



Gender Identity Research and Education Society

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GIRES POSITION ON 'SPOUSAL VETO' - a response to Minister's request for input

Summary

The key points that GIRES would like to convey to the Minister are:

- Contrary to the government's assertion that there is no spousal veto in current legislation, the Marriage (Same Sex Couples) Act 2013 permits the spouse to prevent the award of a Gender Recognition Certificate (GRC) to a person who has undergone gender reassignment by refusing to sign a statutory declaration of consent.
- In cases where a couple have separated and lost contact it might be practically impossible to obtain that declaration.
- In addition, the Matrimonial Causes Act 1973, as amended by the Gender Recognition Act 2004, enables the spouse to void the marriage if they can demonstrate that they did not know that the partner had GRC at the date of marriage.
- Each of the above pieces of legislation appears to be a breach of Article 8 in the Human Rights Act 1998 and discriminatory under the Equality Act (2010).
- The government's arguments in favour of retaining the spousal veto are factually unsound.

GIRES would welcome a meeting with the Minister to explain any of the above if required.

Introduction. GIRES considers that the so-called 'spousal veto', now part of the Same Sex Marriage Act, is harmful to both trans people and their families. It has transpired that the government stance is that the spouse of the trans person should be given a say on the future of the marriage. The government has not explained how the issue of a GRC would actually alter the marriage from the spouse's point of view. The effect of this is to give a spouse the power to delay the issue of a GRC to the trans partner directly resulting in the withholding rights under Article 8. Trans people must surely have the same rights as other people and the concept of one person being able to control access to Human Rights to another is surely from another age?

Gaining a GRC in a marriage is not a life changing event. The scenario painted by government is that the award of a GRC in a marriage is a life changing event for the couple (Baroness Stowell, 3rd reading in The Lords). GIRES has spoken with the spouses of trans people who all advise that the life changing events were their partners announcing their intent to transition, starting to take cross sex hormones, transitioning to the opposite gender role, the spouse going out in public for the first time with the trans partner, telling families and friends, the trans person's career being blighted by transition or even ceasing, changing legal names and having gender reassignment surgery. These truly are life changing events and none subjected to any form of spousal veto. Is the government presumption that the receipt of a GRC in a marriage somehow makes that couple gay? What is the life changing event that has been used to justify spousal veto?

Most couples are already in same sex marriage at GRC award. Many trans people have completed gender reassignment surgery before applying for a GRC (for which one year in the new gender role is the usual requirement). The couple would thus be in a same sex legal marriage prior to

GRC award and in a legal same sex marriage after award. GIRES and the couples consulted fail to see any difference. The terms of their marriage contract are the vows they took and these are not changed.

Most spouses have sufficient time to consider the future of the marriage. Before a GRC can be applied for, the applicant must have been living in the new gender role for (at least) two years. This is two years in which their partner - the person who is now choosing whether to exercise the spousal veto - has remained in a marriage with someone who is now the opposite gender role to the one they married. Surely (the at least and usually a lot more) two years is sufficient to decide whether or not to continue the marriage? If the marriage has survived the upheaval of the above genuine life changing events to the point where the trans partner can regain their legal rights, hasn't the other partner already shown, through their own actions, that they want to remain in the marriage?

If the government position is that the receipt of a GRC in a marriage might offend some spouses as they themselves might feel they were now classified as officially gay, this would be a grave misunderstanding of the issue of sexual orientation in a trans affected marriage. Is government pandering to perceived homophobia of spouses? Others may consider the couple to be gay in the 2 years post one spouse's transition and will have no idea if they are in a legal same sex marriage or a same sex legal marriage and thus GR award or not is irrelevant. Again, articulation of what that life changing event referred to by Baroness Stowell in justification of the veto would be helpful.

How many spouses are likely to get to the point of GRC application and then decide they do not want to continue in that marriage? GIRES considers that this number will be vanishingly small and, for such a cohort, why could the GRC not be used to seek an annulment?

It is essential that spouses are informed of the application for a GRC (disgracefully not done at present), so they have time to end the marriage should they choose, to prevent absolutely a legal same sex marriage occurring, especially if their religious beliefs are relevant. Of course, religious beliefs should never trump Human Rights.

Fast Track but why retain spousal veto? GIRES welcomes the re-introduction of the Fast Track process that will allow folk who transitioned at least 6 years ago to make a simplified application for a GRC. This includes married applicants. Clearly both parties want the marriage to continue as they have been living as a same sex couple for at least 6 years yet the spousal veto still applies. We find this quite extraordinary.

The non trans spouse position. GIRES considers the current law hurtful to the trans partner. In virtually all cases, the non trans spouse would prefer the partner not to transition. However, most come to accept that the trans spouse has no option. The spousal veto, in effect, makes the non trans spouse 'approve' of the partners legal change of sex and they do not want to be involved in that process. Indeed, if they do not sign, they are in effect 'signing' their own divorce warrant. We know of at least two couples where the trans person qualifies for the Fast Track procedure who will not be applying for a GRC as they do not want to 'force' their spouses to 'authorise' something that they would really not want to happen ('the nail in the coffin and the final insult' said one of the trans people). In effect, these trans people are sacrificing their Human Rights to ensure that their spouses are not subjected to such a process.

Absent spouses. Some relationships do break down possibly because each wants a partner of the opposite physical sex or the spouse cannot face the perceived possible shame of living with a trans person in the days following transition. This is the most likely scenario for the marriages that end. The couple may lose contact for whatever reason. The GRC applicant is not in a position to obtain 'spousal consent'. The effect is that the trans person cannot get a GRC. The solution is to apply for a divorce in absentia and the outcome is a delay in the trans person acquiring Human Rights enjoyed by others. There would be no impact on the absent spouse if the trans person is awarded a GRC rather than an IGRC as at present.

