

Report to the Consultation on the Spousal Veto

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Introduction

The Spousal Veto is the most controversial piece of legislation the Coalition Government has introduced regarding transgender people. The trans community's views are almost universal in their condemnation of the legislation; which disempowers an already underprotected minority group in favour of reinforcing the idea that gay marriages are something straight people need protection from finding themselves a part of.

The Spousal Veto appears in Schedule 5 of the Marriage (Same Sex Couples Act 2013) in various subsections, the first being Part 1, section 2; where it inserts subsection (6B)(a) into the Gender Recognition Act 2004:

- (6B) If the applicant is married, and the marriage is a protected marriage, an application under section 1(1) must also include—
 - (a) a statutory declaration by the applicant's spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate ("a statutory declaration of consent") (if the spouse has made such a declaration)

Without a statutory declaration of consent, a legal gender change for a married transgender person cannot be processed. The inclusion of a need for a declaration of consent is where the spousal veto comes from.

The idea that a third party is required to give their consent before a person can exercise their legal rights gives rise to an implicit right of veto - if the third party does not give their consent, the person is unable to exercise their rights.

The spousal veto can therefore be defined as:

The requirement that the spouse of a transgender person give their explicit permission for a change of gender to be recognised in law; without which, the rights and protections provided by the legal recognition of a change of gender cannot be provided.

The spousal veto removes personal autonomy from the transgender person and grants specific power over that person to their spouse. The veto exists for the supposed protection of the marriage but in essence it is saying that gay marriages are different, and lesser, than straight marriages; and are therefore something that a straight person must be allowed protection from in the form of a choice about whether they wish to convert their marriage or not.

Gender Recognition For Unmarried Applicants

The Gender Recognition Act 2004 provides a cumbersome process for applying for a change of legal gender when the applicant is unmarried. The applicant needs to provide evidence from their psychiatrist that they are transgender. This usually comes in the form of a letter from the psychiatrist in question.

Although gender reassignment surgery is not a requirement for receiving a GRC (not all transgender people can have, or want, gender reassignment surgery) if surgery has not been undertaken the applicant must provide justification for it having not happened.

The applicant must also have lived in-role for two years, and must provide evidence to support this. Finally, they must provide a statutory declaration that they intend to live in their “acquired gender” for the rest of their life.

If all this evidence can be provided, the application will be assessed by a Gender Recognition Panel. If the Panel is satisfied that no further information is required, the applicant can receive a Gender Recognition Certificate (“GRC”).

The process usually takes a month, possibly more depending on the number of applications. It is an unnecessarily bureaucratic process but it works. The problems arise when the applicant is married.

Before the Marriage (Same Sex Couples) Act 2013 came into effect, married trans people could not receive a GRC. They could only receive an Interim Gender Recognition Certificate (“IGRC”), which provides none of the benefits.

The IGRC is merely a document stating that a GRC can be provided to the applicant if they divorce. The IGRC allows a swift annulment of a marriage, but only if the application is made within six months of receipt of the IGRC, otherwise it expires and the application must be made again.

If divorce proceedings have already been initiated, the IGRC becomes worthless. It cannot be used to annul a marriage when divorce is already proceeding. This allows a vindictive spouse to entirely disenfranchise a transgender person by stripping them of their only method of severing ties quickly and regaining their legal protections from discrimination on the grounds of transgender status.

A Veto By Any Other Name

Proponents of a person's ability to prevent their transgender spouse gaining a Gender Recognition Certificate ("GRC") often claim the spousal veto is not a veto at all. This has been the Government's line during the debates prior to the passage of the Marriage (Same Sex Couples) Act.

The problem with this line of reasoning is that the spousal veto has the same effect in the way it is written as an outright statement granting a right of veto would. It is, in essence, a veto by the back door.

Married transgender people who apply for a gender recognition certificate must provide a statutory declaration of consent from their spouse. Without that statutory declaration, they cannot receive a gender recognition certificate. The effect of a spouse refusing to provide a statutory declaration is therefore the same as if the spouse were exercising a right of veto.

Proponents of the veto claim that a trans person can simply seek a divorce to get around the spousal veto; or apply without a statutory declaration and use the Interim Gender Recognition Certificate ("IGRC") they will be given in place of a full GRC to annul the marriage.

This is not only a cumbersome approach but it wilfully ignores the fact that an IGRC cannot be used to gain an annulment if the spouse files for divorce before IGRC can be used. Since the IGRC provides none of the rights and protections of a full GRC (its only use is to allow the annulment of a marriage so a full GRC can be provided), this renders the IGRC useless.

Filing for divorce and then stringing the process out for as long as possible is one of the many tricks used by vindictive and malicious spouses who object to their partner's transition.

