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A Critique of the Gender Recognition Act 2004

Andrew N. Sharpe

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Abstract This article critiques recent UK transgender law reform. The Gender Recognition Act 2004 is to be welcomed in many respects. Formerly one of the European states most resistant to social change in this area, the UK now occupies pole position among progressive states willing to legally recognise the sex claims of transgender people. This is because the UK is, at least ostensibly, the first state to recognise sex claims irrespective of whether applicants have undertaken any surgical procedures or had hormonal treatments. The article highlights the significance of this development through providing an overview of the trajectory of common law reform around the world. The legislation clearly benefits transgender people unable to undertake surgery due to financial reasons and/or medical contra-indications. It also benefits transgender people whose search for harmony does not require surgical intervention. However, the Act also perpetuates a mental illness model for understanding transgender desires; contributes to the break-up of legally recognised marriages; insists on the permanence of gender crossings and assumes that surgery will occur. The Act also contains exceptions to the generality of legal recognition provided by the state. In this respect the article considers concessions to religious and sporting lobbies. Finally, the article highlights how non-disclosure of gender history prior to a marriage assumes a kind of legal significance under the Act which non-disclosure of other facts generally lacks in relation to marriage. In this regard, the article will contend that a biological understanding of sex operates as a subtext within the Act.

Keywords Gender identity · Legislation · Great Britain · Marriage

A. N. Sharpe (✉)
School of Law, Keele University,
Keele, Staffordshire ST5 5BG, UK
e-mail: a.sharpe@law.keele.ac.uk

Introduction

The Gender Recognition Act is a response to the European Court of Human Rights' decisions in *Goodwin v UK* [2002] 35 EHRR and *I v UK* [2002] 2 FCR 613. After a series of decisions upholding the right of the UK to rely on its margin of appreciation with regard to domestic law (*Rees v UK* [1986] 9 EHRR 56; *Cossey v UK* [1991] 13 EHRR 622; *X, Y and Z v UK* [1997] EHRR 143; *Sheffield and Horsham v UK* [1998] 2 FLR 928), the European Court of Human Rights finally lost patience with the UK's increasingly isolated position on transsexual rights and found the UK in breach of Articles 8 (the right to respect for privacy) and 12 (the right to marry). The doctrine of the 'margin of appreciation' reflects the long-standing view of the European Court of Human Rights that national authorities (including national courts) may be better placed to make an assessment of local conditions, while remaining subject to its supra-national supervision. In *Goodwin v UK* and *I v UK* the court held that the legal sex of post-operative transgender persons was the sex to which they had been medically reassigned. The effect

of these decisions was to bring to an end the reign of *Corbett v Corbett* [1970] 2 All ER 33, at least for the purposes of English law. In striving to meet its obligations under European law the UK Government introduced the Gender Recognition Bill, which received the Royal Assent on 1st July 2004. The passage of the Bill through the parliament attracted little opposition from parliamentarians and received scant coverage within the media. This perhaps reflects the fact that this was not a party political issue and that the introduction of the Bill had been preceded by a detailed study by a Government interdepartmental working group [1]. It also reflects a strategy by Press for Change, the leading UK transsexual advocacy group, not to draw too much attention to the legislation [2]. Before proceeding to consider the legislation in greater depth as well as identifying a number of difficulties contained within its provisions it is first necessary to provide a legal background to the Act in order to situate it in an appropriate context and to appreciate more fully the significance of this UK reform.

