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The Gender Recognition Bill [HL]

Bill 56 of 2003-04

This paper discusses the provisions of the *Gender Recognition Bill* which is due to be considered on second reading in the House of Commons on 23 February 2004. Explanatory Notes to the Bill have also been issued [Bill 56-EN].

Following two judgments in the European Court of Human Rights, the Government is obliged to arrange for the law in the United Kingdom to be amended, to give transsexual people legal recognition and the right to marry, in order to bring the law into line with the requirements of the European Convention on Human Rights.

The Bill would give transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in their acquired gender, rights and entitlements appropriate to that gender, including the right to marry.

Catherine Fairbairn

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Summary of main points

At present, transsexual people are not recognised in their acquired gender under the law of any part of the United Kingdom.

On 11 July 2002, the European Court of Human Rights delivered two judgments which found that the UK had breached the rights of two transsexual people under Articles 8 (right to respect for private life) and Article 12 (right to marry) of the European Convention on Human Rights. The UK is now obliged to bring UK law into line with the requirements of the European Convention on Human Rights.

In April 2003, in another case, relating to the marriage of a transsexual person, the House of Lords declared that section 11(c) of the *Matrimonial Causes Act 1973* was incompatible with the European Convention on Human Rights.

The Government published a draft *Gender Recognition Bill* on 11 July 2003. The draft Bill was scrutinised by the Joint Committee on Human Rights which, in its report published on 20 November 2003, made various recommendations on a number of issues. The *Gender Recognition Bill* was introduced in the House of Lords on 27 November 2003 and was passed on third reading on 10 February 2004.

Under the provisions of the Bill, transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in their acquired gender, would acquire rights and entitlements appropriate to that gender, including the right to marry. The Bill would establish a gender recognition panel to which transsexual people who want to register under their acquired gender would have to apply. If they meet the requirements, they would be issued with what is effectively a new birth certificate. Married transsexual people would have to dissolve their marriage before a new birth certificate is issued.

In debates in the House of Lords, some provisions and underlying assumptions of the Bill proved controversial, including: the question of whether married applicants should be obliged to end their marriage before being granted full recognition in their acquired gender; making disclosure of information relating to transsexual people a criminal offence in certain circumstances; medical and religious issues; the effect of recognition on the family of the applicant; and entitlement to retirement pension.

The Bill applies to England, Wales and Northern Ireland. It applies to Scotland for reserved matters and the Scottish Executive has passed a Sewel motion on devolved aspects of the Bill. All parts of the UK must make provision for gender recognition if the UK is to fulfil its obligations under the European Convention on Human Rights.

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I Introduction and background

A. Transsexual people¹

1. Number

The Department for Constitutional Affairs (DCA) has stated that there are estimated to be around 5,000 transsexual people in the UK:

There are no firm figures on the number of transsexual people in the UK.

The Inland Revenue and Department for Work and Pensions have around 4,000 cases marked as 'nationally sensitive' because the individual has stated that he or she is transsexual. Groups representing the community estimate that there are 5,000 transsexual people in the United Kingdom. ... [T]ranssexual people can change their name and gender on passports and driving licences. Figures from the Passport Agency and DVLA also suggest that the population is close to 5,000.²

2. Gender dysphoria

The DCA states that transsexualism, or gender dysphoria, involves feelings of being 'in the wrong body' and wanting to live permanently as a member of the opposite gender.³

The Government's statement of policy concerning transsexual people includes the following:

What transsexualism is not

Transsexualism is *not* transvestism or cross-dressing for sexual thrill, psychological comfort or compulsion.

It is *not* an orientation towards people of the same sex.

It is *not* related to paedophilia.

It has nothing to do with drag queens.

Transsexual people do not *choose* their gender identity. Transsexualism is an overpowering sense of different gender identity rather than any sexual orientation: transsexual people may be heterosexual, gay/lesbian or celibate.

¹ The Government uses the term 'transsexual people' rather than 'transsexuals' – apparently the latter term sometimes offends. The term 'trans' is also used by some parties to refer to transsexual people.

² Final Regulatory Impact Assessment, *Gender Recognition Bill*, November 2003, Paragraph 2, <http://www.dca.gov.uk/risk/grbria.htm>

³ *Ibid*

It is *not* a mental illness. It is a condition considered *in itself* to be free of other pathology (though transsexual people can suffer depression or illnesses like anyone else).⁴

The NHS Direct Online website defines gender dysphoria as follows:

A person with gender dysphoria experiences anxiety, uncertainty or persistently uncomfortable feelings about their birth gender.

They feel that they have a gender identity that is different from their anatomical sex. This may lead to a fear of expressing their feelings and a fear of rejection, which may lead to deep anxiety, leading to chronic depression and possibly attempted suicide.

Sometimes a person, with gender dysphoria, undergoes hormone and surgical treatment to physically change their sex. This is called transsexualism.

It is often reported that approximately 1 in 30,000 adult genetic males and 1 in 100,000 genetic females seek to change their sex. However these figures are now accepted to be far too low.⁵

Psychiatric, hormonal and surgical treatment is available, including on the NHS.⁶

In Grand Committee debate on the *Gender Recognition Bill*, Lord Filkin, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, outlined the three stages of the gender reassignment process from the medical perspective:

The first is the social gender role change, when a patient changes his name and informs his family and friends of his plans to live full-time in his chosen gender role. The second is the hormonal gender reassignment, when, after psychiatric assessment for suitability, patients are offered cross-gender hormone prescriptions. The third stage—the stages are not necessarily completely sequential—is surgical reassignment, after completion usually of two years living in the role, when primary surgery is undertaken in some but not all cases.⁷

⁴ Government Policy concerning Transsexual People, accessed 16 February 2004, <http://www.dca.gov.uk/constitution/transsex/policy.htm>

⁵ <http://www.nhsdirect.nhs.uk/en.asp?TopicID=616>

⁶ Final Regulatory Impact Assessment, *Gender Recognition Bill*, November 2003, <http://www.dca.gov.uk/risk/grbria.htm>

⁷ HL Deb 13 January 2004 c9GC

3. NHS gender reassignment operations⁸

The table below shows trends in Finished Consultant Episodes (FCEs) associated with gender reassignment operations in England since 1998-99. The Department of Health note that there are “significant data quality issues with this subject due to the sensitivity associated with it”. The statistics should therefore be used with caution.

Finished Consultant Episodes: Operations for sexual transformation

England, 1998-99 - 2002-03

	1998-99	1999-00	2000-01	2001-02	2002-03
Combined operation M-F	46	29	54	73	79
Combined operation F-M	1				2
Excision of ovotestis	10	14	11	12	10
Other specified	1	7	5	4	3
Unspecified sexual transformation		2	1		
Total	58	52	71	89	94

Source: Department of Health *Hospital Episode Statistics*

Note: A Finished Consultant Episode is a period of admitted patient care under a consultant within an NHS Trust. This is not always the same as a single stay (spell) in hospital. Surgical procedures are coded according to the United Kingdom classification OPCS4.

There were 94 gender reassignment operation FCEs in 2002-03, the highest total in recent years. The majority of these were combined male to female procedures.

Further such operations take place in the private sector. The *Report of the Interdepartmental Working Group on Transsexual People* noted “a study of private-public mix of acute hospital care published by the Association of British Insurers recorded 104 gender reassignment operations in the private sector in 1997/98”.⁹

B. Legal recognition

Under current law in the United Kingdom, there is no provision to allow transsexual people to be officially recognized in the gender with which they identify. This has many consequences including the following:

- transsexual people cannot marry in their adopted gender;
- transsexual people are not currently entitled to have their birth certificates revised;
- the age of qualification for the state pension is the age appropriate for their birth certificate gender;

⁸ Contributed by Adam Mellows-Facer, Social and General Statistics Section

⁹ *Report of the Interdepartmental Working Group on Transsexual People*, Home Office, April 2000, para 1.4, <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>
<http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>

- it may be necessary to reveal the birth certificate gender when applying for a new job;
- transsexual people may worry that if they do not disclose their legal gender for car insurance purposes, this may amount to fraud, since premiums can be lower for women;
- transsexual people are not entitled to enjoy any rights legally confined to persons of the gender to which they feel they belong.

C. The Report of the Interdepartmental Working Group on Transsexual People

The Interdepartmental Working Group on Transsexual People was set up by the Home Secretary in April 1999 with the following terms of reference:

to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue.

The Group's membership was:

- the Home Office (chair)
- the then Department for Education & Employment,
- the Foreign & Commonwealth Office
- the General Register Office for Northern Ireland
- the General Register Office for Scotland
- the Department of Health
- the Office of Law Reform (Northern Ireland)
- the Lord Chancellor's Department
- the Office for National Statistics
- the Scottish Executive
- the then Department of Social Security and
- the National Assembly for Wales.

The Working Group published its report in April 2000.¹⁰ It found that there was no common approach to the transsexual condition and the issues to which it gives rise in the European and Commonwealth countries about which it had received information.

¹⁰ *Report of the Interdepartmental Working Group on Transsexual People*, Home Office, April 2000, <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>

The Report also states:

Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives.¹¹

The Working Group identified three options for the future:

- to leave the current position unchanged;
- to issue birth certificates showing the new name and, possibly, gender; and
- to grant full legal recognition of the new gender subject to certain criteria and procedures.

