



DISCRIMINATION LAW ASSOCIATION

Briefings

Scottish Gender Recognition Reform Bill

Robin Moira White, barrister at Old Square Chambers, explores the history of gender change legislation in the UK and its international context, how proposals for change have fared in the UK and what may happen in coming months. Robin is Britain's only transgender discrimination barrister; she has given evidence to the Scottish and UK parliaments on the Gender Recognition Reform Bill and also attended the Scottish parliamentary sessions which debated the Bill in December 2022.

Historical protection for gender reassignment and the facility for gender change in the UK

Before the case of *Corbett v Corbett* [1970] 2 All ER 33, the few individuals wanting to change their gender had often been dealt with privately and quietly by registrars applying the discretion to correct birth certificates normally used for intersex people who might be registered as one sex but later identify with another. The high-profile *Corbett* case concerning the divorce of a minor member of the aristocracy and trans model April Ashley, brought matters into public focus. Thereafter trans people had to wait almost 30 years to find legislative acceptance and protection in the UK. That came first with the Sex Discrimination (Gender Reassignment Regulations) 1999 which provided employment protection for trans people undergoing medically-supervised transition.

The ground-breaking Gender Recognition Act 2004 (GRA) provided a mechanism for binary trans people to have their gender recognised by the state. This had particular importance at the time as pensions (state and private) were paid at different ages for men and women, and marriage could only be conducted between persons the state recognised as a man and a woman. Evidence of gender-change had (and still has) to be submitted to a panel of legal and medical experts and if the panel is satisfied, a Gender Recognition Certificate (GRC) is issued, which allows the alteration of the individual's birth certificate from 'boy' to 'girl', or vice versa.

Non-binary identities were not considered in the GRA, although a case regarding the position of a US citizen recognised as non-binary in the US who is arguing that the panel has power to issue a non-binary GRC, is currently being considered. The effect of a GRC is that the person is recognised 'for all purposes' in their new gender except where the GRA or other relevant legislation provides. The GRA includes a number of exceptions in areas such as parenthood, social security payments and the inheritance of peerages. Whilst the equalisation of pension age payments and the coming of equal marriage may have reduced the practical effect of a GRC, it has huge symbolic importance to some trans people and has become significant in Equality Act 2010 (EA) matters as we shall see.

Equality Act 2010

The next big change in the UK was the coming of the EA. For most of the nine characteristics for which the EA provides protection (age, disability, gender reassignment, marriage and civil partnership, maternity and paternity, race, religion and belief, sex, sexual orientation), the EA consolidated and codified previous provisions; but for gender reassignment the EA made a significant change in that it removed the requirement for a person to be undergoing medically-supervised transition.

The trigger for the protection against discrimination on the ground of gender reassignment is set by S7 EA which includes the requirement that an individual declares that they propose to undergo transition:

A person has the protected characteristic of gender reassignment if the person 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.

Thus the change may be to physical or other (i.e. non-physical) attributes of sex. So the bar is set low in that a person may not be intending to have medical or surgical procedures but merely to live in their affirmed gender with changed name or pronouns or an altered style of dress or hairstyle, as long as that is part of a process to alter their gender. But the change cannot be intended to be temporary since its purpose must for reassigning the person's sex.

It can be argued that this is, in effect, self-identification of gender.

The EA provides protection against discrimination in the workplace, in the provision of services and other areas such as education and membership of clubs and associations. Some exceptions are specified in the EA where it is lawful to exclude trans people, including gender-affected sport for safety or fair competition and in other areas where such exclusion is 'a proportionate means of achieving a legitimate aim'. Such exceptions will be rare and limited; for example in the provision of a service where communal nudity is involved, it may be lawful to exclude an early-transition trans person whose transition has not progressed very far. This remains contentious as it may result in an employer or service-provider policing the service user's appearance.

Statutory guidance on the EA was published in 2011. The Equality and Human Rights Commission (EHRC) produced new non-statutory guidance on separate and single sex services in 2022. This has proved controversial and the EHRC's own board minutes record that many organisations are not following the new guidance, finding it not to be trans inclusive. In some aspects it appears to contradict the 2011 statutory guidance. While not following the statutory guidance may be taken into account by a court when considering a discrimination case, the new non-statutory guidance has no such effect.

