

Westminster Ate My GeRBill! (Part 1)

Brian Dempsey examines the Gender Recognition Act 2004

Part One of this article explains the pressures for, and terms of, recent law reform relating to transsexual¹ people in the UK. Part Two will look at the criticisms of the Gender Recognition Bill from both supporters and opponents of reform, at the treatment of the Bill in the Scottish Parliament and at the impact of having Westminster legislate in the field of Scots family law.

Pressure For Reform

For many years it has been settled (albeit controversial) law that in England and Wales a person's legal sex² could not change.³ Errors in the register of births can be corrected but the register is a historical record marking the situation pertaining at the time of birth and cannot be altered to reflect subsequent changes. The position is probably the same in Scotland.⁴

The difficulties faced by transsexual people because of this situation are manifold.⁵ A person may be accepted in society in their "new" (the person affected would say their "true") sex. They may dress and act in ways usually associated with their true sex. They may be accepted at work and in their families in their true sex. They may form mixed-sex (or of course, same-sex) relationships in their true sex. They may even have state funded treatment, including hormone treatment and surgery, to reflect their true sex.⁶ But in law they remain the sex into which they were born.

This has several consequences. While a person may get a bus pass and even a passport issued reflecting their true sex, and they may present themselves in their true sex at work - thereby avoiding potential embarrassment and discrimination⁷ - there are occasions when they will be forced to reveal the mismatch between their legal and their social sex. While pension provision and entitlement remain discriminatory between men and women then birth certificates⁸ stating a person's original sex and name have to be produced. Insurance companies, employers, universities and others can demand to see birth certificates. All of this leads to a breach of a person's privacy and can lead to discrimination.

As well as privacy issues there are family law questions to consider. The central issue in both *Corbett* (above) and *Bellinger* (below) was whether a socially mixed-sex marriage was valid. As the woman in each case remained, in law, male, there was no marriage. So a transsexual person could not marry in their true sex but, unless identifying as lesbian or gay, would not want to marry in their legal sex. Marriage is, effectively, closed to them.⁹

The final major issue is parenthood. A female to male transsexual persons may be denied the status of father of a child where his wife is undergoing IVF treatment.¹⁰ More commonly perhaps, negative reactions on the part of children, former partners, local authorities and others might undermine the parental responsibilities of transsexual parents.¹¹

Successful challenges to these legal difficulties proved elusive. While the European Court of Justice ruled in 1996 that discrimination against transsexual people in relation to employment was sex discrimination contrary to the Equal Treatment Directive 1975,¹² human rights challenges from the UK based on arguments for recognising "change" of sex floundered. In *Rees v UK* (1986) 9 EHRR 56, *Cossey v UK* (1991) 13 EHRR 622 and *XY & Z v UK* (1997) 24 EHRR 143 challenges based on Article 8 (respect for private and family life) and Article 12 (right to marry and found a family) failed before the European Court of Human Rights (ECtHR).

However, in 2002 the ECtHR ruled that increased recognition by various jurisdictions of the possibility of changing one's legal sex made the UK's continued refusal to allow reregistration untenable. In *Goodwin v UK* (2002) 35 EHRR 18 the court unanimously held that the UK's position, affecting the applicants' rights *inter alia* with respect to pension retirement dates and contributions as well as to marry, amounted to a breach of Articles 8 and 12.¹³

Further pressure for change came from a declaration by the House of Lords in *Bellinger v Bellinger* [2003] 2 All ER 593 that the refusal to recognise a person in their "new" sex - meaning that they could not, in effect, marry - was incompatible with the Human Rights Act 1998.¹⁴

Government's Response

Responding to increasing political criticism of adherence to the outdated position established back in 1970 in *Corbett*, the Home Office established an Interdepartmental Working Group On Transsexual People in 1999. The shape of the eventual Gender Recognition Bill is clearly identifiable in the Committee's 2000 Report.¹⁵ The Government, reacting to *Goodwin* and seeing the House of Lords decision in *Bellinger* on the horizon,¹⁶ announced in December 2002 that they would legislate to rectify the situation.

The 2004 Act¹⁷

The central consequence of the Act is that where a full gender recognition certificate is issued "the person's gender becomes for all purposes the acquired gender."¹⁸ However, addressing the problems created by the use of the word gender instead of sex, an amendment was necessary to include -

"... (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."¹⁹

By s9(2) this does not affect things done, or events occurring, "before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards)."

