

Self-declaratory system for gender recognition needs far more clarity

Choosing to change gender has far-reaching consequences, says **Calum MacKellar**

For most people, no disparity exists between their allocated birth gender and their sense of gender identity. But in rare cases this does not happen and a degree of distress or dysphoria may arise in such 'transgender' persons. Studies indicate that fewer than about 1 in 10,000 adults are affected by such a condition, but estimates vary widely.

Why such mismatches happen remains unclear, with many factors likely to be involved. These include social influences and the possibility of disparities occurring, during pregnancy, between the biological genes, the biological physiology and the way the biological brain is structured towards male or female dispositions or behaviours.

What does seem to emerge from

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clinical experience, however, is that true gender dysphoria is not chosen and that such persons must be considered with genuine compassion and respect.

Transgender individuals were first given the possibility of changing their birth gender under the UK Gender Recognition Act 2004. To do this, persons over 18 years of age must obtain a certificate from a Gender Recognition Panel after having been medically diagnosed with significant dysphoria and lived successfully, for at least two years, in the opposite gender.

However, a new Scottish Government consultation reviewing this Act, which took place at the beginning of 2018, proposed to make some significant changes to the law including the introduction of a self-declaratory system for gender recogni-

tion. This would enable individuals to legally change their birth gender without any medical or other evidence.

But in this government consultation, no clear definitions were given to the concepts of a person's 'sex' and 'gender' which made it very difficult to even understand the questions being asked. For example, it was unclear whether 'sex' meant 'biological gender' and whether this also included the 'biological gender' of the brain.

Moreover, the consultation document did not explain how a person's gender identity came about. Was it, for example, just based on subjective and socially constructed characteristics of masculinity and femininity? Of course, if such a position was accepted, then individuals could simply

choose to have any gender they liked without any reference to biology. It would then be possible, for them, to change their legal gender any number of times during a lifetime.

But if, on the other hand, it is assumed that gender identity has some biological components including genetic, anatomical, physiological or neurological aspects then things are very different. This is because, in this case, persons may need real support in seeking to understand and address their gender dysphoria. Moreover, if they do choose to change the gender allocated to them at birth this would need to be carefully considered since such a decision has far-reaching consequences.

The Scottish Government also argued that teenagers aged 16 and 17 should be able to decide to change

their legal gender since they were already entitled to make a number of important life decisions for themselves including getting married, recording a change of name, and voting in Scottish elections.

However, questions about how to consider older teenagers affected by gender dysphoria are complex since a number of them experience changes to their gender identity over time. Moreover, because the brains of older teenagers are continuing to develop with the associated behavioural changes, it is unlikely that they will have the same capacity as more mature adults to make balanced and well thought-through decisions.

This means that they may not be able to give appropriate informed consent for certain momentous decisions requiring mature reflec-

tion such as with a change of legal gender. That adolescents have not reached full maturity is also reflected in that only individuals above the age of 18 can buy cigarettes and alcohol in licensed premises, stand as candidates in parliamentary elections or even get a tattoo.

In addition, the government consultation asked whether Scotland should recognise non-binary people. But again, it did not define what it meant by such a term. Are non-binary individuals, for example, people who are bisexual or who are exactly in the middle of the male-female spectrum? Or are they, on the other hand, individuals who believe in the non-existence of male and female characteristics?

Because of such a lack of explanations in the consultation document

and the insufficient evidence-based research available relating to the psychological condition of non-binary individuals it was impossible to appropriately respond to the questions of the Scottish Government on this topic.

In conclusion, a lot more clarity is required in such government consultations if civil society is to make responsible responses in the context of an informed democracy.

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