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Legislation lags far behind society on transgender rights

Gender recognition is too medicalised and legal categories too rigid for a wide range of identities, lawyers warn

Catherine Baksi

- Omission of children from Gender Recognition Act ‘exposes them to bullying’
- Other jurisdictions are far more flexible
- Some separate-sex services and occupational opt-outs may still be needed

In a world where the 13th Doctor in *Dr Who* is a woman and Hamlet and Henry IV have been played by actresses, gender is becoming something of a fluid concept.

In 2021, for the first time, the census will include questions on sexual orientation and gender identity but, as society moves on, lawyers warn that the law is failing to keep up. Two significant pieces of legislation deal with transgender issues, the Gender Recognition Act 2004 and the Equality Act 2010, but both are considered to be in urgent need of reform.

The reassignment legislation enables transgender people to have their gender identity legally recognised and marked on their birth certificates and other documents. It was “powerful and revolutionary” legislation at the time, says Rachel Reese, a transgender woman, vice-chairwoman of the Law Society’s LGBT

lawyers division and chief executive of Global Butterflies, a consultancy supporting the legal profession.

But, Reese says, the process is “costly, medicalised and bureaucratic”. Transgender people have to undergo a series of intrusive medical assessments and interviews and receive a formal diagnosis of “gender dysphoria”, live in their acquired gender for two years, pay a fee and make a statutory declaration.

The “pathologising” of gender identity for the purpose of legal recognition, Michelle Brewer, a barrister at Garden Court Chambers and co-founder of the Trans Equality Legal Initiative, says, causes significant offence, distress and harm. “While it may be correct that a person seeking gender-affirming treatments should obtain a diagnosis, that process is conceptually different from a doctor having a role in determining how the state legally classifies its citizens,” she says.

“It has enshrined in law the notion that transgender people are mentally ill or unwell,” Brewer says, which carries with it stigma and discrimination and encroaches on an individual’s human rights.

The position for those who are married is even more complicated as they must get the permission of their spouses. And spouses, Reese says, can make matters difficult if they are angry at their partner’s decision to transition.

People who are “non-binary” – those who do not identify as either male or female – have no legal recognition under the reassignment act, which also prevents those under the age of 18 from securing a recognition certificate in their identified gender. The omission of minors, Brewer says, makes it harder for young people to require public authorities to engage with them using a congruent identity for all purposes where they do not have the weight of legal recognition of that gender behind them, and their inability to get access to gender-appropriate identity documents exposes them to the risk of being outed in public, bullying and

transphobic violence.

Numerous jurisdictions, including Germany, the Netherlands, Ireland, Argentina, Malta, Norway and Sweden, have included children in their legal recognition models without an increased medicalisation of the young, she says, debunking the argument often cited for the position in England and Wales.

Brewer points to the 2002 European Court of Human Rights ruling in *Good v UK*, saying: “It is now accepted that it would be a violation of an individual’s human rights to deny a trans person legal recognition in their affirmed gender. We recognise in the UN Convention on the Rights of the Child that children must have a voice, their identity must be respected and that ultimately decisions taken by public authorities should be taken in their best interest.

“A blanket denial – irrespective of the particular circumstances of the young person – of legal recognition of affirmed gender is, in my opinion, not compatible with either the principles under the UNCRC or the Human Rights Act.”

The Equality Act 2010 made it unlawful to discriminate against anyone because of nine factors, including gender reassignment, and introduced a public sector equality duty, requiring public bodies to consider how their policies affect people with protected characteristics. But, Robin White a transgender woman and discrimination barrister at Old Square Chambers, notes, the act is limited to people who are proposing to undergo, are undergoing, or have undergone, a process – or part of a process – of gender reassignment, and does not extend to other members of the trans community, such as those who are gender fluid, gender neutral or gender queer (people who neither, both, or a combination of the male and female genders).

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Robin White

The act allows for the provision of separate-sex and single-sex services where it is “a proportionate means of achieving a legitimate aim”. For example a transgender woman might not be able to be a counsellor working with female victims of rape, even if she has a gender recognition certificate, in order to avoid causing the victims further distress. It also permits employers to stipulate that a post is only open to individuals with a particular protected characteristic where there is a “genuine occupational requirement”. Some argue that these provisions reduce the protection afforded to transgender people.

The first piece of work done by the House of Commons' women and equalities committee, whose chairwoman is Maria Miller, a Conservative MP, was an inquiry into transgender equality. The report, published in January 2016, recommended updating the reassignment legislation to shift the gender registration process from medicalised questions to the self-declaration that has developed in other jurisdictions, including Ireland.

The committee recommended updating the protected characteristic in the Equality Act 2010 from “gender reassignment” to “gender identity” and looking into the need to create a legal category for people with a gender identity outside the binary within the act.