Meaning of 'sex'

Controversy has arisen in recent years as to the interaction of the GRA and the EA, particularly over the meaning of 'sex' in the EA. Does 'sex' in the EA mean 'biological sex' however defined, or 'legal sex'? The definition in the EA is rather circular: s212 EA provides that 'a man is a male of any age', On the one hand it is argued that 'male' should be given its natural meaning, which some claim is 'biological sex'. On the other, there is no reference to the GRA in s212, the definition section of the EA (whereas there are references to it elsewhere in the EA).

So it is argued that s212 EA does no more than to include 'boy' in the definition of 'man' and 'girl' in the definition of 'woman' in an act which deals with matters such as schools, and provision of services where young persons are involved. It is therefore argued that the general provisions of the GRA take effect to alter 'legal sex' under the EA when a person possesses a GRC.

It may be, however, that an even more nuanced interpretation of 'sex' in the EA is required, sometimes 'biological sex' (e.g., when gender-affected sports are being considered) and sometimes 'legal sex' for example when the general provision of services is considered.

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In the *Petition of For Women Scotland Ltd*¹ [2022] CSOH 90; December 13, 2022 (see Briefing 1053 in this edition) Lady Haldane ruled that ‘sex’ in the EA means ‘legal sex’. That decision has been appealed to the Scottish Inner House and the appeal is expected to be heard in October 2023. Petitions on whether the meaning of ‘sex’ in the EA should be clarified or changed were debated by MP’s in a Westminster Hall debate on June 11, 2023 but it does not appear that the UK government has much enthusiasm for bringing forward any proposals.

This law in this area remains controversial.

International experience

The Yogyakarta principles 2006 represent international best practice in human rights in respect of sexual orientation and gender identity. The principles make clear that self-identification should be the standard. While some states (e.g. Romania) have no formal process to recognise changed gender and others (e.g. Russia) are moving backwards on this issue, the international direction of travel is towards self-identification of gender, usually with some form of state-regulated formal recording process. Argentina was first to move to a self-identification regime for personal gender in 2012, and a number of other states including Malta, Ireland, Denmark, New Zealand, and recently Spain, have followed suit. Some other federal countries, such as Australia and the US allow self-identification in some states but not in others. This area is controversial but there appears to be relatively little evidence to show that self-identification has caused difficulties where it has been introduced.

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UK proposals to change

When Theresa May became UK Prime Minister in 2016 she re-iterated her pre-election pledge to introduce self-identification of gender in the UK. That change had support from the Labour Party and seemed likely to become law. However, when the May government foundered on the Brexit rock in 2019, the proposals were lost. The subsequent Johnson-led government, which had absorbed many UK Independence Party members and lost a significant number of liberal-wing Conservatives, had much less enthusiasm for self-identification. Despite a public consultation in 2018 which supported the change, progress on gender recognition in the UK as a whole has been limited to reducing the fee paid with an application (if the means-tested exemption could not be used) from £140 to £5 and making the process internet-based. Those who support trans rights have been deeply unimpressed with this progress while there is still a range of views, including calls to end the GRA process altogether.

The Gender Recognition Reform Bill, Scotland

Gender is a devolved matter under the Scotland Act 1998 which established the Scottish parliament, but equality legislation is not. In 2004 the Scottish parliament passed a motion adopting the GRA.

The Scottish National Party (SNP) included a move to reform gender recognition law in its 2016 manifesto. Public consultations in 2018 and 2020 found support for the change but parliamentary time could not be found for it, perhaps because of Covid-19.

After the 2021 Scottish election, the SNP found itself governing in coalition with the Scottish Green Party. Both parties had included gender recognition reform in their manifestos, the Greens perhaps more explicitly. The coalition agreement between the SNP and the Greens specifically dealt with reform as an issue which was to be brought forward.

¹ [2023] IRLR 212

The Gender Recognition Reform Bill (the Bill) was introduced in March 2022, and underwent a third round of public consultation before being passed, *in principle*, by a total of 88 votes to 33 with eight abstentions. It had wide support from Scottish Labour, but opposition from the Scottish Conservatives and individual members of other parties.