“We currently live together but not for much longer. I am under daily threat of being kicked out & losing my children.”¹

In a survey conducted by the international transgender and intersex group T-Vox, 28.57% of transsexual respondents stated their spouse has made getting a divorce difficult². Almost 44 percent of respondents to the survey reported their spouse having actively attempted to prevent their partner's transition.³

¹ Quote from a survey respondent, reproduced from *Spouse Reactions to Transsexuality* (2013), T-Vox / Zoë Kirk-Robinson, page 6. http://www.t-vox.org/docs/Spouse_Reactions_to_Transsexuality.pdf

² T-Vox / Zoë Kirk-Robinson, Spouse Reactions to Transsexuality (2013), page 7. http://www.t-vox.org/docs/Spouse_Reactions_to_Transsexuality.pdf

³ ibid., page 7.

More than 7 percent of British trans people with children are denied any access to their children by their spouses. This number rises to over 15% for those trans parents who have been granted access to their children by a court order.⁴

Providing spouses with a veto over their transitioning partner's legal gender does nothing to "protect" the non-transitioning spouse. The spouse has no say over the medical process that usually leads up to gaining a gender recognition certificate and they have two years from the start of the transition process to the time when a transsexual person is eligible to apply for a GRC in order to determine whether they want the marriage to continue or not.

The inclusion of the spousal veto in the Marriage (Same Sex Couples) Act has provided another weapon for the arsenal of malicious spouses, without any benefit or protection to transgender people and non-vindictive spouses. It is unjust, it is unwarranted and it should be removed.

⁴ T-Vox / Zoë Kirk-Robinson, Spouse Reactions to Transsexuality (2013), page 6. http://www.t-vox.org/docs/Spouse_Reactions_to_Transsexuality.pdf

Ersatz Homosexual Marriages

The primary argument for creating the spousal veto is that it protects the quasi-contractual agreement made during the marriage ceremony. However, this argument falls flat when faced with the reality of the requirements laid out in the Gender Recognition Act 2004.

Section 2(1)(b) of the 2004 Act states:

2(1) In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant—

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,

The spousal veto only applies to married applicants for gender recognition after they have fulfilled the requirement to live in their “acquired gender” for two years. During this two year period, their marriage is an ersatz same sex marriage - the only real difference is the legal sex of the spouses.

If the spousal veto is really to protect the idea that the gender of the people making the marriage vows forms some form of contractual obligation, it fails at this entirely. That “obligation” was broken when the transitioning spouse began the two-year living requirement, not when they applied for a Gender Recognition Certificate.

Marriage After Transition

Protection of the legally questionable idea that the genders of the spouses at the time of marriage forms any kind of legal obligation also fails on other grounds. Transgender people are still able to marry after they have begun living in their “acquired gender”.

A trans woman who does not have a gender recognition certificate is regarded as male in law and is therefore able to marry another woman (either a cisgender woman or a trans woman who holds a gender recognition certificate). Similarly a trans man who does not have a gender recognition certificate is regarded as female in law and may therefore marry another man.

These marriages will be ersatz homosexual marriages from the outset - the spouses married one-another following the trans spouse’s transition. There is now no argument whatsoever for providing one spouse a right of veto over the other’s application for gender recognition.

Nevertheless, the spousal veto still applies to marriages of this kind. The entire argument for implementing the spousal veto fails when it is applied to the realities of transgender peoples’ lives.

Estranged Spouses

It is an unfortunate fact of life that not all marriages will last “till death do us part”. This is especially true when a marriage is faced with the immense upheaval that transition causes.

Many trans people find the strain of transition breaks a marriage apart; or even find that the strain of coping with not transitioning puts too great a burden onto a relationship. Consequently, a large number of trans marriages end in estrangement or divorce.

Estranged spouses have no communication with their trans partner; or if communication does continue, it is distant and irregular. There is, essentially, no marriage left to “protect” by the spousal veto in these situations.

Nevertheless, the estranged partner still has the right of veto over their trans partner’s application for a Gender Recognition Certificate. This puts an indefensible burden on the trans partner to track down their estranged spouse and negotiate them signing a statutory declaration.

Where the estrangement was caused by a total breakdown in the marriage, the likelihood of the trans applicant receiving this statutory declaration is slim at best.

The Human Rights Problem

The Gender Recognition Act 2004 is in no small part the result of over a decade of prolonged court battles, culminating in the decision of the European Court of Human Rights in the case of *Christine Goodwin v The United Kingdom*, Case No 28957/1995.

The *Goodwin* case, which is also known in UK law as *Christine Goodwin and I v United Kingdom* [2002] 2 FCR 577, established that the UK's failure to allow transgender people to correct their birth certificates (and thus leaving them in a legally indefensible position of being treated socially as one gender but legally as another) was a violation of Articles 8 (private and family life) and 12 (marriage) of the European Convention on Human Rights.

In its judgment, the court ruled that:

“The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality.”⁵

The addition of a need to receive spousal consent in the form of a statutory declaration is clearly the imposition of an additional formality on transgender people. It imposes extra stresses on the transgender person, as detailed in previous sections of this document.

Furthermore, this requirement is only imposed on transgender people; and only on those who are married. It is certainly yet another form of alienation for those affected - they are being treated differently to everyone else because of their transsexual status. It is a wholly indefensible situation.

