Scottish Review of the Gender Recognition Act 2004

The following is a copy of the Anscombe Bioethics Centre’s submission to the Scottish government’s consultation on its proposed review of the Gender Recognition Act 2004. These responses were submitted electronically on 1 March 2018.

Consultation questions and responses

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. We are very opposed, like the consultation authors, to a change to a medical model that would require a physical ‘sex reassignment’ via surgery and/or hormones. However, we are also opposed to a change to a self-declaration model, which could deprive a vulnerable group disproportionately affected by suicidality and other conditions of what may be much-needed contact with mental health professionals.

The medical model of gender dysphoria may be only one aspect of a complex human reality, but it is widely accepted that gender dysphoria does affect someone’s healthcare needs, even if there are significant differences of view among clinicians as to appropriate responses. Those experiencing gender dysphoria deserve to be treated as individuals and have their health care needs taken seriously. As the research shows, such issues do not necessarily disappear but may still be present if the person transitions medically and socially.

To remove all medical or social prerequisites for legal transition, even for adolescents who are still exploring their gender identity, could encourage the false idea that gender identity is simply a matter of choice, thus banalising an important personal dilemma the individual is confronting with very wide ramifications for the individual, those around that person, and society at large. Self-declaration fails to acknowledge these complexities.

In considering a change to a self-declaration model, we should also remember the experience of those who regret transitioning medically and/or socially and have ‘detransitioned’ or ‘reidentified’ with their birth gender. Self-declaration will make the process of legal transition much quicker and may also encourage earlier social or medical transition, increasing the
possibility of people making choices they later regret and/or that harm them in objective terms.

The claim that Resolution 2048 and the Yogyakarta Principles represent “the best practice” (3.10, 3.11 and following) accurately expresses the opinions of those who support these principles but it does not prevent the Scottish government from scrutinising these principles independently. It should be noted that the group that drew up the Yogyakarta Principles was focused primarily on issues related to sexual orientation and did not include any clinicians with expertise in gender dysphoria. It should also be noted that the European Court of Human Rights (Garcon and Nicot v France [2017] ECHR 338 (06 April 2017)), in a judgement which is legally binding, held that an “assessment model” is compatible with human rights. Neither the Yogyakarta Principles nor Resolution 2048 is legally binding, and we hope that the Scottish government will reconsider the self-declaration proposal in the light of arguments and evidence identified through the consultation process.

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. These are still children according to the UN Convention on the Rights of the Child which defines children as those under the age of 18 years. As such they need special protection.

We are concerned that young people under 18 and even under 16 might be invited to make a permanent change to their legal status via a mere self-declaration on a question as fundamental as gender identity. It is for good reasons that under-18s are not currently offered sex reassignment surgery or other irreversible elective interventions; for the same reasons, they should not be encouraged to make ostensibly permanent legal declarations on their gender. Indeed, while the consultation is not directly concerned with medical or surgical interventions, but only legal gender status, if a 16 year old were granted permanent legal recognition in the opposite gender then it would surely be more likely that he or she would be offered irreversible surgery, or at any rate, still-experimental interventions whose long-term effects are unclear.

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
- Option 2 – court process
- Option 3 – parental application
- Option 4 – minimum age of 12
- Option 5 – applications by capable children
- None of these options

The last: children should be supported by counsellors, therapists and other mental health and social care professionals but should not be encouraged or assisted to make life-changing and potentially permanent legal changes of status or medical changes to their bodies. There is
good evidence that, with the onset of puberty, most children with gender dysphoria come to identify as the gender congruent with their birth sex.

Commitment to permanent transition of legal gender is a radical thing to undertake, especially for a teenager who may be still confronting the challenges of puberty and its immediate aftermath. Legal transition for a teenager, like other aspects of social transition, may prove a harmful distraction from the psychological issues that might have been addressed in their own right by the young person working together with mental health professionals and others.

Rather than being invited to make a permanent legal commitment to a particular gender status, it is, we believe, better for young and very young people especially to see their current feelings concerning their gender as ‘where they are now’, but not necessarily where they will be for the rest of their lives. Adolescence is a time of turmoil for many young people and several studies have found a low persistence rate of gender dysphoria (if puberty occurs naturally). The *Diagnostic and Statistical Manual of Mental Disorders* states that “in natal males, persistence has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%”. It is for these reasons that the Standards of Care produced by the World Professional Association for Transgender Health (a body which advocates access to hormonal and surgical interventions in adults with gender dysphoria) emphasise the importance of a relatively cautious and tentative approach to addressing gender dysphoria in children (see, for example, WPATH Standards of Care, September 2011, p. 17). Many other health care professionals believe that caution should be exercised and indeed, taken further.