In its summary of findings, the Report states:

The Group identified no areas where a transsexual person might be granted recognition in their acquired gender, in the absence of full legal recognition, without leading to confusion and uncertainty (para 3.8)¹²

The Working Group concluded:

We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation.¹³

The Interdepartmental Working Group on Transsexual People was reconvened in 2002 to examine the implications of granting full legal status to transsexual people in their acquired gender and report to Government.

D. Recent court cases

Over the last few years there have been several important cases in which the current legal treatment of transsexual people has been held to be contrary to the European Convention on Human Rights and/or European Community law.

1. *Goodwin v. The United Kingdom and I v The United Kingdom*

On 11 July 2002, the European Court of Human Rights (ECtHR) delivered judgments in favour of two transsexual people, known as Goodwin and I, in effect obliging the United Kingdom Government to recognise sex changes as legally valid.¹⁴ In each case, the applicant had undergone gender re-assignment surgery provided by the National Health

¹¹ *Ibid* paragraph 5.1

¹² *Ibid* p27

¹³ *Ibid* paragraph 5.5

¹⁴ BBC News, *Transsexual wins right to marry*, 11 July 2002
<http://news.bbc.co.uk/1/hi/uk/2122094.stm>

Service and lived in society as a female, although she remained for legal purposes a male. Each applicant complained about the lack of legal recognition of her post-operative sex and about the legal status of transsexuals in the United Kingdom. The UK was found to have breached Article 8 and Article 12 of the European Convention on Human Rights (the right to respect for private life and the right to marry). The Court considered that society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost. It concluded that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicant. The court also held that although Article 12 referred in express terms to the right of a man and woman to marry, these terms did not necessarily restrict the determination of gender to purely biological criteria. There were other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment, including surgery, to assimilate the individual as closely as possible to the gender in which they perceived that they properly belonged, and the assumption by the transsexual of the social role of the assigned gender.

The Court ruled that a Contracting State could determine the conditions under which a person claiming legal recognition as a transsexual person might establish that gender re-assignment has been properly effected, and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses). However, it found no justification for barring transsexuals from enjoying the right to marry under any circumstances.

Details of both judgements are available online as ECtHR press releases.¹⁵ The decisions were welcomed¹⁶ by Press for Change¹⁷ - a group that campaigns for the rights of the UK's transsexual people.

2. Government response to the ECtHR judgments

The Government is now obliged, under international law, to arrange for the law to be amended in the United Kingdom to bring it into line with the requirements of the European Convention on Human Rights (ECHR) as interpreted in *Goodwin v United Kingdom* and *I v United Kingdom*.

In its nineteenth report of Session 2002-03, *Draft Gender Recognition Bill*,¹⁸ the Joint Committee on Human Rights, considered that any legislation must, as a minimum, achieve the following:

¹⁵ *I. v. The United Kingdom*:
<http://www.echr.coe.int/Eng/Press/2002/july/I.vUKjudGrandChamberepress.htm>

Christine Goodwin v. The United Kingdom:
<http://www.echr.coe.int/Eng/Press/2002/july/GoodwinjudGrand%20Chamber.htm>

¹⁶ “Landmark ruling for transsexuals forces Britain to change law”, *Guardian*, 12 July 2002

¹⁷ <http://www.pfc.org.uk/>

a) to comply with ECHR Article 12 (right to marry), either amend section 11 of the Matrimonial Proceedings Act 1973 or otherwise change the legal treatment of transsexual people so that once they have acquired a new sex or gender they are no longer disabled from entering into a valid marriage with a person of their birth sex;

b) to comply with ECHR Article 8 (right to respect for private life), amend the law so that any failure to recognise a person's reassigned sex or gender is justifiable under Article 8.2 as being in accordance with the law and necessary in a democratic society (i.e. serving a pressing social need and being proportionate to it) in order to achieve one of the legitimate aims listed in that paragraph; and

c) to avoid any incompatibility with ECHR Article 14 (right to be free of discrimination in the enjoyment of Convention rights) taken together with other Convention rights, ensure that arrangements which might lead to such discrimination are avoided.¹⁹

A number of written answers indicate the Government's response to the judgments, including the following:

Lord Lester of Herne Hill asked Her Majesty's Government:

(a) What are the reasons for the continuing delay in introducing legislation to give transsexuals legal recognition and the right to marry in accordance with the European Convention on Human Rights; and (b) whether they will speedily introduce such legislation. [HL5289]

Baroness Scotland of Asthal: The Government recently reconvened the Interdepartmental Working Group on Transsexual People to re-examine the implications of granting full legal status to transsexual people in their acquired gender, and to make recommendations to Ministers before the end of this year. The working group met on 9 July. It has now been tasked additionally with considering urgently the implications of the judgments of the European Court of Human Rights in the cases of *Christine Goodwin v The United Kingdom* and *I v The United Kingdom*.

Reconvening the working group has been necessary as the interests of transsexual people touch on the policy responsibilities of a large number of government departments and the devolved administrations. Responses to the Court's ruling must be carefully co-ordinated.

The Government are obliged, under international law, to implement the judgments and will decide as soon as possible how to do so. The devolved administrations are also considering their approach to these issues where responsibilities are devolved.

¹⁸ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

¹⁹ *Ibid* Paragraph 20

Following the ruling, statutes must be interpreted in the light of the ECHR findings and, where a statute allows, discretion must be exercised differently in any case where the traditional interpretation of exercise of discretion would result in a violation of a transsexual person's convention rights.²⁰

On 13 December 2002, Rosie Winterton, then Parliamentary Secretary at the Lord Chancellor's Department, made an announcement which includes the following:

Legislation

We will aim to publish, in due course, a draft outline Bill to give legal recognition in their acquired gender to transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth. That will make it possible for them (if otherwise eligible) to marry in their acquired gender.

The Government is committed, therefore, to legislating as soon as possible to give transsexual people their Convention rights. Whether Parliament at Westminster should legislate for the whole of the UK on this matter is under consideration, particularly in view of the inter-relationship between devolved and reserved policy aspects.

Rights

Except where limited exceptions will be created in the legislation, we propose that formal recognition in the acquired gender will bring with it the rights and responsibilities appropriate to that gender - normally, from the date that the change is recognised. Registration in the new gender will not cancel out rights and obligations previously incurred. A parent, for example, who changes gender, will not lose his or her obligations - and rights - as father or mother to the child.

[...]

Recognition

Changing legal identity is a serious step, with significant consequences. It is important that no-one should embark upon formal recognition in the acquired gender without convincing evidence. We will therefore propose that applications should be scrutinised by an authorising body, given legal powers to assess medical evidence before the transsexual person is allowed to register in the new gender. In some cases, where the person undertook gender reassignment years earlier, and has lived successfully in the acquired gender, that assessment may be straightforward. In other cases, the authorising body will need to be assured that, in addition to meeting medical criteria, the transsexual person has lived successfully in the acquired gender for at least two years. The medical criteria may include medical treatments to modify the person's sexual characteristics, but

²⁰ HL Deb 24 July 2002 c 76W

the Government will not require surgery as a condition of registration in the acquired gender.

We do not intend history to be re-written. Original birth records will remain in existence, unamended, and will continue to be made available when needed. But the authorising body will empower the Registrar General to create a new record in relation to the transsexual person, from which a new certificate stating acquired name and gender may be drawn. This certificate will be indistinguishable from a birth certificate, in order to remedy the breaches of Article 8 identified by the European Court of Human Rights. The link between the original and the revised record will remain confidential within the Registrar General's office.

[...]

Our aim is to ensure that in future transsexual people will be better protected from having constantly and unnecessarily to reveal their history. Our legislation will enable transsexual people confidently to take up those rights which have been denied to them in society - including the right to marry in their acquired gender - while preserving other obligations entered into in the original gender. We will be pleased to receive comments on our proposals, which deserve the support of all who have in the past expressed concern at the lack of legal recognition of transsexual people in the United Kingdom.

The full announcement, and supporting information, is available online.²¹ The announcement was repeated in a Written Ministerial Statement on transsexual people on 16 December 2002.²²

On 22 February 2003, in reply to Press for Change's response to the government's announcement of 13 December 2002, Rosie Winterton said:

Although we have considered whether any practical adjustments can be allowed in the meantime, we believe that primary legislation will be needed before the judgments in *Goodwin v the United Kingdom* and *I v The United Kingdom* can be implemented. This is partly because there is no legal definition of a transsexual person and apparatus for formal recognition needs to be established.²³

3. *Bellinger v. Bellinger*

In *Bellinger v. Bellinger*,²⁴ decided in April 2003, the House of Lords was asked to rule on whether a marriage between a man and a male to female transsexual person was valid. The Bellingers had gone through a ceremony of marriage over twenty years previously. Mrs Bellinger is a transsexual person and Mr Bellinger has always been aware of this.

²¹ <http://www.dca.gov.uk/constitution/transsex/statement.htm>

²² HC Deb 16 December 2002 c36WS

²³ <http://www.dca.gov.uk/constitution/transsex/rwresp.htm>

²⁴ [2003] 2 AC 467

Section 11(c) of the *Matrimonial Causes Act 1973* provides that a marriage is void unless the parties are respectively male and female.