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SCOTTISH EXECUTIVE

Applications for certificates

Section 1 provides that a person aged 18 or over can apply to the Gender Recognition Panel for a gender recognition certificate. This may be on the basis that they are “living in the other gender” in the UK or that they have already had their changed gender recognised in another jurisdiction.²⁰ The certificate may be “full” or “interim” (s.4).

Section 1 also gives effect to Schedule 1 which details the constitution of the Panels. Appointments are made by the Lord Chancellor after she has consulted the Scottish Ministers. Only legally qualified persons²¹ or “medical members”²² may be members and Panels must be made up of either at least one of each in the case of a “fresh” application from a person in the UK²³ or at least one legal member if the application relates to an already recognised change of gender in another jurisdiction.²⁴

Panels determine applications in private, without a hearing, unless one is judged necessary and the majority prevails with the presiding member having the casting vote. The Panel must give reasons for their decision (Sch 1 para 6). It is unclear whether the Panel will travel to hear cases and whether it will contain legal members from the same jurisdiction as the applicant.

By section 2, a Gender Recognition Panel must grant the application if satisfied that the applicant has gender dysphoria; has lived in the acquired gender for 2 years; intends to live in that gender for the rest of their life and complies with s3. Otherwise they must reject the application.

Section 25 gives a somewhat opaque definition of gender dysphoria as – “the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism”.

The conditions set out in Section 3 are that the applicant must provide a report from two medical practitioners (one of who being a specialist in gender dysphoria) or a medical practitioner and a chartered psychologist specialising in gender dysphoria, stating that the applicant suffers from gender dysphoria. Where an applicant is undergoing treatment, that must be detailed. The application must also include a declaration that the person has lived in the new gender for two years and intends to do so for the rest of their life. Further, the application must contain a statement of whether or not the applicant is married and any other information the Panel may deem necessary, and may include any information the applicant wishes to put before the Panel.

Marriage

The requirement in s3 to state whether or not the applicant is married points to one of the most contested aspects of the Act.

By s4 a successful application must result in a gender recognition certificate being issued to the applicant. If the applicant is unmarried they receive a full certificate (s4(2)) - if they are married they receive an interim certificate (s4(3)) which can only be converted to a full certificate if the applicant divorces their spouse within six months or their spouse dies within that period (s5(1) & (2)). A court granting a divorce must issue the full certificate where the party holds an interim certificate; otherwise an application is necessary to the Panel to convert an interim certificate to a full certificate.

Section 4 gives effect to Schedule 2; Part 2 of which amends the Divorce (Scotland) Act 1976 to add a second ground of divorce to Scots law. In addition to irretrievable breakdown, the securing of an interim gender recognition certificate will suffice for the immediate granting of a divorce, regardless of whether either or both of the parties believe the marriage to have irretrievably broken down. The applicant’s spouse is given no legal basis on which to oppose the divorce which they may wish to do to protect their own interests. Loving spouses who wish to preserve their marriage can only do so at the cost of denying the applicant spouse their gender recognition.

Errors, Appeals and Fees

Section 6 allows for errors in the certificate to be corrected. By s7 there will be a non-returnable fee to be paid by those applying for a certificate. The affordability of the fee is not yet certain.

An appeal against the rejection of an application is competent to the Court of Session on a point of law (s8(1)). The Secretary of State may refer a case to the Court of Session if she considers a certificate was secured by fraud (S8(5)).

Registration

A full certificate must be registered to take effect. Where a full certificate is issued to someone with a “UK birth register entry” (s10(2)) the Secretary of State must send a copy of the certificate to the Registrar General.

Section 10 gives effect to Schedule 3; Part 2 of which provides that the Registrar General for Scotland must maintain a Gender Recognition Register.

The efforts to secure privacy and confusion over what a “birth certificate” is, make the provisions somewhat difficult to follow. The Registrar General must make an entry in the Gender Recognition Register when presented with a full certificate and then, “otherwise than by annotating in any way the birth register, make traceable the connection between the UK birth register entry and the entry in the Gender Recognition Register”. Where an extract from the Register is given (the paper commonly referred to as a birth certificate) it must not indicate that the entry from which it was extracted is in the Gender Recognition Register. Where a certificate has been issued but subsequently quashed in the Court of Session the Registrar General must cancel the entry in the Gender Recognition Register.