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

No. In Scotland, as in England and Wales, the State recognises marriages between persons of the same sex and legal gender. Nevertheless, the sex of the partner remains an essential element in the intention to marry. This is clear from the Gender Recognition Act which clarifies that, where a person has hidden the fact of gender reassignment from his or her spouse, then the marriage is null.

Analogously, if a person transitions there should be no possibility for the unilateral conversion of the marriage into what presents legally and socially as a same-sex marriage. No one should be forced to be in a marriage explicitly recorded as a marriage to a person of the same legal gender, nor should any spouse be left in ignorance of a person’s change of legal gender. Rather, the original legal marriage to which both parties consented should be retained and not re-registered. The couple may choose to stay together after legal transition; however, this need not be expressed through the outward form of a same-sex marriage ceremony or certificate, but as the continuity of their original legal marriage or as a close but non-marital form of friendship (of value perhaps also for the sake of other important goods such as the care of the children).

The Scottish government should give full consideration to the genuine rights and needs of the spouse and children no less than those of the person affected by dysphoria who wishes to
transition. It is important to listen to the stories of spouses and children as part of any assessment of the impact of a change in the law. There should be some consideration also of the way in which (natal) women can be in a more economically and socially vulnerable position in relation to marital breakdown; this remains relevant in cases where the male partner transitions.

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

No. This ground for divorce needs to remain to protect the interests of the spouse, who may have good reason to doubt the validity of the marriage especially if the transitioned person’s feelings of dysphoria were both strong and hidden at the time the marriage took place.

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

Such persons should be recognised as individuals with inherent dignity and human rights, but the law should not create a non-binary gender status. This is something that would have profound effects in a number of areas of law and would require further changes in marriage law so that marriage was possible between a man or a woman and someone with non-binary gender, or indeed between two non-binary persons.

This change is a further step away from the cultural binary of male and female in sex and gender (though arguably even the category of non-binary is dependent on binary categories: all discussion of gender is built on this).

In regard to non-binary status this represents a fundamental change in how gender is understood and potentially threatens all sex/gender specific law. It is reasonable to ask whether a person’s sex or gender is relevant in many official situations and needs to be asked routinely. It is quite different to create a new legal gender category, or a whole set of gender categories (as one will not capture the variety). If there is desire for a third option to M/F it can be “prefer not to say”.

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

A significant change in the law on gender recognition should not be made merely for symbolic reasons; that is, in order to signal solidarity with those affected by gender dysphoria. The government should find other ways to express such solidarity. Revision of statute law should be undertaken if, and only if, it would bring a real improvement in the lives of those it most immediately affects and would not cause disproportionate harm.

In opposing a self-declaration model we are not thereby endorsing the existing ‘assessment’ system for changing legal gender. Rather, we are simply claiming that the proposed new system would not represent an improvement on the current situation, but rather the reverse. There may well be improvements that can be made to the current law, but the radical proposal to move to a self-declaration model without any requirement to involve doctors or to live in the acquired gender, and the still more radical proposal to extend gender recognition law to minors, will not improve matters but will generate serious new problems.
As regards rights of conscience, the right of any marriage celebrant to decline to officiate where both parties are of the same natal sex should be recognised in law. Currently the law recognises this right in relation to religious ceremonies but not in relation to civil marriage. Similarly, the rights of those wishing to confine to members of one or other natal sex access to certain gender-specific employment or voluntary roles (such as membership in male or female religious orders, or youth work with male or female groups) should also be respected. Where it is legal and reasonable to restrict roles or spaces to one sex (without this constituting sex discrimination), for example to respect the feelings of those who have experienced sexual violence, then it should be legal, and may be reasonable, to maintain these restrictions notwithstanding legal gender transition. The law should be flexible in this area.

From the side of employees, just as there should be recognition of the rights of transitioned persons to equal treatment with other employees in all situations where their birth sex is irrelevant, so equally there should be recognition of the rights of health care workers, youth workers, educators and others who are conscientiously opposed to giving the appearance of endorsing the new legal gender of the transitioned person – perhaps because of their own sincere view of what will safeguard that person’s interests. Employers and employees should have the shared goal of sensitivity and courtesy and the avoidance of unnecessary triggers in speaking to or in the hearing of the transitioned person. Employers should not, however, discriminate against employees who, while showing sensitivity in how they speak and act, have detectably divergent religious, philosophical or scientific views from the transitioned person as to the relationship between sex and gender.