Having previously failed to obtain a declaration that their marriage was valid in the High Court and in the Court of Appeal, Mrs Bellinger argued, in the House of Lords, that section 11(c) is contrary to Articles 8 (right to respect for private life) and 12 (right to marry) of the European Convention on Human Rights.

The House of Lords ruled that section 11(c) is incompatible with Articles 8 and 12. However, they also held that, although sympathetic to Mrs Bellinger's plight, they were unable to interpret the section in such a way that would validate the marriage, because English law does not recognize any change of gender. They considered that reform of the test for gender should be left to Parliament.²⁵

4. *KB v. National Health Service Pensions Agency and another*²⁶

In this case, a reference was made to the European Court of Justice from the Court of Appeal for a preliminary ruling on the interpretation of European Community law. KB, the claimant, is a woman and a member of the NHS Pension Scheme. Her partner, R, is a female to male transsexual person and although they wish to marry, the present law prevents them from doing so. KB was informed by the NHS Pension Scheme that, as she and R are not married, if she were to pre-decease R, R would not be able to receive a widower's pension, since that pension is payable only to a surviving spouse. KB claimed that the relevant provisions constitute sex discrimination contrary to Article 141 EC (equal pay for male and female workers for equal work).

In a ruling on 7 January 2004, the European Court of Justice held that a survivor's pension under an occupational pension scheme constitutes 'pay' within Article 141 EC. In a situation such as this, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right, namely the capacity to marry. KB and R are unable to satisfy the marriage requirement as laid down by the NHS Pension Scheme for the purpose of the award of a survivor's pension. The Court noted that the ECtHR had already ruled that the refusal to allow a marriage between a transsexual person and a person of the sex to which he or she belonged prior to gender reassignment surgery constitutes a breach of Article 12 ECHR (right to marry).²⁷ Legislation such as that at issue which, in breach of the ECHR, prevents a couple from fulfilling the necessary marriage requirement in order to benefit from part of the pay of the other, was in principle incompatible with Article 141 EC. It was for the national court to decide whether a

²⁵ See part II B 1 of this paper below for details of how the Bill would affect couples such as the Bellingers

²⁶ Case C-117/01

²⁷ *Goodwin v UK* see part I D of this paper above

person in KB's situation could rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

E. The law in other countries

Information about the law in some other countries is included in the Report of the Interdepartmental Group on Transsexual People.²⁸

Liberty, which describes itself as one of the UK's leading civil liberties and human rights organisations, made a submission to the European Court of Human Rights in relation to *Goodwin v. UK* and *I v UK*.²⁹ In its submission Liberty states:

Gender Reassignment is currently legally performed in 73% of Member States [of the Council of Europe] and not legally performed in 7% of states. The position is unclear in 20% of States. 59% of Member States permit a change to the birth certificate and 17% do not. From our research it appears that 54% of Member States permit post-operative transgender people to marry those of the opposite sex to their reassigned gender and 14% do not. The legal position in relation to marriage of 32% of the respondents to the Questionnaire is unclear.

The information Liberty has received (both from this questionnaire and from that prepared for the Court in Sheffield and Horsham) indicates that of the member states of the Council of Europe, transsexual people in 23 of them can alter their birth certificates (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Slovakia, Spain, Sweden, Switzerland, Turkey and the Ukraine). Of these, 18 states permit transsexual people to marry following surgery.

Only Albania, Andorra and Ireland join the UK in positively prohibiting such a change. Further it remains the case that of the member states where gender reassignment is legal and publicly funded, only the UK and Ireland will not give full legal recognition to the new gender identity.³⁰

The Department of Constitutional Affairs has stated:

There is no single common approach in other countries to the transsexual condition and the complex issues it raises. However, all other EU Member States except Ireland already give legal recognition to gender change, as do many other countries in Europe and the Commonwealth and many American States. Most

²⁸ *Report of the Interdepartmental Working Group on Transsexual People*, Home Office, April 2000, Annex 4, <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>

²⁹ See part I D of this paper above

³⁰ Liberty, *A comparative study of European, Commonwealth and International law and practice regarding the civil status of transsexual people*, 16 January 2002, paragraphs 7 to 9, <http://www.liberty-human-rights.org.uk/resources/interventions/pdfs/goodwin.pdf>

Member States allow marriage in the acquired gender, subject to various thresholds being satisfied and, in some cases, gender reassignment surgery having been performed.³¹

In its response to the Report of the Joint Committee on Human Rights,³² the Government indicated that it is committed to securing rights for transsexual people and to their social and legal inclusion, in a way which goes beyond what is strictly required by the judgments of the European Court of Human Rights:

The Gender Recognition Bill ... goes beyond what is strictly required by the European Court; if the Bill is enacted, the UK will have possibly the most progressive system for gender recognition in Europe.³³

Stephen Whittle, Vice-President of the pressure group, Press for Change, has stated that, although the *Gender Recognition Bill* is not perfect, it is the best of any such legislation in the world:

It does not require sterility (Germany, Japan, Finland, Denmark, Holland etc)

It does not require genital surgery (Sweden, Japan, Turkey, Belgium, France etc)

It does not require childlessness - yes childlessness - Japan in 2003!

It does require that an individual is unmarried but apart from Germany and some US states, so do all the rest.

It ensures that future marriages are indeed valid (unlike the USA, Canada and Australia - yes it is still a dodgy legal position there despite the recent decision in *Re Kevin*)

It will meet 99% of the needs of 95% of trans people who wish to live permanently in their new gender role.

We will still have a few cases to go before courts in the future, but the principles embodied in *Goodwin* will have been extended way beyond what the European Court of Human Rights insisted on. As such those principles are a statement of parliament's intention of what it wishes to achieve rather than a re-statement of

³¹ *Introduction and background to the Gender Recognition Bill*, Department for Constitutional Affairs, November 2003, <http://www.dca.gov.uk/constitution/transsex/intro.htm>

³² The Report referred to is the Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

³³ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003, paragraph 4, <http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

the bottom line. That will give any court much more power of interpretation than otherwise.

Goodwin and I simply required that people be issued with birth certificate showing their new name and gender i.e. they could take the format of Jane formally known as John, female formally male.

Goodwin and I said that governments could decide on what basis they would afford legal marriage and that could include specific surgical requirements.³⁴

F. The draft Bill and consideration by Committees

Announcing the publication of the *Draft Gender Recognition Bill* on 11 July 2003, Lord Filkin, Parliamentary Under-Secretary at the Department for Constitutional Affairs, said:

The legislation demonstrates that this Government is committed to understanding and recognising the needs and aspirations of those members of society who are in a minority; committed to securing their rights and committed to their social and legal inclusion. I hope that transsexual people can now look forward with optimism to the enjoyment of those rights, responsibilities and protections previously unavailable to them in their acquired gender.³⁵

The draft Bill was accompanied by a partial Regulatory Impact Assessment.

The draft Bill was scrutinised by the Joint Committee on Human Rights. The Committee's nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, was published on 20 November 2003.³⁶ It generally welcomed the draft Bill but considered that a number of amendments were needed to ensure that the Bill succeeded in removing the incompatibilities between UK law and rights under the ECHR and in order to avoid further human rights difficulties.³⁷

The Government's response to the Joint Committee's Report was published on 16 December 2003. The Government welcomed the Report, but its response does not give much ground on the main recommendations made by the Joint Committee.³⁸

³⁴ Stephen Whittle, Vice-President of Press for Change, *Why support the Gender Recognition Bill?*, 4 November 2003, <http://www.pfc.org.uk/gr-bill/whysup.htm>

³⁵ Government Announcement on Transsexual People, Lord Filkin, Parliamentary Under-Secretary Department for Constitutional Affairs, 11 July 2003
<http://www.lcd.gov.uk/constitution/transsex/110703statement.htm>

³⁶ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

³⁷ *Ibid* paragraph 112

³⁸ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003,
<http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

Reference to particular recommendations made by the Joint Committee, and to the Government's response, is made, in context, in the following sections of this paper.

The Final Regulatory Impact Assessment (RIA) for the *Gender Recognition Bill* was published by the Department for Constitutional Affairs on 28 November 2003.³⁹ Two risks were considered: the risk to individuals who have gender dysphoria (the DCA stated that Press for Change has figures to suggest that 80% of people who suffer from gender dysphoria seriously contemplate suicide), and the risk of legal challenge to the Government. The three available options were: to do nothing; to make a remedial order; or to bring in primary legislation to rectify all human rights breaches, establish a rigorous and credible process for gender recognition, and ensure full legal recognition in the acquired gender across the range of situations in which gender is significant in law. The DCA stated that these options were analysed in the Partial RIA, published at the same time as a draft Bill, and the third was decided to be the most appropriate. The conclusion in the Final RIA is that none of the three options, including the final proposal to legislate, carry any significant regulatory impact. The minor costs involved with the proposal were considered to be justified by the need to provide legal recognition for transsexual people in their acquired gender, the obligation to rectify breaches of Convention rights, and the potential for eliminating the risk of further legal challenges and the costs associated with those challenges.

The *Gender Recognition Bill* was also considered by the House Of Lords Delegated Powers and Regulatory Reform Committee, which published its Third Report of Session 2003-04 on 8 January 2004.⁴⁰ Its recommendations are discussed in context in the following sections of this paper.