Those who support the spousal veto for its “protection” of the original marriage agreement, despite these arguments being a legal fallacy as described previously, may argue that the veto defends the rights of the transgender person’s spouse under Article 12.

We can dismiss this argument immediately by referring to the fact that the Marriage (Same Sex Couples) Act 2013 now provides equal marriage rights to same sex couples, so the spouse’s marriage rights are not being violated. It is only the transgender person who is being discriminated against here.

Furthermore, it is important to remember when balancing the rights of one person with the rights of another that the spirit of the law is as important as the letter. To this, the ECHR noted:

“It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”⁶

The spousal veto violates the spirit of the Convention by placing the perceived defence of one person’s rights above the very real rights of another. This is an indefensible position.

⁵ *Christine Goodwin v The United Kingdom*, Case No 28957/1995, para. 77

⁶ ibid., para. 74

Case Studies

The following case studies come from reports provided to the international transgender and intersex support charity T-Vox during their *Spouse Reactions To Transsexuality* survey; and from first-hand accounts provided during the writing of this report.

“A”

Case study taken from information provided to T-Vox for the Spouse Reactions To Transsexuality survey.

A is an autistic trans man with children and a husband who is abusive. A has paid all the instalments on his mortgage, which is jointly in the name of him and his husband. His husband is threatening to force A out of the family home and deny him access to the children if his transition continues.

A has suffered financial abuse at the hands of his husband, which has made him unable to afford either a solicitor to file for divorce, or a means to afford somewhere else to live. If A can afford to apply for a GRC, the spousal veto means his husband will be able to deny him one by refusing to provide the required statutory declaration of consent.

Transgender problems do not exist in a vacuum. Care must be taken to ensure that any legislative tools designed to “protect” the spouses of transgender people are not able to be misused. Here the spousal veto enables an abusive spouse to further attack a vulnerable adult.

“J”

Case study taken from information provided directly for this report.

J is an older trans woman who transitioned in her sixties. She has two children, both 16. One of her children “cannot cope with losing her father”, which put a strain on J’s relationship with her family. She moved out and now has little contact with her wife or children.

J and her wife are divorcing after almost two years apart. J will be eligible to apply for a GRC in two months’ time but the divorce process is likely to still be ongoing at the time she can make her application.

Despite going through the divorce process, the spousal veto will demand that J’s wife make a statutory declaration of her agreement to her marriage continuing, if J applies for a GRC. If she does not, J will only be eligible for an IGRC, which will be immediately rendered useless because a divorce is already underway.

This makes a mockery of both the GRC process and the divorce process.

“P”

Case study taken from information provided to T-Vox for the Spouse Reactions To Transsexuality survey

P is a married trans woman whose wife is having continued trouble accepting the transition process. P’s wife, Q, has repeatedly informed P that she “wishes this wasn’t happening” and continues to express uncertainty at their future together. Furthermore, Q’s parents have “demonized” P and are trying to convince Q to file for divorce.

P will soon be eligible to apply for a GRC. At this point, the spousal veto will force Q to either sign a statutory declaration stating her agreement to the marriage continuing, or refuse to sign.

This puts Q in a precarious situation. P and Q have managed to keep the marriage going so far, which suggests there may be a possibility of the marriage continuing once the transition process is completed and they have more of a chance to rebuild their relationship. However, forcing a decision at a set point in time that has no bearing on the state of their relationship will potentially ruin any chance of the marriage surviving.

Furthermore, demanding a decision from Q will allow her parents to exert even more pressure on her. The likely outcome then is that Q will be pressured into not providing the statutory declaration, thus depriving P of her right to a GRC.

The spousal veto in this case will allow outside influence to destroy a marriage that could potentially be saved.

“X”

Case study taken from information provided to T-Vox for the Spouse Reactions To Transsexuality survey

X is a married trans woman whose wife, Y, has attempted to influence the decisions of her psychiatrist (all trans people are required to undergo assessment by a psychiatrist specialising in gender identity).

When X had completed the Real Life Test, Y attempted to persuade X’s psychiatrist to not write a surgery referral letter. Y claimed X would change her mind, despite there being no evidence to support such a statement.

The spousal veto will allow Y another opportunity to interfere with X’s rights. Y is in denial about how important transition is to X. Instead of getting counselling and either being helped to come to terms with the transition process; or getting counselling and seeing that divorce is the right course of action, Y is being presented with an opportunity to deny X her right to the protections provided by the GRC.

This serves no purpose other than to allow a confused person to abuse the law and deny someone else their rights.

Conclusion

The spousal veto is very real and very dangerous to trans people in England & Wales. The Scottish Parliament has already removed it from the Scottish version of the Equal Marriage Act, and England should follow suit.

There are no reasonable arguments for keeping the veto and substantial evidence that it will be abused if it is ever allowed to come into force. There is an opportunity right now to prevent this piece of grossly discriminatory legislation from ever doing any harm and it should be taken before many lives are ruined.