Falkland Islands Constitutional Review - 2023

Thinking about Fundamental Rights and Freedoms

Supplementary guidance notes

These notes supplement the general guidance on Chapter 1 of the Constitution – Fundamental Rights and Freedoms – issued on 20 June 2023 for the 2023 Constitutional Review

Discrimination – Sex and gender

1. Background

Section 16 of the Constitution makes provision for protection from discrimination. The term "discriminatory" is defined in the section, and lists a non-exhaustive number of characteristics. One of the characteristics listed is "sex".

To add one or more characteristics to the list would make it explicit that such characteristic is subject to the protections contained in section 16 (although it may be argued that the relevant characteristic is already subject to protection ie because the list is non-exhaustive).

Those responding to the Constitutional Review have been specifically asked to consider if any other characteristics should be listed explicitly for protection from discrimination.

A number of respondents have suggested that "gender" should be added to the list.

2. What is gender?

The English meaning of the word "gender" is currently subject to significant, and often very polarised, debate.

Historically, the word gender is thought to derive from Latin and other roots, meaning "kind, sort, class, or class of persons". The term "gender" was historically associated with grammar (ie the use of "masculine", "feminine" or "neuter" to categorise nouns in some languages).

The use of gender to mean the male or female sex (rather than being associated with grammar) is thought to originate in the early 15th century.

Gender became the usual English word for "sex of a human being" by the early 20th century; largely for the purpose of avoiding reference to "sex" for social reasons (as "sex" became more associated with sexual intercourse).

Later in the 20th century, "gender" started being used with reference to social attributes as much as biological qualities. In particular, feminist writing sought to distinguish the social roles of men and women (gender) and matters directly linked to biology (sex).

The word gender has further developed in the 21st century in connection with a broader concept of "gender identity", which is explored further below.

Current use of the words sex and gender sometimes involves clear distinctions, but often the two are used interchangeably, including in laws.

3. Sex and Gender – laws

The words sex and gender are currently used in different ways in laws in different countries – with a wide range of effects.

However, consideration of relevant UK legislation provides a useful illustration of the complex and evolving nature of the issues surrounding sex and gender in the world today. The evolution of language and the particularly rapid recent evolution of society in the area of relevant human behaviours means that the intended effect of laws made 15-20 years ago are not particularly clear.

Of particular relevance are the UK Gender Recognition Act 2005 and the Equality Act 2010 (see www.legislation.gov.uk). Neither of these Acts extend to the Falkland Islands.

The Equality Act 2010 protects against discrimination on the basis of sex, sexual orientation, and "gender reassignment", amongst other things (but it does not protect against discrimination based merely on "gender"). "Gender reassignment" is described in terms of a person who is "proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".

So "gender reassignment" and "reassignment of the person's sex" are effectively used in the Act to mean the same thing. The interchangeable use of "sex" and "gender" in a number of parts of the Act has led to calls for amendment of the Act to provide clarity. This is under consideration by the UK Government (see preliminary advice from the UK Equalities and Human Rights Commission https://www.equalityhumanrights.com/en/file/43056/download).

There is also considerable debate around the Gender Recognition Act 2005 and a recent Scottish Bill which aims to relax requirements in Scotland around "gender recognition". The Scottish Bill has been halted and is currently the subject of Government legal proceedings - see The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill - House of Commons Library (parliament.uk)

4. Sex and Gender – what are the key issues?

As indicated above, debate around sex and gender is particularly polarised, and is not easily summarised, but the following provides a starting point for understanding the issues and enabling discussion.

Biological sex

Traditionally, the distinction between men and women has been made on the basis of biology, ie science distinguishes male and female human beings based on chromosomes and reproduction. Biological sex is generally considered to be binary.

"Intersex" is a term traditionally used in science to describe a person who has both male and female sex characteristics. However, the exact meaning of intersex and the rarity of the condition are disputed (the United Nations Intersex Fact Sheet notes figures between 0.05% and 1.7% of the population).

