

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH TRANSGENDER ALLIANCE

The Scottish Transgender Alliance (STA) is the only national transgender specific equality project currently funded in Scotland and is based within the Equality Network. The STA works for full equality and human rights for people of all sex, gender, gender identity and gender reassignment diversity. We recognise and strive to include the fullest diversity of identities and experiences within our equality and human rights work. All of our policy work is based on wide consultation with diverse transgender people across Scotland. We very much welcome this opportunity to submit evidence on the Marriage and Civil Partnership (Scotland) Bill.

4. How would you characterise your views on the Bill in general?

We welcome this Bill as a significant step towards greater equality for LGBT people in Scotland. As our expertise is of transgender equality and human rights we have focussed our evidence on matters affecting trans and intersex people and fully support the submission made by the Equality Network pertaining to the way in which the Bill impacts LGBT people more generally.

We are pleased that some of our views on the draft Bill have been taken into account and improvements made to the Bill as introduced, such as the provision enabling one party to a Civil Partnership to obtain gender recognition and convert their Civil Partnership to a marriage in one step. However, there are a number of further improvements we believe need made to the Bill in order to ensure it provides true marriage equality for trans and intersex people.

As the main provisions of the Bill affecting trans and intersex people were not drafted during the initial consultation on the draft Bill they have not been subject to the same level of scrutiny as the rest of the legislation. It is therefore extremely important that the impact of the legislation on trans and intersex people is thoroughly considered at this stage and detailed evidence taken by the committee.

5. How would you characterise your views on the introduction of same sex marriage, so that same sex couples can marry each other?

We have campaigned for many years for the introduction of sex and gender neutral partnership rights for all and greatly welcome the introduction of same sex marriage as a significant step towards this.

It is very important that the Bill does not create two different versions of marriage, same-sex marriage and mixed-sex marriage, because that would lead to continued discrimination. This is particularly important for trans and intersex people who do not want their legal sex to determine the type of marriage they can enter into.

We welcome that the Bill achieves that, with the exceptions of the arrangements to allow religious and belief bodies to choose to conduct mixed-sex marriages only, and the outdated rule of law that in a mixed-sex marriage the wife cannot be charged with resetting goods stolen by her husband. The treatment of those issues in the Bill is appropriate.

We also note that the Bill applies unchanged the existing meaning of adultery as evidence for divorce, to same-sex and mixed-sex marriages. Under the existing law, sexual intercourse with a person of the opposite sex is adultery; other forms of sexual infidelity, with a person of the opposite sex or the same sex, do not fall within the existing legal definition of adultery but can form the basis of a divorce under the “unreasonable behaviour” rule. We agree with the approach taken in the Bill, which applies the law on adultery and other sexual infidelity equally to same-sex and mixed-sex marriages, and allows divorce on grounds of sexual infidelity for all marriages.

6. How would you characterise your views on putting belief celebrants on the same footing as religious celebrants?

Humanist celebrants in Scotland can already conduct legally-recognised marriages. The Bill clarifies that in the law, and makes clear that other philosophical belief organisations can also apply to conduct marriages. We welcome this.

7. How would you characterise your views on the arrangements for authorising celebrants to solemnise opposite sex and same sex marriage (including the opt-in procedures)?

In order to ensure that this Bill is trans and intersex inclusive we believe an amendment is required to the way in which nominated persons are registered as celebrants to enable religion and belief marriage ceremonies to be sex/gender neutral where both the couple and the organisation conducting the marriage wishes, (see draft amendment at Appendix A).

When a religious or belief body nominates its celebrants to the Registrar General to be approved to conduct marriages, the body must give the Registrar General details of the form of its marriage ceremonies.

The current law (section 9(3) of the Marriage (Scotland) Act 1977) requires that marriage ceremonies must include these two declarations:

1. a declaration by the couple that they accept each other as husband and wife;
2. followed by a declaration by the celebrant that they are then husband and wife.