G. Progress of the Bill in the House of Lords

After consultation and scrutiny of the draft Bill by the Joint Committee on Human Rights, the *Gender Recognition Bill* was introduced in the House of Lords on 27 November 2003. The main provisions of the Bill, as introduced in the House of Lords, were largely similar to those of the draft Bill, although some amendments had been made. There were also additional provisions which would make consequential changes to the pensions and social security system, and extend the effect of the legislation to Northern Ireland and to Scotland.

The following table, from the Library Bill Index site on the Intranet, illustrates the progress of the Bill:

³⁹ <http://www.dca.gov.uk/risk/grbria.htm>

⁴⁰ House Of Lords Delegated Powers and Regulatory Reform Committee, Third Report of Session 2003-04, 8 January 2004, HL Paper 17, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/17/17.pdf>

GENDER RECOGNITION BILL (HL) 2003/04			
27.11.03	655 c24	Presentation and first reading. (HL Bill 4 of 2003/04).	
27.11.03	HL Bill 4 2003/04	(Explanatory Notes HL Bill 4-EN also published).	
18.12.03	655 c1287- 326	Lords second reading debate. Agreed to on question and committed to a Grand Committee.	
07.01.04	HL 17 2003/04	Third Report on Gender Recognition Bill (HL), Justice (Northern Ireland) Bill (HL), Domestic Violence Crime and Victims Bill (HL), Health Protection Agency Bill (HL), Smoking in Public Places (Wales) Bill (HL), Fishery Limits (United Kingdom) Bill (HL), and Air Traffic Emissions Reduction Bill (HL).	
08.01.04	656 c257- 8	Lords motion on instruction to Grand Committee on order of clauses to be taken. Agreed to on question (formal).	
13.01.04	656 c1- 62GC	Grand Committee off the floor of the House (Moses Room) first day. Clauses 1-7 agreed to. Schedules 1 and 2 agreed to.	
14.01.04	656 c63- 134GC	Grand Committee off the floor of the House (Moses Room) second day. Clauses 8-26 agreed to. Schedules 3,4,5,6 agreed to. Bill reported without amendment.	
21.01.04	656 c1032	Lords motion on order in which amendments for Report Stage be marshalled and considered. Agreed to on question (formal).	
29.01.04	657 c357- 436	Lords report stage first day.	
03.02.04	657 c616- 70	Lords report stage second day. Concluded. (HL Bill 24).	
03.02.04	HL Bill 24 2003/04	As amended on Report (HL). Bill. As amended on Report (HL).	

10.02.04	657 c1060-92	Lords third reading debate. Agreed to on division (155 to 57) and passed. Sent to the Commons.
11.02.04	Bill 56 2003/04	Brought from the Lords. (Explanatory notes Bill 56-EN also published).

On 18 December 2003, Lord Filkin, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, moved that the *Gender Recognition Bill* be read a second time in the House of Lords. Baroness Buscombe, Opposition Spokesperson for Home Office, Law Officers and Lord Chancellors Department and Culture Media and Sport, confirmed that:

it gives me pleasure to make it clear straight away that in principle—I stress "in principle"—we on these Benches are supportive of the Bill. We believe it is right to confront the issues that it raises, so that changes can be made in the law to bring about great improvements in the lives of Britain's 5,000 transsexuals.⁴¹

However, Conservative peers were given a free vote on the Bill and Lord Tebbit and Baroness O’Cathain subsequently specifically dissociated themselves from this statement.⁴²

Lord Goodhart, Liberal Democrat Spokesperson for the Lord Chancellor’s Department, expressed support for the Bill.⁴³

H. Summary of changes to the Bill in the House of Lords

The Bill was amended at Third Reading as well as at Report Stage in the House of Lords.⁴⁴ In this paper, unless otherwise stated, all references to individual clauses use the numbering of the Bill as introduced in the House of Commons.⁴⁵

All of the amendments made were Government amendments tabled to meet concerns expressed by committees and/or during the Lords stages of the Bill. The principal ones include:

Clause 3(6)(b): This clause would give power to the Secretary of State to specify the further content of the application form for a gender recognition certificate. Originally

⁴¹ HL Deb 18 Dec 2003 c1291

⁴² HL Deb 18 Dec 2003 c1303 and c1308

⁴³ HL Deb 18 Dec 2003 c1313

⁴⁴ The Bill as introduced was HL Bill 4 of 2003/04, as amended on Report it was HL Bill 24 of 2003/04, and as introduced into the House of Commons, it is Bill 56 of 2003/04

⁴⁵ References in extracts from the Report of the Joint Committee on Human Rights are to clause numbers in the draft Bill

there was no requirement for this to be by order. The Select Committee on Delegated Powers and Regulatory Reform suggested that the House should invite the Government to explain why there should be no formal procedure.⁴⁶ On Report, Lord Goodhart pressed for the content of the application form to be set by order not subject to a parliamentary procedure. The Government agreed and introduced an amendment at third reading. A consequential amendment was also made to **Clause 3(7)**.

Clause 3(8): This is a new sub-clause which would require a Gender Recognition Panel to give their reasons if they require further information or evidence to be provided by an applicant.

Clauses 7(2) and 24(4): Fees for an application to a Gender Recognition Panel would be prescribed by order subject to the negative resolution procedure (previously fees would not have had to be prescribed by order and the Select Committee on Delegated Powers and Regulatory Reform suggested that the House might wish to invite the Government to explain why this should be the case⁴⁷).

Clause 23(5): This is a new sub-clause. Before an order is made to modify statutory provisions, appropriate consultation would now have to be undertaken with persons likely to be affected by it.

Clause 24: This clause was amended to implement a recommendation of the Delegated Powers and Regulatory Reform Committee.⁴⁸ Applicants who already have recognition overseas would be able to apply on a simpler procedure whereby they have to prove that they have recognition overseas and that the country in which they have recognition is an 'approved country or territory'. The Committee concluded that the negative procedure for approving such countries would not provide an appropriate level of Parliamentary scrutiny for a power of such potential significance in the context of the Bill and recommended that the affirmative procedure should apply. The power to prescribe approved countries would now be subject to the scrutiny and approval of both Houses.

Clause 27: Originally, the fast-track procedure would have applied only to applications within six months of commencement. This period has now been extended and the procedure would be available for the first two years after commencement. The Government has explained that this would enable a married transsexual person who would have to end the marriage in order to acquire full recognition, to wait for civil partnership legislation to come into effect.⁴⁹

⁴⁶ House Of Lords Delegated Powers and Regulatory Reform Committee, Third Report of Session 2003-04, 8 January 2004, HL Paper 17, paragraph 8,

<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/17/17.pdf>

⁴⁷ *Ibid* paragraph 9

⁴⁸ *Ibid* paragraph 5

⁴⁹ HL Deb 3 February 2004 c669

Schedule 3 Paragraph 11: This provision would seek to accommodate a Regulatory Reform Order that is already under way in relation to the civil registration system for England and Wales. The Delegated Powers and Regulatory Reform Committee said:

The “two year” rule in the Regulatory Reform Act 2001 would prevent a Regulatory Reform Order amending Schedule 3 from being made for two years following this bill’s enactment. So paragraph 11 of Schedule 3 overrides the two year rule for amendments to Part 1 of Schedule 3. We have commented in the past that we do not expect to see this sort of provision frequently in legislation. On this occasion, however, we raise no objection.

Paragraph 11(b) of Schedule 3, however, raises a different order of questions. Paragraph 11(b) disapplies both the consultation requirements of the 2001 Act and the “first stage” scrutiny, so that the order amending Schedule 3 would proceed as an ordinary affirmative resolution order. Bearing in mind the limited scope of Schedule 3, we do not suggest, in this case, that the resulting level of Parliamentary scrutiny is inappropriate. But we are concerned about the underlying point of principle. The consultation and scrutiny requirements are normally an essential part of the Regulatory Reform Order process and such orders undergo a different Committee procedure in Parliament to other orders. If the effect of the bill is to shorten the process, in this particular case, so that it is equivalent to the ordinary affirmative procedure, then we take the view that the bill should provide a particular power (subject to affirmative procedure.) limited to amendments to Part 1 of Schedule 3.⁵⁰

The paragraph has been amended to give effect to this recommendation.

Schedule 4 Paragraph 3: A Government amendment was introduced to overcome a potential problem with the original ‘conscience clause’ provided to the clergy of the Church of England and the Church of Wales, in relation to conducting marriages. In debate in the House of Lords, concerns were expressed that the original provision might not have been effective, if the person seeking to marry refused to disclose that he had a gender recognition certificate. It would now be provided that the minister would not have to conduct the marriage if he or she has a reasonable belief that the person seeking to marry has a gender recognition certificate.

II The Bill

This part of the paper sets out the main areas covered by the Bill and includes reference to the Report of the Joint Committee on Human Rights and to the Government’s response to that Report. Reference is also made to the main issues debated in the House of Lords in

⁵⁰ House Of Lords Delegated Powers and Regulatory Reform Committee, Third Report of Session 2003-04, 8 January 2004, HL Paper 17, paragraphs 11 and 12, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/17/17.pdf>

relation to particular provisions, although not always to every stage at which any particular issue was debated.