The Legal Background

In order to appreciate the significance of the Gender Recognition Act it is necessary to situate it in the context of transgender reform jurisprudence. In particular, it is necessary to pay close attention to the relationship between surgical intervention and legal recognition as articulated in prior reform decisions. The first common law decision to consider the sex claims of a transgender person for purposes of marriage was the landmark English decision of *Corbett v Corbett*. The case concerned the validity of a marriage between a biological man and a postoperative male to female transgender woman. In that decision Ormrod J held that sex is determined at birth and by a congruence of chromosomal, gonadal and genital factors (at [48]). Accordingly, the marriage was held to be invalid. This particular refusal of transgender sex claims has been, and continues to be, followed by courts across many common law jurisdictions (*Anonymous v Anonymous* 325 NYS 2d 499 (1971); *Re T* [1975] 2 NZLR 449; *W v W* [1976] 2 SALR 308; *Dec CP* 6/76 National Insurance Commissioner Decisions; *EA White v British Sugar Corporation* [1977] IRLR 121; *Social Security Decision Nos R(P)1 and R(P)2* [1980] National Insurance Commissioner Decisions; *R v Tan* [1983] QB 1053; *Peterson v Peterson* (1985) The Times, 12 July; *Re Ladrach* 32 Ohio Misc 2d 6 (1987); *Franklin v Franklin* (1990) The Scotsman, 9 November; *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184; *Collins v Wilkin Chapman* [1994] EAT/945/93; *Re P and G* [1996] 2 FLR 90; *S-T (formerly J) v J* [1998] 1 All ER 431; *Littleton v Prange* 9 SW 3d 223 (Texas App 1999); *W v W* [2001] Fam. 111; *Bellinger v Bellinger* [2003] UKHL 21; *Kantaras v Kantaras* (2004) Fla. App. 2 Dist, 23 July.). Reform jurisprudence, in many respects, details a story of 'departure' from *Corbett*, of a limiting of its stranglehold over the lives of transgender people [3: 57–86]. It has sought to bring the law into conformity with certain realities, and specifically, the fact of sex reassignment surgery.

In the common law world, reform can be dated to the New York decision in *Re Anonymous* 293 NYS 2d 834 (1968). In this case Pecora J expressed the view that the question of a person's gender identity should not be limited by "the results of mere histological section or biochemical analysis" (at [838]). Rather, and in preference to grounding his analysis in biological considerations, Pecora J articulated a test of *psychological and anatomical harmony.* This test requires that the body be brought into conformity with psychological sex through surgical interventions. Accordingly, the test articulates a 'wrong body' story. This approach was extended to marriage in the New Jersey decision of *MT v JT* 355 A 2d 204 (1976). Thereafter United States transgender jurisprudence has either articulated reform in these terms (*Richards v United States Tennis Association* 400 NYS 2d 267 (1977); *Re the Estate of Marshall G Gardiner* Kan App LEXIS 376 (2001)) or has followed Corbett (*Anonymous v Anonymous* 325 NYS 2d 499 (1971); *Re Ladrach* 32 Ohio Misc 2d 6 (1987); *Littleton v Prange* 9 SW 3d 223 (Texas App 1999); *Kantaras v Kantaras* (2004) Fla. App. 2 Dist, 23 July). More recently, and with greater consistency, the test of psychological and anatomical harmony has been adopted in Australia and New Zealand (*R v Harris and McGuiness* [1989] 17 NSWLR 158; *Secretary, Department of Social Security v HH* [1991] 23 ALD 58; *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467; *M v M* [1991] NZFLR 337; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603).

In speaking of the legal test of psychological and anatomical harmony a degree of precision is required. While the test clearly requires surgical intervention it is important to detail the nature and extent of the intervention considered necessary in prior decisions. In essence, the judiciary have, with one significant exception that we shall deal with shortly (*Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074), emphasised consistently the need for genital reconstruction. It would seem that phallic woman and vaginaed man have not generally accorded with law's aesthetic sensibility. That is to say, *harmony* in law has been predicated on the genitocentric couplings man/penis and woman/vagina. Indeed, this view is underscored by, and finds a partial rationale in, a judicial requirement that post-operative genitalia 'function' sexually. Thus in *MT v JT* the court expressed the view that "it is the [post-operative] capacity of the individual which must be scrutinized" (at [209]) noting that MT had "a vagina and labia which were adequate for sexual intercourse and could function as any female vagina, that is, for traditional penile/vaginal intercourse" (at [206]). Here the capacity to be vaginally penetrated assumes particular significance in enabling law to read the male to female transgender body as female.

