

## **Same-Sex Marriage, Where are we Now?**

**Helen Belcher**

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The Marriage (Same Sex Couples) Act 2013 was given Royal Assent on 17 July 2013, which means that “marriage of same sex couples is lawful”. Except that, currently, there’s no mechanism to “solemnise” them – the marriage ceremony to you and me.

In order for an Act of Parliament to take effect, it’s not sufficient for it to be passed and granted Royal Assent. It must be enabled, and this is done by a series of Statutory Instruments. As an example, the Easter Act was passed by Parliament and granted Royal Assent in 1926. This act sets the date of Easter to be the second Sunday in April. But, because it was never enabled, we still celebrate Easter based on full moons after the spring solstice.

So, we are currently waiting for the Statutory Instruments to be laid before Parliament which enable different parts of the Act. And the Department of Culture, Media and Sport have said the Act will be implemented piecemeal. The main thrust of the Act looks as though it will be enabled in the spring of 2014, allowing marriages to be contracted between people of the same sex in the summer. The other parts of the Act, relating to converting civil partnerships to marriages and, most importantly for trans people, the provisions for changing “legal” gender while remaining married, look as though they won’t be enabled for at least another 6 months afterwards. The difficulties in working out what to do with existing marriage certificates, and the new procedures the Gender Recognition Panel have to go through need to be resolved first.

This means that while same-sex marriages will be taking place, trans people will still have to divorce to gain gender recognition.

It is usual for Statutory Instruments to go through Parliament unchallenged. But various MPs and peers, particularly in the Labour and Liberal Democrat parties, are really uneasy about the spousal veto concept that was introduced, so that the appropriate Statutory Instruments may face a challenge.

What’s the spousal veto? Well, under the new Act, if a trans person is married at the time they apply for gender recognition, they must also declare a statutory declaration from their spouse that they are content for the marriage to continue post gender recognition. While an improvement from the current position, which is that the marriage must end before gender recognition can be granted, this means that, uniquely, trans people are not trusted to have talked things through with their spouse within their marriage. It also means that a spouse has a potential veto over their partner’s gender recognition – because if the spouse refuses, divorce is the only way forwards. The issue with divorce is, contrary to the Government’s belief, it can take

many years to resolve. It's the distribution of property and access rights to any children that are the usual sticking points – and this applies whether the marriage is ending through divorce or annulment. The law treats every other issue that arises within a marriage (apart from an arcane one about changing names) to be capable of being resolved within that marriage. The state doesn't interfere. If one spouse cannot live with another's decision, divorce is their only option – except, now, for a spouse's gender recognition.

A survey by Zoe Kirk-Robinson revealed that around half of spouses had objected to their partner's transition, and a third had actively obstructed it. These are likely to have ended up in protracted divorce proceedings. The new Act makes no distinction between couples who are happily married and those who are divorcing – if you haven't got a decree absolute, you are married and therefore need your spouse's consent. A phenomenal number of marriages involving trans people break down, and a large portion of them result in hostile and contested divorce cases. So a hostile spouse will have a trans person's right of gender recognition in their hands.

Another quick survey of spouses of trans people revealed that not one of them wanted this additional "protection". The vast majority, well over 90%, believed that gender recognition was a process for their trans partner and their trans partner alone. Not that any spouses of trans people had been asked for their opinions by Government.

One defence that has been put forward is that this requirement for a spouse's consent protects the trans person from being divorced because they have applied for a gender recognition certificate. Such an application should not be classified as unreasonable behaviour, the reasoning goes.

Another defence is that the marriage contract specifically references the terms "husband" and "wife", and gender recognition will change the contract, which requires the agreement of both parties.

My view is that these are both weak defences, especially in the light of putting the trans person as legally subordinate to their spouse – where the spouse loses no rights, but the trans person does. If the spouse cannot cope with gender recognition then they should be able to get out of the marriage if they desire it, and issuance of a gender recognition certificate should, in my view, be cause for divorce. Nobody's human rights should depend upon another person not obstructing them. And all sorts of contracts reference people by names, yet no-one is seriously proposing that a trans person changing their name (or even a person changing their name by marriage) will need to redo all their other contracts, including employment, mortgage, pensions, etc.

There are some other issues with the Act as well:

- The Act persists in using gendered language, referencing “husband” and “wife” throughout. Many partners of trans people find it difficult to use the appropriate gendered term, preferring non-gendered alternatives such as “spouse” or “partner”. Also there are a growing number of people who don’t identify as either male or female, but they will be forced to assign themselves a label they will be uncomfortable with.
- Failure to disclose a gender recognition certificate to a potential spouse remains stated grounds for annulment of a marriage, but if you’re trans and don’t have one, then failure to disclose your gender history may not be – that would be up to the discretion of the court. So trans people with GRCs are legally discriminated against – despite the Gender Recognition Act stating that a person with a GRC will be treated as their acquired gender for all purposes.
- Those trans people in civil partnerships will either have to convert them to marriages (for a fee – and then get their spouse’s consent) or dissolve them before going for gender recognition. Given that there are quite a few trans people who were married and are now in civil partnerships with the same person, to have to pay again to not quite reinstate what they had before (because the date of the marriage won’t be acknowledged as the date of the original marriage) is a slap in the face.
- The fast-track procedure for gender recognition has been reintroduced, but only for those trans people who are married at the time of application – even if they weren’t married at the time of transition. And, yes, the spousal consent requirement still exists for these marriages.

Discussions are ongoing about resolving these issues, either in other pieces of legislation or by challenging the Statutory Instruments, although challenging the Statutory Instruments is unlikely to be successful. However the Government is not planning any more equalities legislation this parliament.

While grateful that there is some light at the end of the tunnel, many trans people remain angry about being labelled as separate with their rights completely subordinated to those of their spouses.

What can you do about this? Well, firstly, write to your MP to explain your concerns. Some MPs are already onside, but we need to show that there’s a real appetite to change the law in this area. If you want, you may also want to pick a Lord to lobby! You may also want to write to the DCMS and the General Register Office to see what progress has been made, and whether it’s possible to speed it up. Ultimately we are reliant on those in Parliament and in Government to change the law. We just need to keep the pressure on.