It then entered a committee stage (at which I was privileged to give evidence) which considered the detail of the Bill. Holyrood held two mammoth sessions to deal with proposed amendments on December 20 and 21 (the only times the Scottish parliament has sat beyond midnight) and a final shorter session the following day, December 22, 2022 at which the (very slightly amended) Bill was passed by 86 votes to 39 with the majority of Scottish Conservatives, two Labour and nine SNP Members of the Scottish Parliament voting against - slightly different numbers from the previous 'in principle' vote.

Effect of the Bill

If the Bill were to become law it would result in the:

- removal of the requirement for certified medical diagnosis of gender dysphoria (increasingly 'gender incongruence') and replacement by statutory declaration, with penalties for false declaration;
- replacement of consideration of applications by a specialist panel by application to the Registrar General;
- reduction in the age of eligibility from 18 to 16 years;
- replacement of the requirement for '*living in the acquired gender*' from two years to three months (six months under 18) but with a three month's reflection period;
- use of a simplified process to recognise overseas grants of gender recognition.

The above changes would only apply to people whose births were registered in Scotland or who are normally resident in Scotland.

UK government blocks the Bill

At the very end of the 28-day period allowed by the Scotland Act 1998, on January 17, 2023, Alistair Jack, Scottish Secretary of the UK government, used s35 of the Scotland Act to block the Bill. This section gives the Secretary of State power to intervene and make an order in certain cases prohibiting the Presiding Officer from submitting a bill for royal assent.

This is the first time this power in the Scotland Act has been exercised by the UK government. This action was debated in the House of Commons on January 17, 2023 and supported by 318 votes to 71, with 249 abstentions, including 183 Labour Party abstentions.

The UK government published a 12-page document setting out its concerns; these include a concern that the Bill will affect matters reserved to the UK government on devolution, principally 'equal opportunities', and the definition of the protected characteristic of 'sex'.

It predicts difficulties in three areas:

- administrative difficulties;
- risks posed by fraudulent applications; and
- exacerbations of effects on institutions such as clubs and schools.

The test under s35 of the Scotland Act to justify its use is that the provisions of the Bill would:

*... make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an **adverse effect***

on the operation of the law as it applies to reserved matters. (emphasis added)

The first two categories of concern appear to lack any real substance.

Administrative difficulties

The UK government alleges there would be difficulties in the administration of taxes and state benefits. However, very few state benefits are now sex-based. And, for example, many female barristers continue in practice in their maiden names and the tax system has no difficulty collecting their taxes, relying on a unique tax identifying number as the identifier. Cross-border difficulties for operating equal pay provisions and operation of the S149 EA public sector equality duty seem equally flimsy.

Fraudulent applications

This concern seems somewhat illogical. If a predatory male wished to gain access to female spaces for illicit purposes, would he be likely to declare himself to state authorities for such a purpose? What evidence supports this concern? Some 350 million people now live under regimes (including in Argentina, Ireland and Switzerland) in which self-identification of gender is available and there is no evidence of trouble with fraudulent applications.

Exacerbation of existing problems with the EA

The third category of concerns appears to have a stronger logical basis, but here the *de minimis* principle would seem to be important. Take, for example, the objection that a Scottish school pupil aged 16 to 18 might obtain a GRC and then move to England, complicating the position for a single-sex school which wished to exclude pupils of one legal sex. The tiny numbers of trans individuals (about 1 in 700 of the population as revealed by the 2021 UK census) coupled with the unlikelihood of a pupil who had obtained a Scottish GRC moving to England or Wales during their senior school education, means that these problems are likely to occur very rarely. The same could be said of alleged difficulties for clubs and associations. If the UK government was really concerned about these tiny effects, then extending the '*proportionate means of achieving a legitimate aim*' exception allowing exclusion of trans people where it can be justified in schools and associations would seem a simple, easy and proportionate approach 'fix' rather than negating the whole Bill and its benefits for Scotland as seen by the Scottish parliament.

Scottish government seeks judicial review

It was announced in April 2023 that the Scottish government has initiated a judicial review of the Secretary of State's action to block the Bill under s35. The Court of Session will first decide whether to grant permission for the petition to proceed - it seems impossible that permission would not be given - and then directions will be given for a full hearing. It may be that interested organisations ask to intervene. It is anticipated that the application will be heard in the autumn of 2023.

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