Section 11(2)(f) of the Bill retains this provision for marriages between legally mixed sex couples. This is very problematic as there are couples who are legally of different sexes but who are not comfortable using the terms husband and wife. The fact that a trans person’s overseas gender recognition is not automatically recognised in the UK means that a trans woman who has fully transitioned and received gender recognition as female in her home country would still be regarded as legally male under UK law. When

she and her lesbian partner get married in Scotland, they would regard their marriage as a lesbian same sex marriage but legally it would be a mixed sex marriage. It would be highly offensive and inappropriate to call her a husband during a marriage ceremony when she lives permanently as a woman. Furthermore, where someone is born with an intersex physical variation in their biological sex or is a transgender person who lives in an androgynous manner rather than simply as either a man or a woman, they should not be forced to be called a husband or a wife against their wishes.

Section 11(2)(g) however alternatively provides that where a marriage is between a couple of the same legal sex the ceremony must include a declaration that the parties “accept each other in marriage,” and it is therefore gender neutral.

We agree that religious organisations should be free, if they wish, to conduct all their mixed-sex marriages using the gender-specific terms husband and wife. And those terms should also continue to be available for all couples who want to use them. But it is wrong to impose those terms where the couple would prefer to use the gender-neutral language and the organisation conducting the marriage agrees to do that. We therefore suggest that the Bill be amended to accommodate mixed sex couples who would prefer to use this gender neutral wording, and provide that the ceremony for a mixed couple, be in one or other form.

8. How would you characterise your views on Civil Partnerships changing to marriage?

It is our view that the process of changing a Civil Partnership to a marriage should be a simple administrative procedure which costs applicants as little as possible. We are however aware that some couples may wish to marry via the usual route to marriage and we therefore welcome the fact that the Bill gives couples the option to either have a marriage ceremony (in section 7) or change their Civil Partnership to a marriage using an alternative procedure (in section 8).

We are also pleased that the Bill includes provision, in Schedule 2, paragraph 6 (new section 5D), for a person in a Civil Partnership to obtain gender recognition and change their Civil Partnership to a marriage in one step, a much less burdensome procedure than the other route provided in the Bill at Schedule 2, paragraph 5 (new section 4C(3)).

It is particularly important for trans people that a second ceremony is not required in order to re-register a marriage or change a Civil Partnership into a marriage on gender recognition. This would be an onerous, distressing and unnecessary requirement which would be experienced as offensively undermining the couple’s original marriage or Civil Partnership and their relationship, which is longstanding and continuing. We therefore welcome the fact that section 8 and Schedule 2, paragraph 6, provide administrative processes for changing a Civil Partnership to a marriage.

Our main concern relating to this question is the fact that only parties to a protected Scottish Civil Partnership will be able to change their Civil Partnership to a marriage in

Scotland. This means that people who come to Scotland who have a Civil Partnership from another country will be unable to obtain gender recognition without having to dissolve their Civil Partnership because otherwise a mixed sex Civil Partnership would be created. The English Act similarly excludes couples with foreign Civil Partnerships from gender recognition but does enable those with foreign marriages to obtain gender recognition. It seems to us to be very unsatisfactory for the unfair divorce requirement to be applied only to couples who have a foreign Civil Partnership.

We therefore recommend that the Bill be amended to allow couples with Civil Partnerships registered outwith the UK to marry using section 7. This would then enable applicants with foreign Civil Partnerships to obtain gender recognition without being required to divorce. In this particular situation it would be acceptable for couples to be required to undergo a marriage ceremony; given that there is no Scottish record of their Civil Partnership.

9. How would you characterise your views on allowing civil marriage ceremonies to take place anywhere, other than religious premises, agreed between the couple and registrar?

This is not specifically an issue for trans and intersex people, but we welcome the additional flexibility that will be allowed in choosing the location of civil marriage ceremonies.

10. How would you characterise your views on allowing the religious and belief registration of Civil Partnerships?

Allowing couples greater choice as to how they would like their relationship to be solemnised is to be welcomed.

11. How would you characterise your views on allowing transgender persons to stay married when obtaining a full Gender Recognition Certificate, which provides legal recognition in the acquired gender?

