The Gender Recognition Act 2004

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.

Not Answered

If you want, you can give reasons for your answer, or make comments.

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.

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

If you want, you can give reasons for your answer or make comments.

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.

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.

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.

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.

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?

Not Answered
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.

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

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.

Marriage and Civil Partnership

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

Not Answered

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 Steinfield 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.

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 wishesto obtain a full Gender Recognition Certificate.

Not Answered

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

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.:  
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.

Other aspects of the 2004 Act

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

Not Answered
If you answered Yes, describe the changes you consider are needed.:  
We consider this to be a matter for the current Data Protection Bill. Data protection issues are reserved to Westminster in any event.

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?  
Yes  
If you want, you can give reasons for your answer or add comments.:  
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).

Non-binary people

12 Should Scotland take action to recognise non-binary people?  
Not Answered  
If you answered No, and if you want, you can give reasons for your answer.:  
We consider this to be a policy issue rather than a legal one and accordingly make no comment.

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

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

Conclusion

15 Do you have any comments about, or evidence relevant to:  
Not Answered  
If you answered Yes, add your comments or evidence.:  
We consider this to be a policy issue rather than a legal one and accordingly make no comment.

16 Do you have any further comments about the review of the Gender Recognition Act 2004?  
Not Answered  
If you answered Yes, add your comments.:  
We have nothing further to add.

About You

What is your name?  
Name:  
Faculty of Advocates

What is your email address?  
Email:  

Are you responding as an individual or an organisation?  
Organisation

What is your organisation?
Organisation:
Faculty of Advocates

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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