Gender identity

Whilst gender was traditionally used to mean a person's sex, it is now frequently used in a different sense.

"Gender identity" is argued by some to be determined merely by the person's sense of self. So, for example, if the person feels that they are a woman, then they are a woman, regardless of any sex characteristics and regardless whether or not the person has sought to modify any of their sex characteristics or not.

A "non-binary" gender identity is said to involve a person who cannot be defined by reference the male or female sex (or gender).

Some go further, and argue that the range of gender identities which exists is limitless (eg aerogender, agender, androgyne, bigender, cisgender, demigender, dual gender, gender expansive, gender fluid, gender queer, pangender, etc etc).

It is argued that only the individual may identify their own gender, ie it cannot be medically or otherwise independently determined.

Sex and gender – transition

The term transsexual has been traditionally used to refer to persons who wished to "transition" from one biological sex to another (physically and/or legally).

However, whilst it is widely accepted that a person's biological sex characteristics can be modified (for example by taking sex hormones or having surgery), a key point of debate is whether it is possible to change biological sex. Science suggests not, but that is disputed by some. Questions flow from that about the circumstances in which a person should be permitted to legally change sex (if at all). Some argue that sex is immutable and that any contrary position is an ideology, and is not based on science.

The UK's Gender Recognition Act 2005 provides for a person to be granted a "gender recognition certificate" on the basis of a person having "the disorder" of "gender dysphoria" (also said to be known as "gender identity disorder" and "transsexualism"). Gender dysphoria can be very generally summarised as a feeling of discomfort or distress in a person whose "gender identity" differs from their biological sex (which is sometimes referred to as a person's "sex assigned at birth"). A gender recognition certificate has effect that the holder of the certificate must be treated as the sex stated on that certificate for certain legal purposes (eg marriage). It is disputed by some about how limited those purposes are.

The terms transgender or simply "trans" are now more commonly used than transsexual. And many trans people would not describe themselves as wishing to transition from one sex to another, but would describe themselves as living with a more fluid gender identity or without a reference to a binary gender identity at all. Many trans people argue that their rights should not be determined by sex, but by gender identity (although such a person might also still argue that they can change sex).

Why is this so controversial?

The main reason for the polarised nature of the debate is because the issues involve competing and overlapping rights of different groups of persons; notably women as a sex class, and trans persons.

The United Nations notes that women, girls and trans people are some of the groups regularly subject to discrimination and violence, and that such groups are deserving of protection.

Discrimination and violence against women is disproportionately carried out by men, so protections for women are necessarily often focussed on a distinction between women and men.

The concept of gender identity, ie which does not relate to sex and does not necessarily involve any physical or legal "transition" is in direct conflict with the ability to protect women as a sex class.

Some trans people do not accept the existence of this conflict, and state that merely asserting that the conflict exists is to discriminate against trans persons.

There are many aspects to this debate, but at its heart is the need to balance rights of groups with conflicting views and interests.

5. <u>Summary</u>

- Because the meaning of "gender" is significantly disputed, particular care would have to be taken if an amendment to the Constitution were to be included using the word. There would need to be a clear policy understanding what is meant by it and what the purpose of the amendment would be.

- Similar considerations arise in relation to the potential to include reference to “gender reassignment”. In particular, Falkland Islands law does not yet make any provision for gender reassignment, so there would need to be a clear policy understanding what is meant by the term.

- Given the rapidly evolving situation in UK, and the potential for change to UK law, it is suggested that regard should be had to the UK position.

- It should be noted that it has been agreed by Executive Council that a significant Programme of work on equalities should be carried out in coming years – and issues around sex and gender will be considered as part of that work. However, that work is not scheduled be completed before the end of this Constitutional Review – leaving choices to be made about timing and prioritisation of the issues.

Issued 19.7.23 (v2) by Law and Regulation Directorate on behalf of Gilbert House