Spousal consent

The requirement to divorce or dissolve a Civil Partnership in order to obtain Gender Recognition has been one of the most iniquitous effects of the lack of equal partnership rights for same sex couples. Trans people and their partners have been forced to make the extremely difficult choice between losing the legal status of their relationship and denying the trans person recognition of their identity.

While we are pleased that more people will be able to access Gender Recognition once the requirement to divorce has been repealed, we are very concerned that the provision requiring an applicant's spouse to provide a statutory declaration of consent may mean that, in practice, some married applicants are still unable to obtain full gender recognition.

Many trans people and their allies are extremely troubled by the inclusion of the spousal consent requirement within this Bill. The spousal consent provision in the Marriage (Same Sex Couples) Act 2013 generated a great deal of criticism from trans people during the passage of the Act at Westminster and has led to many trans people feeling deeply unhappy about the legislation as enacted.

Across the UK the concept has been described as a “spousal veto” as it effectively enables the spouse of a trans person to prevent their partner from obtaining gender recognition, unless the trans person is able to obtain a divorce. If the non-trans spouse is unwilling to cooperate divorce proceedings can take many years.

Our main objections to this requirement are that:

- Although the couple have been parties to an ostensibly mixed sex marriage, the trans person must have been living in their acquired gender for at least 2 years prior to applying for gender recognition, and so the non-trans spouse has already remained in a socially same sex marriage for at least 2 years.
- In the time preceding the gender recognition application the non-trans spouse could have, if they had wanted, initiated divorce proceedings on grounds of unreasonable behaviour.
- The granting of the gender recognition certificate has no practical impact on the non-trans spouse because their pension, inheritance, parenting and all other rights remain unchanged.
- Under the current provisions of the Bill, if the non-trans spouse withholds consent then urgent divorce is the only option left available to the trans person in order to access their human right to have the gender they identify as legally recognised. This government inflicted pressure to urgently divorce could cause unnecessary disruption and harm to the non-trans spouse and any children of the marriage. Separating the conflicting interests of the couple’s marriage and the trans spouse’s gender recognition enables the couple to fully consider their options without external pressures and so to arrive at the best settlement for their particular circumstances.
- Under the current provisions of the Bill, even if the trans spouse urgently initiates divorce proceedings as soon as their interim certificate has been issued, if the non-trans spouse decides to be uncooperative they can take a number of steps to delay proceedings and so deny the trans spouse access to gender recognition for an indeterminate length of time.

We understand that there may potentially be some non-trans spouses who could feel strongly that they want their marriages to remain as they were originally solemnised. Some might be distressed by the thought that their marriages would be re-registered, and a new marriage certificate issued showing new details for the trans spouse following gender recognition. At present, however, we have not heard of any such spouses requesting protection from the re-registration of their existing marriage. If such spouses exist, we agree that they should be able to block the re-registration of the

existing marriage but consider it to be highly disproportionate for them to be able to block their trans spouse from the right to access gender recognition.

We view it as important to ensure that the rights of both the trans and non-trans spouse are appropriately balanced and therefore the solution we are suggesting below enables a trans spouse to be granted a full gender recognition certificate but does not enable the marriage to be re-registered if spousal consent is withheld.

We suggest this could be achieved by amending the Bill as follows (see draft amendment at Appendix B):

- As is currently the case a person applying to the Gender Recognition Panel (GRP) without a statutory declaration of consent from their spouse will receive an interim gender recognition certificate.
- An interim gender recognition certificate holder is able to make an application to the Sheriff Court for a full gender recognition certificate to be issued.
- Such an application must be made within 6 months of the date of issue of the interim certificate.
- The application will be granted as long as it is made within the time limit. Once the full gender recognition certificate has been issued the applicant will be able to obtain a new birth certificate.
- As there has been no spousal consent the marriage will not be re-registered to show new details for the trans spouse and a new marriage certificate will not be issued.
- If, once full gender recognition has been granted, the non-trans spouse consents then the marriage will be able to be re-registered.
- As is the case now either party will continue to be able to use the granting of the interim gender recognition certificate as grounds for divorce.