It also suggested amending the act so that the occupational requirements provision and/or the single-sex/separate services provision does not apply in relation to discrimination against a person whose acquired gender has been recognised under the Gender Recognition Act. Unusually among transgender people, White urges caution over this point if the government does move towards a system of self-declaration where “you won't have to be very male or very female to get a gender

recognition certificate” and you could have a rape counsellor born male dealing with women. “I don’t think that is sensible,” she says.

In its response to the committee, published in July 2016, the government agreed to review both acts but so far nothing has come of that.

Privacy and data protection laws can also be problems. Under section 22 of the recognition act those acquiring information relating to a person’s gender history in an official capacity are breaking the law if they disclose it without the consent of the person concerned, except in certain specific circumstances. But, Reese says, it is not clear what is meant by “official capacity” and there have been no prosecutions brought under the section, prompting the Commons committee report to warn that “there is a grave danger that this provision will become (if it has not already become) a ‘dead letter’ ”.

White adds, however, that organisations that reveal an employee’s gender history could fall foul of the Data Protection Act 1998 and be liable for a fine of up to £5,000.

“We are in the process of seeing the topic of gender being redefined and rethought,” Matthew Graham, a partner at the Bath law firm Mowbray Woodwards, says, predicting that that will create conflicts in the criminal justice system as well as the workplace because of the binary terms in which legislation is drafted and the system operates. He highlights the issue of gender fraud or identity allegations, of which there have been six successful prosecutions – all of young people who were born female but who express their gender identity in different ways.

In July Gayle Newland was sentenced to six and half years in prison after being found guilty at a retrial of six charges of sexual assault by penetration. Newland, posing as a male, Kye Fortune, had been in a relationship with a woman. During

the 100 or so hours they were together Newland's partner wore a blindfold and Newland wore a strap-on prosthetic penis to have sex with the woman, who consented until she removed her blindfold and found that her partner was Newland.

“At the heart of the issue is consent and what that means,” Graham says. “It is said that consent is vitiated by an alleged fraud around gender.” But he suggests that the criminalisation of otherwise consensual acts is “complicated and troubling” and indicates that the law of consent does not work in this context. It does a huge injustice to other non-consensual sexual behaviour, he suggests, and criminalises young people with gender identity issues.

Graham suggests that in a world in which the concept of gender is fragmenting it is “problematic and increasingly meaningless” to have gender at the heart of consent in this context. He would like to see a new offence of fraudulent misrepresentation in sexual behaviour.

In 2015 Graham represented Tara Hudson, a transgender woman sentenced to 12 weeks in prison after pleading guilty to assault. Born Raymond Aaron David, Hudson had been living as a woman for almost a decade but, because she had not legally changed her gender by applying for a gender recognition certificate, she was initially sent to a male prison.

When it comes to dealing with transgender people, Graham says, the prison service is not fit for purpose and the problem highlights more fundamental issues about the treatment of all vulnerable people in prison. He explains: “When trans-people go to prison, the service must decide if they are put in a male or female prison, because the choice is binary. There are guidelines on what to do but there is still a heavy focus on the gender recognition certificate. If you do not have one, you will go to prison according to your birth gender.”

He would like to see a small gender-neutral prison facility and adapted prison clothing and washing facilities as well as improved access to appropriate mental health services for transgender people in prison.

“I would welcome some type of guidance from the Law Society for criminal practitioners dealing with trans-clients, so they are aware of the right things to consider,” he adds.

Looking ahead, Graham suggests there will be many other areas where the law will have to grapple with issues relating to transgender people, including challenges to decisions made by clinical commissioning groups on the funding of medical care.

White adds that if the law fails to catch up with social change businesses and others will face legal challenges from some elements of the trans community who see such actions as a way of advancing trans rights.

Changes on the horizon

The Gender Recognition Act 2004 After recommendations in a report from the House of Commons’ women and equalities committee in 2016, the equalities minister, Justine Greening, confirmed last July that the government intends to reform the act and remove the need for a diagnosis of gender dysphoria. Theresa May confirmed this in October but no further progress has been announced.

The Equality Act 2010 The government said it would keep the matter under review and monitor people’s experiences of discrimination, harassment or victimisation, following the MPs’ report.

Response to committee report The government committed to conducting a cross-government review on removing unnecessary requests for gender information; improving the way people are supported by gender identity services through new training of NHS staff; tackling harassment and bullying in higher education by

working with universities; assessing how to measure the size of the UK's transgender population so that policy could be more evidence-based; and measuring and monitoring public attitudes towards transgender people.

National LGBT survey Results of a survey from the government equalities office to understand the experiences of lesbian, gay, bisexual and transgender people. The publication date is unknown.

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