A. Application for gender recognition certificate

1. Gender/sex and application to the Gender Recognition Panel

a. The Report of the Joint Committee on Human Rights

The Joint Committee on Human Rights commented on the significance of the use of the term ‘gender’ rather than the term ‘sex’ in the draft Bill:

The Draft Bill is couched in terms of gender, not sex. As noted above, gender is a matter of a person’s psychology and social role, and depends on the person’s view of himself or herself and his or her relationships with others, while sex is principally concerned with physical characteristics. The Draft Bill emphasises that it is not concerned with physical characteristics in a number of ways. A person may apply for a gender recognition certificate on the basis of living in the other gender (clause 1(1)(a)). There is no requirement for a person to have had, be having or be planning to have any treatment to change his or her physical appearance before applying for a certificate (clause 1(4)), although evidence of any such treatment would have to be given by a medical practitioner and would strengthen the case for recognition (clause 2(1), (3)).⁵¹

The Committee approved of this flexible approach and considered that, on the evidence presented to it, the expert professional members of the Gender Recognition Panel were unlikely to issue certificates to people making a mere lifestyle choice:

We conclude that the Draft Bill represents a sensitive and sensible compromise by allowing pre-operative transsexual people to have their acquired gender recognised, with the Gender Recognition Panel providing a safeguard against premature or frivolous applications. In our view, the absence of a requirement for people to undergo surgical or medical reshaping of their bodies before applying makes it sensible to speak of gender rather than sex in the Draft Bill.⁵²

However, the Committee considered that legal problems may be caused by the language of gender rather than sex:

we recommend that a further paragraph should be added to clause 5⁵³ of the Draft Bill, making it clear that where under any legislation it is necessary to decide the sex of a person who has an acquired gender, or to say whether that person is a

⁵¹ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, paragraph 25,
<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

⁵² *Ibid* paragraph 29

⁵³ Now Clause 9 of the Bill

man or a woman or male or female, the question must be answered in accordance with the person's acquired gender, except to the extent that the Draft Bill or the legislation in question provides otherwise expressly or by necessary implication. Without such a provision, we fear that there is a significant risk of the Draft Bill failing to achieve some of its purposes.⁵⁴

In particular, the Committee was concerned that there should be no uncertainty about the application to transsexual people of the *Sex Discrimination Act 1975* (which generally makes it unlawful to discriminate on the ground of sex, not gender):

To make absolutely sure that the legislation would achieve its intended effect, we recommend that it should expressly state that 'sex' in the 1975 Act is to be interpreted as including the acquired gender of a person who has obtained a full gender recognition certificate.⁵⁵

The Committee considered that the requirement to apply to a panel for a gender recognition certificate, and the procedural and registration requirements, which are essential elements in the proposed scheme, advance the aims of certainty and help to ensure that the Government's flexible approach to the stage at which an acquired gender should be recognized will not degenerate into giving legal recognition to lifestyle changes.

The Committee acknowledged criticisms of these requirements and procedures and that the proposed system interferes to some extent with people's freedom to be who they choose. However, it considered that a person's sex or gender has important legal and social consequences and affects the rights of others and so the state has a legitimate interest in ensuring that people who take on a new legal status can establish to the satisfaction of an official that they meet certain criteria. People can choose whether or not to apply and the procedure is to be confidential.

b. Government response

The Government confirmed its intention that, once a full gender recognition certificate is issued to an applicant, the person's gender would become for all purposes the acquired gender, so that an applicant who was born male would, in law, become a woman for all purposes. The relevant clause in the draft Bill (now **Clause 9(1)**) has therefore been amended to ensure the full legal effect of recognition in the acquired gender.⁵⁶

⁵⁴ *Ibid* paragraph 34

⁵⁵ *Ibid* paragraph 94 and see part II B 6 of this paper below

⁵⁶ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003, <http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

c. The Bill

Clause 1 would enable persons aged 18 or above to apply for a gender recognition certificate on the basis of living in the other gender to their birth certificate gender or having changed gender under the law of another jurisdiction. The application would be determined by a Gender Recognition Panel. People with legal qualifications and registered medical practitioners or chartered psychologists would be eligible to sit as members of Gender Recognition Panels. **Schedule 1** would contain more details about Gender Recognition Panels, including the eligibility criteria for the legal and medical members, the constitution of individual panels, and procedure.

Clause 2 would specify that the Gender Recognition Panel would have to grant the application if satisfied that the applicant:

- has or has had gender dysphoria,
- has lived in the acquired gender for two years,
- intends to live in the acquired gender for the rest of their life, and
- provides the evidence required by or under Clause 3

Where the applicants have changed gender under the law of another country, the Panel would need only to be satisfied that the country or territory in question has been approved by the Secretary of State under a power contained in **Clause 2(4)**. The Government's Explanatory Notes published with the Bill state that the power to approve would be used to prescribe those countries that have recognition criteria which are at least as rigorous as those in the Bill.⁵⁷ The power to prescribe approved countries would be subject to the affirmative procedure.

d. House of Lords debate

In the Lords second reading debate, Lord Filkin confirmed that the Bill has been influenced by judgments of the European Court of Human Rights.⁵⁸

Under the Bill, it would not be necessary to undergo gender reassignment surgery in order to gain recognition in the acquired gender. Indeed, Lord Filkin said specifically that the test would not be:

whether the person's physiology fully conforms to the acquired gender, nor whether the person "looks the part".⁵⁹

⁵⁷ Bill 56-EN, paragraph 15

<http://www.publications.parliament.uk/pa/cm200304/cmbills/056/en/04056x--.htm>

⁵⁸ HL Deb 18 Dec 2003 c1288

⁵⁹ HL Deb 18 December 2003 c1289

In Grand Committee, Lord Filkin confirmed the Government's position about why surgery was not a requirement for recognition in an acquired gender:

We could have included the further test, which some European Union countries impose, of requiring surgery. We have not done so for a number of reasons. In some cases, there will be medical reasons why the person cannot or should not have surgery. It therefore did not seem to us right to deny them, if every other factor seemed to indicate that they are genuinely showing clear evidence of an intent to live in that gender for ever. As we know that most transsexuals do seek surgery, in cases where the person has not had surgery we would expect the panel not to treat that as *prima facie* evidence that there was doubt, but at least to question why surgery had not taken place. It might, just possibly might, have a bearing on the seriousness of the intent.⁶⁰

This issue was also debated on Report when Lord Filkin confirmed the evidential requirements for someone who had not undergone surgery:

(W)here a person has not had surgery I would expect the panel to be more alert in inquiring whether there were sufficient evidence of commitment to a permanent change. That is not the same as saying that a person who has not had surgery should not be recognised. It is to say that the panel would want to inquire why the person had not had surgery. If it was because at heart there was doubt in the person's mind about whether he or she was going to make a committed and permanent change the panel would not grant a gender certificate. I do not think that we are at risk in this respect. The panel is likely to want to inquire more in such circumstances.⁶¹

Lord Tebbit took exception with the basic proposition that it was possible to change sex at all. This was a point he raised on several occasions. In the second reading debate he said:

Sex cannot be changed. ... Sex is decided by the chromosomes of a human being. If we have XX chromosomes, we are women; if we have XY chromosomes, we are men. I might perhaps accept the Bill if an additional requirement for registering changes of gender were that it had been discovered that those concerned had inappropriate chromosomes for the sex in which they had been registered. That is the only way in which the Bill could avoid telling a lie. So far as I know, there is no law nor any known medical procedure that can change the sex of a human being. The Bill purports to do so. It is therefore an objectionable farce.

Moral and constitutional issues are also involved. The Bill requires members of a gender recognition panel, on the production of certain evidence, in broad terms to certify that a person who was born a woman, lived as a woman, married as a

⁶⁰ HL Deb 13 January 2004 c10GC

⁶¹ HL Deb 29 January 2004 c375

woman and has borne children is, despite all that, entitled to be issued with a birth certificate falsely professing that she was born as a male child. That cannot be anything other than a lie. It is a lie that the state would require its servants, such as the Registrar General, to certify as a truth.⁶²

On the first day of Grand Committee Lord Filkin confirmed:

It is fundamental to the Bill that legal recognition is given to transsexual people on the basis of their gender regardless of their chromosomal sex.⁶³

In the debate on Report, Lord Filkin confirmed that he did not consider the distinction between the terms 'gender' and 'sex' to be important:

Therefore, the Bill is about legal recognition and it will define a person's sex in law. We consider the arguments about the meaning of the words "sex" and "gender" to be beside the point. There is no stark dichotomy between the meaning of the words. Language, as I said, is fluid. Our sense of the words "sex" and "gender" has changed over time and no doubt will do so in the future. While the meaning of the word "sex" is not the same as that of "gender", the word "sex" is increasingly in use in ways that go beyond a narrow biological definition.⁶⁴

Following a recommendation from the Delegated Powers and Regulatory Reform Committee, the Government introduced an amendment on Report which would have the effect of ensuring that the power to specify 'approved countries' in terms of applications from individuals who already have recognition overseas, is subject to the affirmative rather than the negative resolution procedure. Lord Evans of Temple Guiting, Government Spokesperson for the Department of Constitutional Affairs, had previously said, in Grand Committee, that this would ensure that in the future Parliament would be able to exercise proper scrutiny over the criteria by which the list of approved countries or territories is drawn up.⁶⁵

On Report, the Crossbencher Lord Chan, proposed that two medical members be appointed to all Gender Recognition Panels, particularly in the light of the difficulties caused by the use of one expert witness in criminal cases involving more than one sudden infant death in a family. Lord Filkin pointed out that the medical member of the panel would be there not to make a diagnosis (this would be provided by the person practising in the field of gender dysphoria) but so that the medical evidence could be properly understood. On question, this amendment was negatived.⁶⁶

⁶² HL Deb 18 December 2003 c1304

⁶³ HL Deb 13 January 2004 c3GC

⁶⁴ HL Deb 29 January 2004 c366

⁶⁵ HL Deb 13 January 2004 c29GC

⁶⁶ HL Deb 29 January 2004 c377

2. Evidence

a. *The Report of the Joint Committee on Human Rights*

The Joint Committee on Human Rights considered that, generally, the required statements and evidence are limited to what is necessary to establish that the application meets the criteria for recognition and to protect the other party to any subsisting marriage:

It follows, in our view, that applicants are very unlikely to be subjected, through the need to provide evidence to the Panel, to a violation of their right to respect for private and family life under ECHR Article 8.