Our suggested improvement to the Bill is a distinctly Scottish solution. The Sheriff Court in Scotland is well placed to issue full gender recognition certificates because it already does so when a divorce is granted on grounds of a party to the marriage having been issued with an interim certificate. It has the advantage of not requiring any alternative procedures to be used by the GRP for Scottish applicants. Due to the wording of Part 2, Schedule 2 to the Gender Recognition Act 2004 either spouse will continue to be able to rely on the fact that an interim gender recognition certificate has been issued as grounds for a divorce.

Our strong view is that the fact that the trans person is issued with full gender recognition causes no actual detriment to the non-trans spouse, as their marriage remains as it was originally recorded. Conversely, the trans spouse can suffer a great deal of discrimination and other detriment while their birth certificate does not reflect the gender they live as. This proposal achieves the objective of the legislation, that being to ensure that a non-trans spouse does not find themselves in a registered same sex marriage against their wishes, because the marriage is not re-registered, while ensuring

that the trans spouse is able to access their human right to have the gender they identify as legally recognised.

We are unaware of any spouses of trans people who feel strongly that their consent should be sought prior to their spouse obtaining gender recognition. We therefore believe that it would be wrong for the Committee to retain the “spousal veto” of gender recognition without having heard compelling evidence from the spouses of trans people that they would need to make use of it and why.

Long-term transitioned people

Trans people who transitioned a long time ago find it difficult to assemble the same level of medical evidence for the GRP as a recently transitioned person because long-term transitioned people are no longer in contact with the gender specialists who treated them. The Gender Recognition Act provided (in section 27) a two-year temporary arrangement for long-term transitioned people, which was available between 2005 and 2007. This enabled those who had lived in their acquired gender for at least six years to obtain gender recognition with only one medical report, rather than two, from a medical practitioner who did not have to be a specialist practising in the field of gender dysphoria. The temporary arrangement also enabled applicants to apply based on evidence of having undergone treatment to modify sexual characteristics as an alternative to providing evidence of a diagnosis of gender dysphoria.

This provision was extremely valuable because obtaining confirmation of a diagnosis of gender dysphoria can be extremely difficult after a long period of time. The specialist who provided the original diagnosis will often have retired, or may even have died, and applicants would therefore have to be re-diagnosed by another specialist. Patients currently have to wait for between one and two years between being referred and getting a first appointment with a specialist practising in the field of gender dysphoria, and it is extremely difficult for patients who have been out of the system for a considerable period to be re-referred.

Since 2007 it has become clear that long-term transitioned people are still coming forward for gender recognition who had not previously heard about it. The longer a person has been transitioned, the less likely they are to have heard about the availability of gender recognition, because the less likely they are to be in contact with trans organisations. These late applications cause the GRP difficulties and delays because it is much harder for the applicants to assemble the two medical reports required.

There are trans people who transitioned a long time ago who were unable to take advantage of the 2005–2007 temporary arrangement, because they did not want to dissolve their marriage.

There are also a significant number of trans people who would have been able make use of the temporary arrangements but chose not to on a point of principle because they felt it unjust that others could not, simply because they were married or in a Civil Partnership .

Overall, therefore, there would be advantages for married long-term transitioned people, and other long-term transitioned people, and for the GRP itself, in reinstating the alternative rules for obtaining gender recognition which were in operation for the first two years following the introduction of the legislation. Those alternative rules operated perfectly well without problems during that period.

In light of this the UK government introduced Paragraphs 15 to 20 of Schedule 5 to the Marriage (Same Sex Couples) Act 2013, which provide alternative grounds for granting a gender recognition application, similar to those formerly contained within section 27 of the Gender Recognition Act.

We therefore suggest that the Scottish Bill should include a provision similar to Paragraphs 15 to 20 but remove the rather arbitrary requirement for the applicant to be, or have been, married or in a Civil Partnership prior to making the application, and rather require applicants to be ordinarily resident in Scotland. This will ensure that long-term transitioned people who had not heard in time about gender recognition and those who refused to use the discriminatory process as a matter of principle will finally be able to access the process.