Expedited applications

Section 27 creates an expedited process for certain applications within two years after commencement of the Act. Those who have lived in their acquired gender for six years or more may apply providing a statement from only one medical practitioner who must, however, be practicing in the field of gender dysphoria. For the first six months of the Act being in force only “Section 27” applications will be processed.

Legal Consequences

As stated earlier, the main effect of the Act, laid down in s9(1), is that where a full certificate is issued the person’s gender becomes for all purposes “the acquired” gender. There are, inevitably, exceptions and further glosses on this principle.

Forbidden Degrees

Section 11 deals with forbidden degrees - the marriage of related persons. It amends the provisions of s2 of the Marriage (Scotland) Act 1977 to make clear that the sex-specific lists of forbidden degrees of relationships given in Schedule 1 of the 1977 Act are to include relationships which, but for the 2004 Act, would have been same-sex (and therefore not forbidden).

While the effect is sensible the complexity of amending the sex specific lists (ie a son may not marry his mother, a daughter her father instead of “an adult child may not marry his or her parent”) results in some fiendish sounding provisions. For example, the following provision works, but requires significant thinking time to understand -

“Sch 4, para 7

In section 2 of the Marriage (Scotland) Act 1977 (marriage of related persons), insert at the end –

(a) the reference in paragraph (b) of subsection (1B) above to the relevant person’s son’s mother is to the relevant person’s son’s father if the relevant person is the son’s mother”

Parenthood

Section 12 states baldly –

“The fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.”

Parental responsibilities and rights are, therefore, unaffected by the change in status of the applicant parent which maintains the best interests of the child and the child’s right to contact etc.. Should there be a question about the child’s best interests in such a situation it could, of course, be the subject of a s11 application under the Children (Scotland) Act 1995.

State Benefits & Discrimination

Section 13 brings Schedule 5 into effect. The detailed provisions establish that persons are to be treated in their acquired gender for the purposes of state benefits.

Section 14 gives effect to Schedule 6, which amends the Sex Discrimination Act 1975. As stated above, it is unlawful to discriminate against a person in relation to employment on the grounds that they intend to undergo, are undergoing or have undergone gender reassignment.²⁵ However this is subject to exceptions based on ‘genuine occupational qualifications’. Those exceptions will be removed insofar as they affect “a person whose gender has become the acquired gender under the Gender Recognition Act 2004”.

Peerages, Succession and Trustees

Section 16 provides an exception to the principle of the Act to provide that peerages and titles transfer as if a person were still of their birth gender.

More commonly questions will arise about succession under wills leaving property to, eg, “my eldest son”. Section 15 provides that for wills and other deeds made before the coming into force of the Act the provisions will apply as if any gender reregistration had not taken place. For wills written after the Act comes into force sex specific provisions such as “son” will apply *recognising* any gender reregistration – that is someone whose birth registration is female but has reregistered as male may inherit whether or not the reregistration takes place before or after the will is written.

Section 17 provides protection for trustees when conveying and distributing property from a trust or estate. They do not need to inquire whether a gender recognition certificate has been issued or revoked. While no fiduciary duty to investigate is placed on a trustee, Section 18 allows those whose expectations of property under a will or other deed has been defeated to apply to the Court of Session for an order redistributing the property. This would apply, for example, where there was a will made before the coming into force of the Act leaving property “to my youngest son”. The youngest son’s expectations would be defeated were his younger sister to have her gender reregistered. The court may make a redistribution of property “if satisfied that it is just to do so.” What considerations would apply is far from clear.

Criminal Offences

Section 20(1) provides –

“Where (apart from this subsection) a relevant gender-specific offence could be committed or attempted only if the gender of a person to whom a full gender recognition certificate has been issued were not the acquired gender, the fact that the person’s gender has become the acquired gender does not prevent the offence being committed or attempted.”

This is particularly relevant in Scotland since we retain a number of sex specific offences whereas the Sexual Offences Act 2003 affecting England and Wales has made many offences sex-neutral. The effect of this section means that where, for example, a person whose birth registration states that they are female but they have secured a full Gender Recognition Certificate, a charge of rape would still be relevant were they so assaulted. The person would be, in law, a man but, should they retain their vagina, penetration without consent could found a charge of rape.

Prohibition on disclosure

Section 22 makes it an offence for a person to disclose information he has acquired *in an official capacity* regarding an individual applying for a certificate or regarding the gender history of a successful applicant. This information is termed ‘protected information’ under this Act.