On balance, the Committee accepted that it is appropriate to ask for details of treatment to modify sexual characteristics where such treatment has been or is being received or planned.⁶⁷ They accepted the force of the Government's argument that a willingness to receive treatment is very important as evidence that the applicant is suffering from gender dysphoria and intends to live permanently in the acquired gender.

b. *The Bill*

Clause 3 would set out the evidence required to support an application. This would include:

- a report from a registered medical practitioner or chartered psychologist practising in the field of gender dysphoria which includes details of the diagnosis of the applicant's gender dysphoria;
- a separate report from another registered medical practitioner (who need not be a gender dysphoria specialist);
- a statutory declaration by the applicant that they have lived in the acquired gender for two years and intend to do so for the rest of their life, and as to whether the applicant is married or not;
- any other information or evidence that the Gender Recognition Panel or the Secretary of State (by order) requires. The panel must give its reasons for requiring any further information or evidence.

At least one of the reports would have to include details of any treatment that the applicant has undergone, is undergoing or that is prescribed or planned, for the purposes of modifying sexual characteristics.

The applicant would also be able to include other information or evidence.

⁶⁷ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, paragraph 65
<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

The evidence to be supplied by a person applying for gender recognition on the basis that they have legally changed their gender in another country is modified and would include evidence of that legal change.

A requirement to produce a birth certificate, which was in the draft bill, is no longer included.

c. House of Lords debate

In Grand Committee, Lord Goodhart pressed for an amendment to require the Panel to give their reasons if they need to request further information.⁶⁸ The Government agreed and introduced an amendment on Report.

On Report, Lord Goodhart also pressed for the content of the application form to be set by order, not subject to a parliamentary procedure.⁶⁹ Again, the Government agreed and introduced an amendment at third reading.

In each case, the amendments reflected the concerns of the Delegated Powers and Regulatory Reform Committee.⁷⁰

3. Successful applications and married applicants who have acquired a new gender since marriage

a. Report of the Joint Committee on Human Rights

A person who is validly married in his or her birth gender would be unable to obtain a full gender recognition certificate unless the marriage is first annulled or dissolved. The Joint Committee on Human Rights expressed its concern at this proposal:

When we initially examined the Draft Bill we were deeply concerned about the way that people in stable marriages, perhaps with dependent children and strong family ties, would be pushed into ending the marriage if one of the parties suffers from gender dysphoria and wants legal recognition of his or her acquired gender. A number of the people who sent us written evidence provided eloquent testimony to the heartache and hardship which this might cause. As well as the emotional costs, the ending of a marriage could affect people financially, by depriving a surviving partner of widow's benefits or of the benefit of a pension, or of a right to damages under the Fatal Accidents Acts. It was also pointed out

⁶⁸ HL Dec 13 January 2004 c 43GC

⁶⁹ HL Dec 29 January 2004 c 380

⁷⁰ House Of Lords Delegated Powers and Regulatory Reform Committee, Third Report of Session 2003-04, 8 January 2004, HL Paper 17, <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/17/17.pdf>

that the approach gives relatively little weight to the value of maintaining family life and the sacredness of marriage vows.⁷¹

The Committee noted the Government's stance that it does not want to sanction the idea that there can be a valid marriage between two people of the same sex or gender. However, the Committee recommended that the Government reconsiders its position:

We therefore recommend that the Government should reconsider the requirement for a party to a subsisting marriage to end the marriage before obtaining a full gender recognition certificate (clause 3(3) and (5)).

If the Government decides as a matter of principle that the requirement should remain part of the legislation, we recommend that transitional provision should be made to ensure that the requirement will not apply to applications made to Gender Recognition Panels until such time as the relevant provisions of the proposed civil partnership legislation are in force to allow the parties to the marriage to enter into such a partnership with legal consequences.

We recommend that the gender recognition legislation should relieve the parties to the marriage of any adverse financial and fiscal consequences of the ending of the marriage by reason of the provisions of the legislation, as long as the parties enter into a civil partnership within a reasonable time if and when the civil partnership legislation is in force.⁷²

b. *Government response*

The Government confirmed that it considered there to be a matter of principle at stake which prevented it from acceding to the Committee's recommendation:

UK law defines marriage as being between two people of the opposite legal gender. The Government does not intend to see that position changed. Marriage is a distinct institution for opposite-sex couples and the Government believes that it should remain so. We are now planning to legislate so that a same-sex couple can also gain legal recognition for their relationship. This institution of civil partnership will be available to married couples after one partner receives recognition in the acquired gender.

Acquiring a new gender brings with it all the rights, responsibilities and restrictions that currently exist in UK law. In deciding whether to seek legal recognition in the acquired gender a person has to take all of the implications of that change into account, including the effect on an existing marriage. Great care has been taken to ensure that the Bill provides the smoothest possible mechanism

⁷¹ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, paragraph 85,

<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

⁷² *Ibid* paragraphs 89-91

to allow a married person to apply to the panel first and seek dissolution of the marriage only when they are assured that a full gender recognition certificate will then be issued.

The practical effects of the dissolution of marriage can be dealt with by the court on making the annulment, for example by a pension-sharing order, or by making provisions regarding the children of the family. The Government will also ensure that, in the development of the draft Bill on civil partnership, the interests of couples who are registering a civil partnership after having previously been married are borne in mind. The Government is keen that the relationship between these two important measures is properly thought through. In particular, as part of the civil partnership proposals, the Government is considering ways in which the gap between the ending of a marriage and the formation of a civil partnership could be minimised. We would hope that the period during which the relationship of the parties has no legal status could be as short as one day.

Should the Gender Recognition Bill be enacted and implemented prior to the civil partnership legislation, it will be for a married transsexual person to decide whether to wait for the implementation of civil partnership proposals or whether to seek gender recognition as soon as the Gender Recognition Panels are in place.⁷³

c. The Bill

Clause 4 would contain details about successful applications. If the Gender Recognition Panel grants an application, it would issue a full gender recognition certificate. However, if the applicant is married, the applicant would not receive the full gender recognition certificate until the marriage is ended. Meanwhile the applicant would receive an ‘interim gender recognition certificate’ (IGRC), which would have no effect except that either the person or their spouse could use it as the basis for an application to court to annul the marriage (England and Wales) or for divorce (Scotland). Proceedings for dissolution on this basis would have to be begun within six months of the issue of the IGRC. **Schedule 2** would contain further provisions relating to the annulment or dissolution of marriage after the issue of an IGRC.

Clause 5 would provide for the subsequent issue of a full certificate to anyone initially granted an interim certificate. This would be automatic if the marriage is ended on the ground that an IGRC has been issued.⁷⁴ If, however, an IGRC has been granted and the marriage is dissolved or annulled on some other ground in proceedings instituted within six months of the issue of the IRGC, or the person’s spouse dies within six months of the issue of the IGRC, the transsexual person would be able to apply for a full certificate

⁷³ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003, <http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

⁷⁴ In the draft bill the applicant would have had to apply for this.

within six months of the dissolution or annulment of the marriage or the death. This would effectively place a time limit of six months on an IGRC and would be a new provision which was not included in the draft Bill.

d. House of Lords debate

In the second reading debate, Lord Filkin acknowledged the recommendation of the Joint Committee on Human Rights that existing marriages should not have to end. However, he confirmed the principle that marriage is an institution for opposite sex couples and that the Government would not change the fundamental nature of the institution of marriage to allow same sex couples to marry. If the civil partnership legislation is enacted, a couple who would have to end their marriage in order that one party might obtain a full gender recognition certificate, would be able to enter into a civil partnership the day after the marriage was dissolved.⁷⁵

Lord Filkin expressed the hope that the *Civil Partnership Bill* would be enacted in this session but said that if there was a gap between the two pieces of legislation:

[O]ne would expect anyone who wished to avoid making themselves subject to the legal anomaly to wait before they applied for gender recognition change as a consequence. That would be their right and their freedom of choice.⁷⁶

In Grand Committee, Lord Goodhart expressed concern at the effect of a gender recognition certificate on an existing marriage:

The Government say that the law must not recognise a marriage between a couple who are seen in law as being of the same sex. It may well be justifiable to say that marriage can be entered into only between a couple of the opposite sex, but it does not follow logically that a marriage validly entered into must be annulled before the gender change can be recognised by law. If the couple were legally married originally and wished to continue their marriage, I believe that it would be wrong to present them with the dilemma either of having to terminate the marriage, which both wish to keep, or of depriving one of them of the right to legal recognition of gender change.⁷⁷

The Lord Bishop of Winchester cast doubt on the Government's proposed solution of civil partnerships for such couples:

It cannot be the case that there is an equivalence between marriage on the one hand and civil partnership on the other. The notion that there can be a seamless

⁷⁵ For more information about the proposed civil partnership legislation see Library Standard Note SN/HA/2205, *Civil Partnership Registration Scheme*.