The provision in the UK Government Act requires the applicant to provide evidence of having undergone surgical treatment. However a number of applicants may not be able, or may not wish, to undergo surgery (for example because they have another medical condition which means it would be dangerous for them to do so or because they were unable to access funding for surgery) but will nonetheless have fully transitioned to live as the gender they identify as for the requisite amount of time.

We therefore suggest that a similar Scottish provision should instead require evidence of medical treatment. This would mean that a long-term transitioned person who had not had surgery but had received hormone treatment to enable them to live as their acquired gender will also be able to make use of this route to gender recognition. Due to the fact that, as discussed above, many trans people remain unaware of gender recognition, we further suggest that the Scottish provision, unlike the English version which will expire 6 years after the commencement of the 2013 Act, should not be time limited.

Lowering the age for gender recognition (see draft amendment at Appendix C)

Currently one of the requirements for obtaining gender recognition is that applicants be at least 18 years of age. We suggest lowering this to 16 for the following reasons:

- The Gender Recognition Act 2004 as it applies to Scotland would thereby be harmonised with both the Age of Legal Capacity (Scotland) Act 1991 (providing that people of 16 can enter into any transaction) and the Marriage (Scotland) Act 1977 (providing that people can marry at 16 without parental permission) and so accurately reflect the legal position in Scotland rather than that in the rest of the UK;
- Under the current provisions of the Marriage and Civil Partnership (Scotland) Bill, a young couple, where one person is legally male and the other person is a 16 or

17 year old trans woman who identifies and lives as female but is still legally male due to not being old enough to access gender recognition, would be discriminated against compared to other couples. This is because, as they are unable to access gender recognition, and so become a legally mixed sex couple, they would be unable to marry in a church which does not conduct same sex marriages. If the trans person was able to have their gender legally recognised at 16 they would be able to have a mixed sex marriage in their church, like any other mixed sex couple of their age. The same discrimination would apply to a couple where one person is legally female and the other person is a 16 or 17 year old trans man who is still legally female due to not being old enough to access gender recognition;

- Due to the Age of Legal Capacity (Scotland) Act 1991 young people in Scotland are able to consent to medical treatment as soon as they are able to fully understand the nature and consequences of the treatment and therefore increasing numbers are receiving a diagnosis of gender dysphoria, undergoing transition and beginning hormone blockers in early puberty. We are in contact with several young people who have already been living as their acquired gender for more than the 2 years required by the Gender Recognition Act, by the age of 16. LGBT Youth Scotland is in contact with even more young people in this situation. It is unfair to require young people to wait a further two years for gender recognition and the ability to marry in accordance with their gender identity, particularly at a time when they are at risk of facing a great deal of discrimination in education and employment due to the sex on their birth certificate not reflecting their gender.

12. Would you like to comment on the wider issue of protections for those in society who may have concerns about same sex marriage?

As no religious organisations will have to conduct same sex marriages unless they choose to do so, and individual celebrants whose religious organisations have chosen to conduct such marriages will be able to opt out from doing so, we believe the Bill contains ample protections for those with concerns regarding same sex marriage.

It has been suggested that civil registrars should similarly be able to opt out from conducting marriages between people of the same sex and we strongly disagree with this. Unlike religious celebrants, civil registrars are carrying out a public function on behalf of the state and it would therefore be as inappropriate for them to be able to use their personal religious beliefs as grounds to refuse to marry a couple due to their sexual orientation or gender identity as it would be for them to use their personal religious beliefs as grounds to refuse to marry a couple with a different religion, a couple where one party is divorced, or a couple who are having a sexual relationship prior to marriage.

Some people have suggested that the Bill should include a provision enabling teachers to refuse to teach pupils about same sex marriage. Such a provision is completely unnecessary as teachers will not be required to tell pupils that they support same sex marriage, and indeed are not supposed to express their personal views in the

classroom. It is however entirely appropriate that they are required to teach the facts so, in the same way that a creationist science teacher would have to teach the facts of evolution, a teacher who does not personally agree with same sex marriage would still have to state the fact that Scottish marriage legislation allows same sex marriage.