This legal understanding of the content and, in the main, the purpose of sex reassignment surgery is replicated in Australian and New Zealand reform decisions. Thus in *R v Harris and McGuiness* the refusal of Mathews J to treat as significant the temporary nature of Lee Harris' "inability to have intercourse as a female" (at [193]) caused by a closing-up of her vagina post-surgically, highlights the need for both genital reconstruction and post-operative sexual functioning. Again in *Secretary, Department of Social Security v HH* O'Connor J and Muller expressed the view that anatomy must be the overriding factor in sex determination if "overwhelmingly contrary to the assumed sex role" and that after reassignment surgery the male to female transgender woman is "functionally ... a member of her 'new' sex" (at [64]). By "assumed sex role" the court is referring to the sex role assumed by a transgender person. In *Secretary, Department of Social Security v SRA* this view of the content and purpose of sex reassignment surgery was endorsed by the Federal Court. In unanimously overturning a decision of the Administrative Appeals Tribunal (*Secretary, Department of Social Security v SRA* [1992] 28 ALD 361), which had recognised as female a person who had not undertaken genital surgery, or indeed any surgical procedures, the Federal Court noted that, unlike a post-operative (male-to-female) transgender woman, SRA was not "[f]unctionally ... a member of her new sex and capable of sexual intercourse" (at [493]).

More recently, in the decision of *Re SRDD v Secretary, Department of Family and Community Services* (*Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777) the Administrative Appeals Tribunal resisted counsel's attempt to reconstitute the pre-/post-operative dyad. It was contended on behalf of SRDD that the case differed from *SRA* because, unlike SRA, SRDD had undergone an orchidectomy (castration). While the tribunal recognised that the procedure undertaken was "irreversible" and that SRDD "could never function as a male" (at [777]) it insisted that the decision of the Federal Court in *SRA* was predicated on "three-step surgery" (at [780]). According to McMahon, the Deputy President of the tribunal, the three steps "involve the removal of the penis, the removal of the testicles and the construction of an artificial vagina" (at [780]). Thus, as in previous decisions, law's bodily aesthetics conceived of anatomical harmony only in terms of a particular genital configuration. In the New Zealand decision of *Attorney-General v Otahuhu Family Court* Ellis J departed from these prior analyses insisting that parties to a marriage did not "have to prove that each can function sexually" (at [612]) for "there are many forms of sexual expression possible without penetrative sexual intercourse" (at [615]). However, and while this aspect of his judgment is to be welcomed, he insisted, consistent with prior reform jurisprudence, that "in order for a transsexual to be eligible to marry in the sex of [re]assignment" there must have occurred "complete reconstructive surgery" (at [614–15]) for "in order to be capable of marriage two persons must present themselves as having what appear to be the genitals of a man and a woman" (at [612]).

Thus prior to the Australian decision in *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 transgender reform jurisprudence had, and irrespective of legal subject-matter, insisted on a genitocentric, and typically a sexually functional, understanding of the requirement

of sex reassignment surgery. In this respect Chisholm J's comment that *Corbett* "exhibits a remarkable focus on the mechanics of genital sexual activity" (at [para 94]) belies an important commonality linking reform jurisprudence to *Corbett*. In *Re Kevin* we witness a significant shift away from the genitocentrism of law. In this decision the court recognised Kevin as a man for the purposes of Australian marriage law despite the fact that he had not undertaken phalloplastic procedures. Accordingly, prior to the Gender Recognition Act *Re Kevin* represented the zenith of global reform. However, it is important to appreciate other, more problematic, features of the *Re Kevin* decision. Specifically, *Re Kevin* introduced into the mix for determining legal sex two considerations previously absent within reform jurisprudence.