⁷⁶ HL Deb 18 Dec 2003 c1321

⁷⁷ HL Deb 13 January 2004 c 44GC

join means that we are into dusk and dawn again. There cannot be a seamless join between two significantly different relationships.⁷⁸

On Report, the Lord Bishop of Winchester also considered the Government's responsibility in relation to marriage:

If people have committed themselves to a marriage, whether or not out of a religious understanding, of any faith, it is part of the Government's responsibility to sustain that marriage if they wish to sustain it; ... To force them to be broken apart and then to suggest that they be placed in some other legal relationship which—quite apart from the fact that it does not yet exist—if it were to exist, they do not want, is not a sustainable way of behaving on the part of the Government.⁷⁹

In Grand Committee, Lord Filkin confirmed that couples had a choice:

Acquiring a new gender brings with it—it is tough but true—all the rights, responsibilities and restrictions that currently exist in UK law. We believe that it is not possible, nor is it right to have a mix-and-match situation. In deciding whether to seek legal recognition in the acquired gender a person has to take all of the implications of that change into account, including the effect on an existing marriage. My noble friend Lady Hollis ... will also signal that and it applies to all the financial and relationship implications.⁸⁰

Lord Filkin also explained the reasoning behind the proposal to have Interim Gender Recognition Certificates:

In this way, the Bill proposes to avoid the situation where a married applicant must first end his or her marriage and only then learn whether his or her application meets the criteria for a gender change. The process provided in the Bill prevents the applicant falling into the vulnerable position of learning that his or her application has been unsuccessful after having already ended his or her marriage. The applicant is therefore in control of the process and able to plan his or her affairs.⁸¹

Baroness Buscombe regretted that the proposed civil partnership bill had not been debated first and proposed that the *Gender Recognition Bill* should not take effect until the civil partnerships bill is in force. Lord Filkin pointed out the unfairness that this might cause:

⁷⁸ HL Deb 13 January 2004 c51GC

⁷⁹ HL Deb 29 January 2004 c395

⁸⁰ HL Deb 13 January 2004 c52GC

⁸¹ HL Deb 13 January 2004 c52GC

I do not believe that anything is gained by preventing transsexual people from applying for gender recognition until the civil partnerships Bill is enacted. In other words, the vast majority of this group, who are not married, therefore should have the right to exercise their right to change their gender, while the others, who cannot as yet avail themselves of civil partnerships, can exercise the option I indicated of waiting until the civil partnerships Bill is enacted. That is a better remedy than saying nothing must happen at all until there are civil partnerships.⁸²

On Report, Lord Filkin gave an indication of the proposed time scale for implementation of this Bill and the civil partnership legislation:

We also signalled at earlier stages of the Bill that we intend to bring in the civil partnership Bill. When that is enacted, if people so wish, they can have a legal relationship, sustaining their emotional relationship, but it will not be marriage. On the timing of that, we intend to bring that Bill into the House as a substantive Bill before Easter and, if it passes, it will become legislation and implementable by about October 2005. This Bill, if and when it passes, will become legislation by April 2005. Therefore, there will be a short gap of some six months between our best forecast of when the two Bills will be in place. Those who do not want to go into a legal limbo, awaiting civil partnership, after their divorce as a result of gender change recognition, will not need to do so; they can wait until the civil partnership process is in place.⁸³

Lord Filkin also confirmed the numbers involved:

(T)here is a small number of marriages, thought to be in the order of 50, in which one party to the marriage is a transsexual person who wishes to obtain the same right as other transsexual people to legal recognition in their required gender, while both parties wish to keep the marriage in existence.⁸⁴

On Report, an amendment moved by Lord Goodhart, Lord Carlile of Berriew (Liberal Democrat Spokesperson for Wales), and the Bishop of Winchester, which would have removed the provisions relating to Interim Gender Recognition Certificates was defeated by 120 votes to 33. Those voting against the amendment included the Bishop of Chester who expressed the view that:

I believe that it comes down to which decision would best uphold the dignity and institution of marriage in our country. We are caught between our absolute sympathy for the individuals concerned, which the noble Lord, Lord Goodhart, and my noble friend expressed, and an unholy alliance.⁸⁵

⁸² HL Deb 13 January 2004 c 54GC

⁸³ HL Deb 29 January 2004 c402

⁸⁴ HL Deb 29 January 2004 c392

⁸⁵ HL Deb 29 January 2004 c400

4. Errors in certificates, applications, fees and appeals

a. *The Bill*

Clauses 6 to 8 would set out provisions relating to errors in certificates, applications and appeals.

An application would have to be made in a specified form and a non-refundable fee would be payable, unless the application is made in circumstances in which it has been specified that no fee is payable. The fee might differ according to circumstances. Fees for an application to a Gender Recognition Panel would be prescribed by order subject to the negative resolution procedure (**Clauses 7(2) and 24(4)**).

It is not clear at what level the fee will be set. The Final Regulatory Impact Assessment includes the following comment:

The Bill provides for the creation of a new Gender Recognition Register and for the issue of new birth certificates showing the acquired gender. The Office of National Statistics estimates an initial cost of £0.2m; thereafter the cost will be absorbed under the normal operational budget.⁸⁶

The Department for Constitutional Affairs has commented:

It is quite normal for people to pay for a whole range of services, for example, passports, birth and marriage certificates, drivers' licences, and applications to the civil courts for a variety of issues. Applications for legal recognition in an acquired gender will be no different.⁸⁷

However, Press for Change has estimated the costs for applicants at between £709 and £1640, of which the application fee is estimated to be between £440 and £833.⁸⁸

If the Panel rejects the application, the applicant would not be able to make another application for at least six months, but would be able to appeal the refusal to the High Court on a point of law. The appeal would have to be heard in private if the applicant so requests.

The Secretary of State would have the right to refer the case to the High Court or Court of Session if he considers that the grant of a certificate was secured by fraud.

⁸⁶ <http://www.dca.gov.uk/risk/grbria.htm>

⁸⁷ Department for Constitutional Affairs, Applying for legal recognition- *Frequently Asked Questions*, January 2004, <http://www.dca.gov.uk/constitution/transsex/applyfaq.htm#part4>

⁸⁸ Submission to the Joint Committee on Human Rights Regarding the Draft *Gender Recognition Bill*, Press for Change, September 2003 <http://www.pfc.org.uk/gr-bill/jchr-sub.pdf>

b. *House of Lords debate*

In Grand Committee, Lord Goodhart, supported by Baroness Buscombe, pressed for an amendment in accordance with comments made by the Delegated Powers and Regulatory Reform Committee. They wanted to require orders prescribing forms and fees under Clause 7 of the Bill to be made by Statutory Instrument. Lord Filkin acceded:

Subsection (2) allows the Secretary of State to set the fee or fees. The Bill confers that power on the Secretary of State to enable a degree of flexibility. However, since the Bill was drafted I have considered the matter in detail in the context of fees for other judicial matters and have come to the conclusion that, given the arguments advanced, this situation should be changed. Of course, such fees are routinely changed. They are increased annually with inflation. Furthermore, given that Parliament has oversight of court fees and the like, it seems to me that it is right to extend the power to fees for applying to the panel. Therefore, I accept the spirit of the amendment and shall introduce a government amendment on Report to give effect to that.⁸⁹

The amendment was duly made and now appears as Clause 7(2).

B. Consequences of issue of gender recognition certificate

These would be set out in **Clauses 9 to 21** which would include provisions relating to:

- General recognition in acquired gender
- Issue of new birth certificate
- Marriage
- Parenthood
- Social security benefits and pensions
- Discrimination
- Sport

1. General recognition in acquired gender

A full gender recognition certificate would make the recipient's gender the acquired gender for all purposes. However, this would be prospective only and so would not validate a marriage which was invalid at the time when the parties went through a ceremony of marriage (because, at the time of the ceremony, one partner was a transsexual person whose acquired gender had not been formally recognised).

⁸⁹ HL Deb 13 January 2004 c62GC

Therefore, couples in the same situation as the Bellingers⁹⁰ would have to go through a further ceremony of marriage following the issue of a gender recognition certificate to the transsexual partner.

a. *Report of the Joint Committee on Human Rights*

The Joint Committee on Human Rights acknowledged that this particular provision provoked a good deal of concern among respondents to the Committee's consultation exercise and that the Government had stated its position on this issue in correspondence with the Committee.⁹¹

The Committee concluded:

On balance, we are not convinced that the difficulties which influence the Government's approach are insuperable, or that the suggestion that some retrospective effect for recognition of acquired gender would lead to same-sex marriage being legally recognised is correct. We recommend that the Government should give further thought to the possibility of giving retrospective recognition to a person's acquired gender from the date at which the person can show that he or she would have satisfied the requirements of clause 1(4) of the Bill had it been in force, at least for the purpose of deciding whether a marriage was void when entered into after that date.