13. Would you like to comment on the wider issue of freedom of speech?

Section 14 of the Bill makes clear that the Convention Rights to freedom of speech and freedom of religion are not affected by the legislation and the Bill will therefore not curtail freedom of speech. We believe this provision provides sufficient protection to opponents of equal marriage.

It has been suggested that the case of *Smith v. Trafford Housing Trust* is evidence of the fact that people may lose their jobs for expressing their disagreement with same sex marriage. However the court in that case in fact held that the employer had been wrong to demote Mr Smith for espousing his opinions on same sex marriage using social media.

The Lord Advocate's guidance, published with the Bill, provides protection from prosecution for those engaging in public debate about same sex marriage, by stating that it is not in itself a crime to publicly disagree with same sex marriage.

14. Would you like to comment on any other wider issues in relation to the Bill that are not mentioned above?

Mixed Sex Civil Partnership

We believe that partnership rights should be sex and gender neutral, which is why opening up Civil Partnership to mixed sex couples has been central to the Equal Marriage Campaign. Introducing mixed sex Civil Partnership would also enable couples in existing Civil Partnerships, where one person obtains gender recognition, to continue their Civil Partnership rather than having to convert it to a marriage.

We therefore welcome the Scottish Government's public commitment on 27th June 2013 to conduct a review of Civil Partnership law, "driven by the need to consider the position on opposite sex Civil Partnership". We believe that review should start without delay, and, once it is complete, there should be prompt legislation to open up Civil Partnership in Scotland to couples regardless of their gender.

Scottish Transgender Alliance
23 August 2013

Scottish Transgender Alliance/Equality Network Draft Amendments

Appendix A - Text of Gender Neutral Ceremony Draft Amendment

In section 11, page 11, line 5, delete sub-subsections (f) and (g) and insert–

<(f) in subsection (3), for the words from “(a)” to the second occurrence of “wife”, substitute–

“(a) in the case of a marriage between persons of different sexes, either the two declarations in subsection (3A) or the two declarations in subsection (3B); or

(b) in the case of a marriage between persons of the same sex, the two declarations in subsection (3B),”.

(g) after subsection (3) insert–

“(3A) The two declarations are–

(a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other as husband and wife; and

(b) a declaration by the celebrant, after the declaration mentioned in paragraph (a), that the parties are then husband and wife.

(3B) The two declarations are–

(a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other in marriage; and

(b) a declaration by the celebrant, after the declaration mentioned in paragraph (a), that the parties are then married.”.>

In section 11, page 11, line 40, delete from “and” to the end of line 1 on page 12.

Appendix B – Text of Spousal Consent Draft Amendment

Schedule 2, page 41, line 20, at end insert –

<4E Person with interim certificate: issue of full certificate on application to the sheriff (Scotland)

(1) A person to whom an interim gender recognition certificate has been issued may make a summary application to the sheriff for the issue of a full gender recognition certificate.

(2) The sheriff must grant the application if satisfied that–

(a) the applicant was a party to a protected Scottish marriage at the time when the interim gender recognition certificate was issued and remains a party to that marriage, and

(b) the application is made within 6 months of the date of issue of the interim gender recognition certificate.”.>

Schedule 2, page 42, line 37, at end insert –

<(1A) Regulations made under sub-paragraph (1)(a) must provide that where a full gender recognition certificate has been issued by virtue of section 4E to one spouse in a qualifying Scottish marriage the marriage must not be registered unless the other spouse consents thereto in writing.>

Schedule 2, page 43, line 11, replace <or 4C> with <, 4C or 4E>

Appendix C - Text of minimum age draft amendment

In schedule 2, page 38, line 32, at end insert–

<Minimum age of applicant

2A In section 1(1) (applications), after “18” insert “, or if the person is ordinarily resident in Scotland 16,”.>