First, the decision proved dependent on *social* and *cultural* in addition to psychological and anatomical harmony. That is to say, in addition to the undertaking of surgery the court placed considerable emphasis on evidence that Kevin had been accepted as a man by his community. This approach threatens to undermine the autonomy of future transgender litigants who lack the environment of a supportive community. Indeed, ostracism, violence and economic and social marginalisation are perhaps typical of transgender experiences [4–8]. In relation to surgery, while Kevin had not undertaken phalloplastic procedures, he had undertaken breast reduction surgery and a total hysterectomy and these facts proved crucial to legal recognition. In this regard, *Re Kevin* does not transcend a requirement for surgical intervention. Second, the court placed considerably reliance on biological evidence concerning 'brain sex.' Specifically, emphasis was given to the medical science of endocrinology and the scientific argument that gender identity is causally linked to the reception of hormones during the first 3 months of pregnancy. According to this argument genetically male transgender persons possess a female brain structure while genetically female transgender persons possess a male brain structure. This claim is said to support the hypothesis that gender identity develops as a result of an interaction of the developing brain and sex hormones. The tiny region of the brain that has been scrutinised is the central subdivision of the bed nucleus of the *stria terminalis*, known as BSTc. It is the part of the hypothalamus that helps to keep the different systems of the body working in harmony and which is viewed as essential for sexual behaviour. This area of the brain is ordinarily larger in men than in women, while in transgender people post-mortem studies suggest that size corresponds with assumed gender [9, 10]. Indeed, and while there is a lack of medical consensus regarding the 'brain sex' hypothesis, the court went so far as to suggest that:

> the characteristics of transsexuals are as much 'biological' as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally 'biological' characteristics of the brain that are present in transsexuals (at [para 272]).

I do not mean here to challenge the validity of this science. Rather, I simply note that the legal determination of sex need not rely on, or be over-determined by, scientific findings. Reform prior to *Re Kevin* exemplifies this point. In emphasising 'brain sex' the decision reorients the relationship between sex and truth. In contrast to decisions such as *MT v JT* and *Otahuhu*, which insist on the present and post-surgical moment as the one in relation to which sex is to be determined, *Re Kevin* provides support for the view that sex is determined at birth. In this regard the spectre of the *Corbett* decision haunts the reform moment. It is against this background of common law reform that the full significance of the UK Act can best be appreciated. It is toward an analysis of the Act and the identification of its limits that the article now turns.

The Gender Recognition Act and Its Limits

Under the Act transgender persons may apply for a Gender Recognition Certificate. Once granted and by virtue of section 9(1):

> the person's gender becomes for all purposes the acquired gender (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).

This rather badly worded section arose out of concerns that the judiciary might interpret the Act to mean that a change of gender did not entitle a

transgender person to protection under sex discrimination law [11: 45]. However, despite the rather clumsy nature of this provision, there is no material difference between legislative use of the terms sex and gender. Accordingly, once a full Gender Recognition Certificate has been granted the sex/gender to which a person has been legally reassigned becomes their sex/gender for all purposes known to law. Thus a male to female transgender woman is to be considered a woman under the Sex Discrimination Act 1975. She is also to be considered female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 and therefore able to enter into a valid marriage with a man.

A successful application requires that an applicant satisfy the Gender Recognition Panel, the body set up to hear and determine applications under the Act, that certain criteria have been met. The applicant, who must be at least 18 years of age (s 1(1)), must establish by way of medical evidence that s/he "has or has had gender dysphoria" (s 2(1)(a)) and produce affidavit evidence (s 4) that s/he "has lived in the acquired gender throughout the period of 2 years ending with the date on which the application is made (s 2(1)(b)), and that s/he "intends to continue to live in the acquired gender until death" (s 2(1)(c)). Further, an application must include "a statutory declaration as to whether or not the applicant is married" (s 3(6)(a)). If an applicant has not obtained a divorce in relation to a prior marriage at the time of the application then a full Gender Recognition Certificate cannot issue under the Act, although, where the other criteria are satisfied, an Interim Gender Recognition Certificate may be granted (s 4(3)). An interim certificate recognises that an applicant has changed gender, but gives him/her no legal rights as a member of the acquired gender. In other words, an interim certificate has only symbolic value. Recognition in any substantive sense occurs only after divorce.