A member of the Charity has received a response to her concerns over spousal veto from the Minister responsible and this has been passed to us. Comment on the key points that were made by the Minister (Maria Miller) in defence of spousal veto is appropriate.

a. There is no spousal veto and it is a myth

The trans community consider the spousal veto transphobic in the extreme. The actions of the spouse absolutely determines if a GRC is awarded. Call it what you will but the effect achieved is one of a veto. Once they are no longer the spouse, they lose their veto and a full GRC can be issued. Hence spousal veto. Veto is defined as "refuse to accept or allow" and thus a reasonable person would consider that there is a spousal veto.

b. No role play used to determine policy

GIRES was present at a consultation meeting on Same Sex Marriage and, with others, was advised that the veto policy came from role play - 'how civil servants would feel if their partner obtained a GRC in a marriage'.

c. It is not possible to legislate in a way to meet every couple's situation

Government has not met the needs of the couples noted above. What couples' needs have been met?

It may not be appreciated that there are 'vindictive' spouses. These either wish to pressure the trans person into de-transitioning or take revenge.

When spousal consent is not forthcoming, the IGRC can be used to initiate annulment. However, if divorce proceedings have already been commenced, the annulment route is curtailed. Thus a spouse trying to put pressure on the trans person to de-transition or one who is vindictive, there is the possibility of a pre-emptive initiation of a divorce that can be dragged out for many years, denying access to children and causing costs that the trans person can seldom afford and indeed result in the forcing of an unfair financial settlement. A vindictive spouse thus has an extended veto on her partner's access to Article 8 rights by blocking the issue of a GRC. Government has presented such spouses with a new weapon to attack their trans partner.

d. The policy had to be based on very little data for married trans

Government was informed of the trans community perspective during the Bill stages in both Houses and, disappointingly, chose to ignore it. The community points to the debate on the Scottish Bill where the arguments put forward by us, in England, were accepted by the Scottish Parliament.

Had government accessed information available to LBGTory, it would have known that a recent survey has shown that 43.75% of the partners and spouses of transsexual people have actively attempted to prevent their transsexual partner from transitioning. Furthermore, 28.57% of the spouses of transsexual people have made getting a divorce difficult.

e. The policy is intended not to place any undue pressure on couples to either stay together or end their marriages

The reality is that some spouses do not know if they can continue to be in the marriage yet desperately try and accommodate the changes to the marriage. The trans person wants to obtain legal rights asap and the spouse is really not sure of his/her position. This can create enormous pressure within the relationship if the relationship and legal recognition issues are not separated. The trans person is desperate to resolve the ID issues (and reduce the enormous mental stress associated with being classified in the incorrect legal sex). All of this contrives to put pressure on the spouse to come

to a decision, possibly prematurely, under current legislation. Such a couple would be greatly assisted by having the GRC awarded in the marriage and allowing the couple to annul, should they choose, say within 2 years of the GRC issue, if either of them fail to make the necessary adjustments.

A trans affected marriage is a pressure cooker of emotions. GIRES is aware that the original GRA has caused marriages to break up that would have otherwise stayed together and the new legislation will have the same effect. We believe that such family units should be given every chance to survive intact.

GIRES has pointed out that the original GRA was unfair to spouses as they were not informed of a GRC application. Government has now swung too far in the other direction by putting the spouse in a position of power over the trans person and can control their access to Human Rights. Government has interfered with the power balance within relationships. The trade-off between the trans person accessing Human Rights soonest by award of a GRC in a marriage and the lost benefit to the spouse as a consequence has yet to be articulated. There is no public detriment to spousal veto being removed.

f. Policy is to allow the non trans person to have a say on the future of the marriage

As argued above, surely if the couple is together for 2 years as a same sex couple then the marriage is continuing. GIRES cannot see what receiving a piece of paper (GRC) does to a couple's relationship. 'Fast Track couples' have clearly indicated how they see their future. GIRES would like to know how the future of such a marriage differs from that just prior to GRC award. There must be a substantial reason to permit one person to delay the access to Human Rights for another.

g. The IGRC is retained to allow easy end of marriage

The Scottish Act retains the IGRC in order to minimise impact on the GRA. However, the GRC itself could be used to end the marriage with spousal veto removed, for the small number who decide to split and perhaps this route should be available for a maximum of two years.

h. 2 years may or may not be enough for couples to determine their future

GIRES agrees with this comment and this should have been taken account of in the legislation. This is what we argued at the Committee stage of the Bill and it is repeated above. The couple's future and the Human Rights of the trans person must be treated as separate issues.

Trans people made it very clear that they wanted the possibility of a new marriage certificate and we are pleased that government is giving this active consideration. GIRES agrees that a new marriage certificate should be an option that not only requires spousal consent but also the consent of the GRC holder.

The other 'spousal veto. Finally, and also given in evidence at the Committee Stage, there is an older spousal veto: Section 12(h) of the Matrimonial Causes Act, which was inserted by the Gender Recognition Act way back in 2004. This allows someone to void their marriage if they find out their partner had obtained legal gender recognition prior to the marriage. There is a time limit of three years after marriage to annul unless you get special permission from a judge, and it only applies if the spouse claims that he/she did not know the partner had a GRC. One can immediately see the difficulties that would arise here.

As with the Same Sex Marriage spousal veto, this is just another case of the law feeling it needs to create special cases surrounding trans folk. GIRES recommends that if the non trans spouse has an objection, the solution should be divorce as it would be if the new husband or wife turned out to be e.g. a serial sex offender.

Thus the effect of Section 12(h) of the Matrimonial Causes Act is to provide yet another way in which trans folk have less rights in marriage than everyone else.