transitioned, it is important that the spouse is able in good conscience to divorce the person should they wish to do so. For some people they would not be able to justify divorcing the person on other grounds as they would consider this to be acting dishonestly. Neither should the spouse be forced into a same-sex ‘marriage’ against their will and conscience. To remove this ground for divorce would force some people to seek divorces on the grounds of ‘unreasonable behaviour’ as they would consider the fault element to be essential in order to divorce in good conscience. It remains the case that evidence of unreasonable behaviour has to be provided (e.g. adultery, domestic abuse etc.). It should be noted that in 2013 the Scottish Parliament’s Equal Opportunities Committee recognised the importance to the fact that legal gender recognition is a ground for divorce as a protection for the non-transitioning spouse.

**Other aspects of the 2004 Act**

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

Yes
If you answered Yes, describe the changes you consider are needed:

Section 22 should be repealed in order to help address the problem of gender fraud and to protect people from being deceived into entering a same-sex ‘marriage’. It has never been used and is redundant. The Scottish Government should press the UK Government to repeal section 22.

It is important that religious celebrants should be able to establish if a person has undergone legal gender recognition in order to avoid being placed in a situation where they inadvertently ‘marry’ a same-sex couple in violation of their faith identity. It should not be an offence to for any person to reveal to a religious celebrant that one of the people who are proposing to marry has received legal gender recognition. This change is essential in order to honour the commitments given by Scottish Ministers when the Marriage and Civil Partnership (Scotland) Bill was considered and passed religious by the Scottish Parliament religious celebrants faith denominations would not be forced to ‘marry’ same-sex couples.

11 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?

No

If you want, you can give reasons for your answer or add comments:

Non-binary people

12 Should Scotland take action to recognise non-binary people?

No

If you answered No, and if you want, you can give reasons for your answer:

CARE for Scotland does not support the creation of a third gender categorisation, believing as we do that human beings are created male and female in the image of God.

We are concerned that this proposal would undermine marriage and lead to further confusion over its definition. It would raise considerable difficulties for religious celebrants and in determining whether they could in good conscience marry two individuals if one of them was legally registered as non-binary. Moreover, pressure would be likely to arise very quickly for the number of categories of gender to be expanded to include a multiplicity of non-binary gender identities. For example, ABC news reports that there are 58 different gender identities on social media. This will lead to significant confusion and difficulties arising for charities, businesses and public sector organisations as they seek to accommodate the emerging plethora of gender identities each of which will need to be treated equally in policy and administration.

13 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.

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option:

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.

Not Answered

If you answered Yes, describe the impacts you have identified:

Conclusion

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

Yes

If you answered Yes, add your comments or evidence:

CARE for Scotland is disappointed by the brevity of the discussion in the Partial Equality Impact Assessment on the potential negative impacts upon Christians and people of other faiths whose religious beliefs teach against the assumptions that underpin and animate self-declaration. In particular, we are concerned that there is no adequate discussion of how the introduction of the new self-declaration system and the move to recognise a third legal gender might increase the marginalisation of Christians in public life and may have a detrimental impact upon some people's careers.

CARE for Scotland does not support the introduction of a self-declaration system and the legal recognition of a non-binary category as proposed in the consultation document. The post structuralist, anti-foundationalist philosophy of Judith Butler et al is based on a worldview which is wholly at odds with the Christian worldview. It prioritises subjective self-perception over objective biological reality. At its core is a worldview which believes that human beings can define their own identity and recreate themselves to suit that identity. It is diametrically opposed to the Christian understanding that human beings are created male and female in the image of God, finding their identity and purpose in relationship with Him.

We very much hope that the Scottish Government abandons its plans to legislate for highly controversial post-structuralist anti-foundationalist philosophy. At the very least, however, in proposing such an approach the impact assessment should have acknowledged the impact of doing so on people of faith and indeed other people who do not subscribe to this particular philosophy.

Of particular concern we note that the Yogyakarta Principles, for example, principle 20, argue for a right for organisations representing sexual orientation or
gender identity to be able to assemble and associate without any restriction and thus even if the rights of others are interfered with. No other group has a right to assemble without regard for the rights of others in this way. Principle 20 clearly demonstrates a desire to create a hierarchy of rights in which sexual orientation and gender identity are at the top. The empowerment of groups defining themselves in terms of sexual orientation or gender identity through new legislation, drawing on the Yogyakarta Principles, must necessarily therefore be of concern for any grouping in society with a different worldview.

People who, for religious or other reasons, consider that the proposed legislation will compel them to endorse gender ideology and impose on them an obligation to connive in illusion and untruth need to be protected. For example, the rights of those who believe that it is right to respond to transgenderism as a psychological condition to be treated through holistic psychotherapy, truth, common sense and compassionate pastoral support must continue to be protected. By introducing a system of self-declaration the Scottish Government will increase the likelihood of those people having their rights disrespected and neglected by public authorities. This is only likely to lead to Scottish public bodies operating a de facto hierarchy of rights to the detriment of many people.

One example of this problem relates to education. Any requirement placed on teachers to acquiesce with the gender transition of a school child is likely to be problematic. This could lead to teachers (even in denominational schools) being required to promote a worldview which is wholly at odds with their own religious worldview and even the religious ethos of the school. If the teacher were to be required to operate in a way which was contrary to their own identity and beliefs then they would be compelled either to act in violation of their conscience or possibly lose their livelihood. If the school was compelled to act in a way which was contrary to its ethos, this could well lead to a legal challenge both under Article 9 of the ECHR and Article 2 of Protocol 1 of the ECHR.

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

Yes

If you answered Yes, add your comments.:
In view of all the above concerns and the fact that the UK Government has not launched a review of the Gender Recognition Act, it is surely unwise for the Scottish Government to press ahead at this time. Any change in the law in Scotland is likely to lead to confusion, especially if the proposed self-declaration system is extended to those living outside of Scotland. The introduction of a self-declaration system in Scotland alone and also legal recognition of a ‘non-binary’ status, will raise significant problems for businesses and other organisations which operate both within Scotland and throughout the rest of the UK. The removing of the protections and safeguards which exist in the Gender Recognition Act 2004 will be harmful both for individuals and for society as a whole.

About You

What is your name?
Name: 

What is your email address?
Email: 

Are you responding as an individual or an organisation?
Organisation

What is your organisation?
Organisation: CARE for Scotland

If you are responding as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, you can do so here.

If you are responding to this consultation as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, please do that here.: 

Where are you resident?
Scotland

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

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