The Gender Recognition Act is remarkable in numerous ways. In the first place it locates the UK at the forefront of global transgender law reform. The principal reason for this is that the Act dispenses, at least ostensibly, or at the level of legal form, with any requirement that legal recognition be contingent on the undertaking of sex (genital) reassignment surgery. Indeed, the Act appears to dispense with the need for surgery of any kind or, for that matter, hormonal treatments. In other words, what distinguishes the Act from reform legislation and judicial decisions of other jurisdictions is the fact that on its face it appears to dispense with the body – that is, not merely with biology in the sense of chromosomes (a move well rehearsed within transgender law reform generally) but anatomy. In contrast to a reformist approach to transgender sex claims that has looked to post-surgical realities, the Gender Recognition Act would appear to sever the link between sexed status and the physical body and in this regard goes further than strictly required by the European Court of Human Rights.

In this respect the legislation is to be welcomed. The Act is positive in the sense that not all transgender people feel the need to resort to surgery in order to feel that they inhabit the correct gendered body [12–15]. It is also positive in the sense that some individuals who would like to undergo surgery are unable to so due to financial reasons and/or to medical contra-indications. Medical difficulties are perhaps especially apparent in the case of female to male transgender men. Thus Garber has noted that phalloplastic procedures are "not easily accomplished," are "fraught with rather serious hazards" and are "still quite primitive and experimental" [16: 148, 17]. The Act is also positive in that, unlike the European jurisdictions of Germany, Denmark, Sweden and the Netherlands, it does not make legal recognition dependent on sterilisation [18]. Further, the Act is also welcome because, unlike the 'progressive' Australian decision of *Re Kevin*, it does not introduce the 'community' as regulatory gatekeeper. In *Re Kevin* the court found that Kevin had been accepted as a man by his community, a finding of fact that proved central to the decision. Nor does the Act make reference to transgender aetiology. While there is growing evidence within endocrinological science of a link between transgender identity and 'brain sex', legal recognition of sex claims under the Gender Recognition Act does not depend on proof of such a link. In all of these respects the legislation can be viewed as respecting and enhancing transgender autonomy. However, there are a number of difficulties associated with the Act that the article will now detail.

The Perpetuation of a Mental Illness Model

In the first instance because an application for a Gender Recognition Certificate requires that an applicant demonstrate gender dysphoria (s 2(1)(a)), the Act furthers a mental illness model for comprehending transgender experiences [3: 30, 19: Chapter 4, 20: 38, 21]. The phrases *gender dysphoria* and *gender identity disorder* are more recent medical expressions for the phenomenon of transsexualism. They refer to persons who have a persistent sense of discomfort and inappropriateness about their anatomical sex and a persistent desire to live as a member of the opposite sex [22: 203.85]. The phrase *gender dysphoria* was introduced in the early 1970s in order to capture the diverse group of persons requesting sex reassignment surgery [23], many of whom did not fit the transsexual narrative constructed by Robert Stoller [24, 25]. The new terms place emphasis on gender in contrast to (trans)sexuality. However, they also emphasise mental illness and disorder over ontology. While the term *transsexualism* has a relation to ontology, where sex reassignment surgery might be viewed as the realisation of being, the language of gender dysphoria serves to translate desire into need and disorder [21: 64]. Moreover, *gender dysphoria* and *gender identity disorder* are quite inappropriate phrases because gender identity is something about which many, if not most, transgender people feel certain [12: 135].