The definition of receiving information in an official capacity is given in s22(3) as where one receives information –

“(a) in connection with [ones] functions as a member of the civil service, a constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation,

(b) as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or

(c) in the course of, or otherwise in connection with, the conduct of business or the supply of professional services.”

There are, of course, exceptions (s22(4)). These are that –

“(a) the information does not enable that person to be identified,

(b) that person has agreed to the disclosure of the information,

(c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued,

(d) the disclosure is in accordance with an order of a court or tribunal,

(e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,

(f) the disclosure is for the purpose of preventing or investigating crime,

(g) the disclosure is made to the ... Registrar General for Scotland ...

(h) the disclosure is made for the purposes of the social security system or a pension scheme,

(i) the disclosure is in accordance with [provisions made by the Secretary of State or the Scottish Ministers] or

(j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section.”

Breach of the prohibition on disclosure renders the offender “liable

on summary conviction to a fine not exceeding level 5” (s22(8)).

Sport

A potentially controversial provision is found in Section 19 which allows the controlling bodies of certain sports to continue to discriminate on the basis of gender realignment as well as on the grounds of sex. Those running “gender-affected” sports may “prohibit or restrict the participation as competitors in ... events of persons whose gender has become the acquired gender under this Act” if this is necessary to secure fair competition or the safety of competitors.

A gender-affected sport is one where “the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport” (s19(4)). S19 applies to both amateur and professional activities.

To be continued ...

Footnotes

1. The terminology is somewhat difficult. Transsexual is taken to mean the situation where a person’s own sex identity is in conflict with their legal, biological and/or social sex, where persons are viewed as being either male or female. Transgender implies a more complex understanding of sex as socially constructed and contested and therefore not “either” female “or” male. However, reference to sex as fluid or contested would make this article unacceptably complex.
2. It is a person’s sex which is recorded on their birth certificate and it is, for example, persons of the same sex who are not allowed to marry. The use of “gender” here is simply wrong and confusing – “sex” and “gender” are not synonyms.
3. *Corbett v Corbett* [1971] P 83 (English High Court)
4. *X Petr.* 1957 SLT (Sh Ct) 61. It is unclear from the report what “condition” X was experiencing. Transgender or intersex people (formerly hermaphrodites) may have an incorrect entry changed on the basis that the original record was wrong, see “Successful Sex in Succession 1998 Juridical Review 257
5. For a detailed exploration of transsexual and transgender politics in England see Stephen Whittle (2002) *Respect and Equality* (Cavendish, London)
6. “even” – as the very state which denies their true identity makes the treatment available
7. Discrimination on the grounds of “transsexuality” in employment is unlawful - Sex Discrimination (Gender Reassignment) Regulations 1999, 1999 SI 1102 which followed from *P v S and Cornwall County Council*, Case C-13/94 [1996] IRLR 347, ECJ
8. or rather an official extract from the Register of Births
9. On the question of voidable marriage see Norrie, “Transsexuals, the right to marry and Voidable Marriages in Scots Law” 1991 SLT 353
10. The issue at point in *X, Y & Z v UK* above
11. See Mitchell “Contact and the Unusual Parent” 2003 Family Law 169
12. *P v S and Cornwall County Council*, fn 7
13. See Bessant “Transsexuals and Marriage after Goodwin v UK” 2003 Family Law 111
14. The equivalent Scottish legislation being s5(4)(e) of the Marriage (Scotland) Act 1977. See Norrie, “Bellinger v Bellinger, The House of Lords and the Gender Recognition Bill” 2004 ELR 93
15. *Report Of The Interdepartmental Working Group On Transsexual People*: www.dca.gov.uk/constitution/transsex/wgtrans.pdf
16. The case having initially been decided in 2000
17. Note - the Act follows the Bill as introduced unless otherwise stated
18. s.9(1), as also in the Bill as introduced
19. s9(1), 2004 Act
20. S1(1)(a) and (1)(1)(b) respectively. S21 contains details of recognition of “Foreign gender change and marriage. This article will examine only “UK resident” provisions unless otherwise specified
21. a lawyer (in Scotland an advocate or solicitor) of seven years standing
22. a registered medical practitioners or chartered psychologists regardless of length of qualification
23. Sch 1 para 4 & s1(1)(a)
24. Sch 1 para 4, s1(1)(b) & s6(1)
25. *P v S and Cornwall County Council*, fn 7