The Diagnostic and Statistical Manual of Mental Disorders stipulates that in order to make the diagnosis "there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning" [22]. It has been argued that a well-adjusted individual falls outside this clinical definition [20: 20]. Yet, as the law currently stands, legal recognition proves dependent on being characterised as mentally ill. This is problematic in the instrumental sense that assertions of rationality serve to undermine the prospect of legal recognition. It is also objectionable in terms of the broader discourse that it fosters in which transgender people, as a class, are stripped of their rationality and therefore their autonomy. In opposition to the gender dysphoria model, an alternative set of standards were adopted in 1993 by the Second International Conference on Transgender Law and Employment Policy, a group of, primarily transgender, people in the fields of law and health care policy. These alternative standards are predicated on the view that most transgender people seeking sex reassignment surgery, hormonal treatments or other medical services do not require psychological services [26: 221–224]. However, it should be noted that diagnosis of gender dysphoria has support among some transgender people. It not only facilitates access to a variety of medical procedures. Diagnosis also lends itself to medical health insurance coverage. In the absence of a diagnosis, surgery might be viewed as elective rather than necessary and therefore not covered by a policy [19: 75].

The Breaking Up of Marriages

In addition to pathologising transgender people, the Act requires married transgender persons to divorce in order to gain a full Gender Recognition Certificate (s 3(6)(a) and 4(3)). This provision was the cause of considerable consternation in both Houses. It was criticized as inhumane and as destructive of the family (the Honourable Dr Harris, House of Commons Standing Committee A, 9 March 2004, Col 60). Nevertheless, it was retained for the explicit purpose of insulating marriage from homosexual incursion. In the words of the Parliamentary Under-Secretary for Constitutional Affairs, David Lammy, "it is the Government's firm view that we cannot allow a small category of same-sex marriages" (House of Commons Standing Committee A, 9 March 2004, Col. 69). It was suggested in the debates that the number of transgender people who have undertaken gender reassignment and who are currently living in a marriage was no more than between 150–200 (the Honourable Mr Oaten, House of Commons 2nd Reading 23 February 2004, Col. 69). The provision governing married applicants places transgender persons in an unenviable position by requiring them to choose between legal recognition of their gender identity and the continuation of their marriage. Accordingly, this legal provision serves, somewhat perversely, to place undue pressure on healthy marriages. There is no other circumstance known to law in which the state requires parties, who are married and who wish to remain married, to divorce. It remains to be seen whether this provision will be challenged under Articles 8 and 12 of the European Convention on Human Rights.

Legal Insistence on the Permanence of Gender Crossings

In addition to these objections it is clear that the Act requires of transgender people not only that they live in their acquired gender for a 2-year period (s 2(1)(b), but also that they "intend to continue to live in the acquired gender until death" (s 2(1)(c)). Here it is apparent that the law requires permanent, even if apparently non-surgical, gender crossings. In this regard the Act clearly aims to reproduce a binary gender order. In the words of David Lammy, "individuals will not be able to skip from one gender to another" (House of Commons Standing Committee A, 9 March 2004, Col. 18). As Sandland notes the provision serves to "divid[e] the transgendered community from itself; the 'lifers' from the rest" [11: 50]. In this respect the Act serves to reproduce a more general legal reluctance to contemplate gender in non-binary ways. Indeed, the possibility of inaugurating a third term or gender position has consistently been rendered inconceivable within legal discourse. Thus the self-conscious occupancy of a gender position outside the binary has been variously described judicially as a "no man' land" (*MT v JT* at [210]), "a far-out theory" (*MT v JT* at [210]), "novel" (*R v Harris and McGuiness* at [194]), "lacking in substance" (*R v Harris and McGuiness* at [170]) and as "some kind of sexual twilight zone" (*M v M* at [347]).

Persistence of the Importance of Surgery

It is necessary to invoke a distinction between legal form and substance in thinking about the legal regulation of transgender people under the Gender Recognition Act. While on its face the Act does not require applicants to undergo surgery of any kind, it is clearly the expectation of the government that surgery will occur. As David Lammy explained in the House of Commons: "ultimately [transsexuals] have surgical treatment if it is viable" (House of Commons Standing Committee A, 9 March 2004, Col. 19). Moreover, transgender applicants who have not undertaken surgery are, as made clear by section 6 of the Gender Recognition Panel Guidance document, required to explain why no surgical intervention has occurred [27]. In other words, the Government presuppose a surgical outcome, and indeed, an outcome in which genitalia are transformed, as the proper end of the transsexual journey. In relation to phallic women and vaginaed men therefore an application for a Gender Recognition Certificate serves to reproduce a 'wrong body' story. Moreover, in the case of an applicant who has not undertaken surgery, it remains a possibility that this fact may hinder a diagnosis of gender dysphoria and therefore undermine an application. For failure to resort to surgery "might, just possibly might, have a bearing on the seriousness of intent" (Lord Filkin, House of Lords 2nd Reading 18 Dec 2003, Col. GC10). It remains unclear what influence failure to undertake surgery might have in determining applications for a Gender Recognition Certificate. At this stage Gender Recognition Panel figures indicate only whether a final decision has been made [2]. They do not provide information as to rates of success or failure or as to whether any of the applications received have come from pre/non-surgical transgender applicants.

The Religious Exemption

In the political lobbying that preceded the Act, the Roman Catholic Church and Evangelical Alliance secured an exemption for clergymen concerning marriage. In this respect the right to marry guaranteed by the Gender Recognition Act is restricted. By virtue of section 5(b) of the Marriage Act 1949, as amended by Schedule 4 paragraph 3 of the Gender Recognition Act, a clergyman is entitled to refuse to solemnise a marriage in circumstances where he reasonably believes a party to the proposed marriage has changed gender under the Act. While this provision has no impact on civil marriage it may serve to cause unnecessary suffering for transgender persons of religious faith. While recognising the right to religious freedom in Article 9 of the European Convention on Human Rights, it is arguable that "churches are public authorities when conducting marriages, and so the Convention rights to marry and to privacy may be capable of being used to challenge any exclusionary policy by a church" [11: 58, 28].

Gender-affected Sport

Section 19(1) of the Act provides sporting bodies with the power to "prohibit or restrict" the participation of transgender persons, who have been granted a Gender Recognition Certificate, in a "gender-affected

sport" (s 19(1)). A sport is defined as "a gender-affected sport if 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" (s 19(4)). The grounds for exercise of this power are securing "fair competition" or the "safety of competitors" (s 19(2)). It is unclear from the legislative provision precisely how a conclusion of unfair competition might be reached. What does appear clear from section 19 however is that an ostensible jettisoning of the body, a feature of the Gender Recognition Act that distinguishes it from prior reform moments, is brought into question. A legal concern to separate out sport from other subject matters precedes the Act. Indeed, it is evident, both in prior legislative enactments (see, for example, the Anti-Discrimination Act (NSW) 1977, Part 3A, s38P (1) introduced by the Transgender (Anti-Discrimination and Other Acts Amendment) Act (NSW) 1996, Sch 1, s4; the Victorian Equal Opportunity Act 1995, s66(1) as amended by the Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000, s7; and the Equal Opportunity Act (WA) 1984, Part IIAA, s 35AP(2)(b) introduced by the Gender Reassignment Act 2000, Sch 2, s5) and within reform jurisprudence more generally (*MT v JT* at [209]; *R v Harris and McGuiness* at [188]; *Otahuhu* at [617]). While considerable opposition exists among many women's sporting groups to transgender inclusion [29: 5–6], resorting to biology proves problematic. The division of sport along sexed lines is arbitrary to a degree. Differences in factors such as heart size, lung capacity, muscle mass and body fat often traverse, rather than parallel, the division of sex [30: 175, 31: 6]. The precise configuration of these attributes in any particular individual is perhaps more a matter of genetics than sex. If there were a genuine concern to institute a level playing field in the arena of sport it would be necessary to take into account biological and other differences, such as differences of opportunity, among men and women as well as between them and to consider the pertinence of these various differences to a multiplicity of sports [32]. In short, the social organisation of sport along sexed lines is less an effect of biology than of cultural and historical factors [33, 34]. While those factors produce a present reality, to which the courts and legislatures respond 'pragmatically', the sign-posting of sport as a realm beyond which legal (re)construction of sex terminates functions to 'naturalise' sexed difference. In this regard, the sport exemption runs counter to the underlying philosophy of the Act.

Non-Disclosure of Gender History

In a similar vein and by virtue of paragraphs 4 and 5 of Schedule 4 to the Act non-disclosure of transgender history is added to the grounds for annulment of a marriage under section 12 of the Matrimonial Causes Act 1973. In other words, where a transgender person fails to disclose his/her gender history to the other party to the marriage prior to the ceremony this fact will provide a ground for the party lacking knowledge to have the marriage declared a nullity. This can be contrasted with the position in other jurisdictions, such as Australia and New Zealand, where the parties are left to institute divorce proceedings (s 51 Australian Family Law Act 1975; s 31 New Zealand Family Proceedings Act 1980). It is hard to imagine what, other than the homophobia of law, might give life to this provision. That is to say, it is the possibility of inadvertent communion with the homosexual that provides the only plausible explanation. Indeed, it is precisely this concern that has been voiced repeatedly by judges (*Anonymous v Anonymous* at [499]; *MT v JT* at [205]; *M v M* at [348]; *Re Kevin* at [para 39]), and which found expression in the parliamentary debates preceding enactment of the Gender Recognition Act (the Honourable Andrew Selous, House of Commons 2nd Reading 23 February 2004, Col. 166). The provision reveals, much like the sport exemption, that the biological truth of sex operates as a subtext within the Act. While the Gender Recognition Act places emphasis on present surgical and/or psychological realities, the non-disclosure of gender history provision serves only to reinscribe the 'truth' of the past and the past as 'truth.' Once again, the underlying philosophy of the Act, as well as its radicality, are brought into question.

Conclusion

This article has considered the recent Gender Recognition Act 2004. This UK legislation represents an enormous step forward for transgender law reform. The UK Government is to be commended for not

only enacting such legislation but for going much further than required under European law. Indeed, it is somewhat ironic that one of the hitherto most regressive states in Europe on transgender rights now leads the way. The uncoupling of sex claims from the body would have been unimaginable only a few years ago, especially with regard to marriage. Yet, in the UK a requirement for surgical intervention for the purposes of legal recognition appears to have been dispensed with. It would appear that feminism's claim that "anatomy no longer determines destiny" [35] has, at least in one particular context, received legal sanction.

However, as its history demonstrates, transgender law reform is rarely so straightforward. Accordingly, it is important to recognise the limits of reform. In this regard the article has detailed difficulties with the legislation. In particular, the Act fosters a view of transgender people as disordered. In 1973 homosexuality was declassified as a mental illness. It would appear that a similar move in relation to transgender people is not on the horizon. The legislation is also problematic in that it encourages the break-up of lawful marriages. There is also uncertainty regarding the processing of applications for a Gender Recognition Certificate made by non-surgical transgender persons. In this respect, and given the Government's clear expectation that surgery should normally occur, it might be premature to conclude that the Gender Recognition Act has transcended the body. Further, the Act, through its insistence on the permanency of gender crossings, reveals law's commitment to a binary gender order. It is this particular categorical imperative that future reform may have to address if it is to create spaces for the diversity of gender identities in the life world. Finally, and perhaps most revealingly of all, the sport exemption and the provision concerning non-disclosure of gender history serve to highlight limits, not only to the transcendence of anatomy, but biology. In other words, while the legislation can be read 'progressively,' as a move away from a concern with the body, it is important to appreciate that in certain respects the body returns and it returns in its biological-that is, chromosomal-guise.

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