We consider that this applies even more strongly to anyone who has entered into a ceremony of marriage since 11 July 2002 when the European Court of Human Rights gave judgment in *Goodwin v. United Kingdom* and *I. v. United Kingdom*. Since then, it has been well established that the UK has been in breach of international law by refusing to recognise the acquired gender for the purpose of marriage. There seems to us to be a particularly strong case for providing in the legislation for retrospective recognition of the acquired gender of a transsexual party to these marriages, and thus for the validity of the marriages themselves. We recommend that the legislation should include such provision.⁹²

In particular, the Committee considered that the parties involved in the litigation in the House of Lords and in the European Court of Human Rights should be rewarded for their endeavours. The Committee recommended that those litigants should have their acquired gender recognised by law from the earliest time at which they can show that they met the criteria for recognition set out in the legislation. This would have the effect of retrospectively validating any marriage entered into after that time.

⁹⁰ See part I F of this paper above

⁹¹ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>
The Committee summarises the position in paragraph 39

⁹² *Ibid* paragraphs 42 and 43

b. *Government response*

Notwithstanding the recommendations of the Joint Committee, the Government confirmed its existing stance that the Bill would have no retrospective effect:

Having looked again at the issues raised by the Joint Committee, we can see no compelling reason to change this position. The laws relating to legal status, and matters related to legal status, such as marriage, or benefits and pensions, should only have prospective effect. Therefore, it will in all cases be necessary for transsexual people to apply for legal recognition in their acquired gender. Recognition will take effect from the day that an application is granted.

If the Bill is enacted, a successful applicant will be entitled to contract a marriage in his or her acquired gender. The Joint Committee places emphasis on the perceived need to give retrospective recognition to the acquired gender of a transsexual person, who is a party to a marriage. Whether that 'marriage' took place before or after 11 July 2002 is academic. It is a simple fact that any such marriage contracted in the UK is void and, as far as the law is concerned, has therefore never existed.⁹³

c. *The Bill*

A full gender recognition certificate would have the effect that the recipient's gender becomes for all purposes the acquired gender⁹⁴ (**Clause 9**). The Government amended the original clause in the draft bill in accordance with a recommendation of the Joint Committee on Human Rights that the clause should be clarified in order to ensure that the legislation would achieve its intended effect.⁹⁵

d. *House of Lords debate*

On Report, Baroness O'Cathain questioned whether the breadth of the clause was necessary and whether this amounted to 'gold-plating'.⁹⁶

Lord Filkin refuted this suggestion:

We can ensure compliance with international obligations only by ensuring that a person has recognition for all purposes. To avoid doubt, even if we did not have that obligation, we would want, as a position of policy, to be consistent on this.⁹⁷

⁹³ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003, paragraphs 8 and 9

<http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

⁹⁴ Subject to an exception relating to inheriting peerages

⁹⁵ See part II A 1 a above

⁹⁶ HL Deb 29 January 2004 c407

⁹⁷ HL Deb 29 January 2004 c411

2. Issue of new birth certificate

a. *Report of the Joint Committee on Human Rights*

The Joint Committee on Human Rights considered that, taking into account the whole set of safeguards relating to registration and the issue of certificates, the interest of transsexual people in confidentiality and their right to respect for private life under ECHR Article 8 would be properly safeguarded by the measures contained in the draft Bill.⁹⁸

b. *The Bill*

Clause 10 and **Schedule 3** would contain provisions relating to the issue of certificates. The Registrar General would be required to maintain a Gender Recognition Register which would not be open to public inspection or search. In the draft Bill, this was originally referred to as the Transsexual Persons Register, but the name was revised at the suggestion of the Joint Committee on Human Rights as several people thought the original title demeaning.

When a full gender recognition certificate is issued, an entry would be made in the Gender Recognition Register and the original birth register entry would also be marked. The Registrar General would make the connection between the two registrations traceable but this information would not be open to public inspection or search.

It would be possible to apply for a new birth certificate and this would not disclose that it has been compiled from the Gender Recognition Register.

The Government's Explanatory Notes state:

32. Paragraph 3 [of Schedule 3] ensures that the issue of a gender recognition certificate obliges the Registrar General to make an entry in the GRR and to mark the original entry referring to the birth (or adoption) of the transsexual person to show that the original entry has been superseded. This will ensure that caution is exercised when an application is received for a certificate from the original birth (or adoption) record. If applicants for a birth certificate provide details of the name recorded on the birth certificate, they will be issued with a certificate from the birth record. If they supply the details recorded on the GRR, they will receive a certificate compiled from the entry in the GRR. The mark linking the two entries will be chosen carefully to ensure that the fact that an entry is contained in the GRR is not apparent. The mark will not be included in any certificate compiled from the entries on the register.⁹⁹

⁹⁸ *Ibid* paragraph 73

⁹⁹ Bill 56-EN <http://www.publications.parliament.uk/pa/cm200304/cmbills/056/en/04056x--.htm>

Schedule 3 Paragraph 11 has been amended in line with a recommendation of the Delegated Powers and Regulatory Reform Committee.¹⁰⁰ The Government's Explanatory Notes state:

37. Paragraph 11 gives the Chancellor of the Exchequer an express power to make an order amending Part 1 of this Schedule in consequence of any Order made under the Regulatory Reform Act 2001 which includes provisions in relation to the system of registration of births and adoptions in England and Wales. Any such order must, by clause 24(3) of the Bill, be made by the affirmative resolution procedure. The processes have already begun for making an Order under the Regulatory Reform Act which will reform the legislation relating to the registration of births, marriages and deaths. This Order will come before parliamentary committees later in 2004. Because of the restrictions contained in the Regulatory Reform Act (which prevent, for example, an Order made under that Act reforming any law passed less than two years before the Order is made) it will not be possible for that Order to contain provisions amending this Schedule. Without this provision, the Order will either have to be delayed, or the GRR will need to be kept in the 'old' format even though the format of other registers has been updated.¹⁰¹

c. House of Lords debate

In Grand Committee, in response to concerns voiced by several peers, Lord Filkin confirmed the position relating to original birth records:

The original birth records will not be destroyed. The Bill does not rewrite history. The original birth records will remain in existence and will be available to any person who has the relevant birth details. Therefore, a child or grandchild will be able to search for, and obtain a copy of, the original birth record entry. The Bill requires no amendment to ensure that result and I am glad to be able to confirm that.¹⁰²

On Report the Lords also debated why transsexual people should be entitled to privacy. Lord Tebbit proposed an amendment, and was supported by Lord Elton and Lord Chan, which would have enabled general access to the Gender Recognition Register.¹⁰³ After debate, the amendment was withdrawn.

¹⁰⁰ House Of Lords Delegated Powers and Regulatory Reform Committee, Third Report of Session 2003-04, 8 January 2004, HL Paper 17, paragraphs 11 and 12,
<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/17/17.pdf>

See also part I H of this paper above

¹⁰¹ *Ibid*

¹⁰² HL Deb 13 January 2004 c41GC

¹⁰³ HL Deb 29 January 2004 c413

Baroness Hollis of Heigham, Parliamentary Under-Secretary of State, Department for Work and Pensions, explained the position relating to birth certificates:

Basically, there will be two birth certificates. The original birth certificate will not be destroyed. If someone goes to the registrar he could be provided with a copy of the certificate requested. The original birth certificate remains. Anyone knowing the original name, date and place of birth—as one would expect a child or grandchild with access to relatives in the family to know—would be able to obtain it.

The certificate consists of either the original birth entry or the entry on the gender recognition register, which is the alternative. Both will be genuine. There can be no question of the registrar having to lie. So the original records are there. Those who are privy to such information—usually because they are the son, daughter or a grandchild, and it may have some concern for them if there is a medical history and so on—would be able with that information, as now, to get to the original records. But if we do not have that—so to speak—firebreak, there is no protection to privacy.¹⁰⁴

3. Marriage

a. *The Bill*

A clergyman in the Church of England or the Church of Wales would not be obliged to solemnise the marriage of a person whom he reasonably believes has a gender recognition certificate (**Clause 11** and **Schedule 4**). The ‘reasonable belief’ provision was introduced into this ‘conscience clause’ by the Government in an attempt to overcome concerns about how the clergy would know whether a person who approached them for marriage had a gender recognition certificate.

The Explanatory Notes state:

No such provision is needed for Northern Ireland or Scotland as there is no obligation to solemnise marriages on the clergy of churches in those jurisdictions.¹⁰⁵

If at the time of a marriage, one party to the marriage did not know that the other was previously of another gender, the former would be able to seek to annul the marriage (**Clause 11** and **Schedule 4**).

¹⁰⁴ HL Deb 29 January 2004 c421

¹⁰⁵ Bill 56-EN, paragraph 41,
<http://www.publications.parliament.uk/pa/cm200304/cmbills/056/en/04056x--.htm>

b. House of Lords Debate

In the second reading debate, the Conservative peer, Baroness O’Cathain, considered the notion of allowing transsexual people to marry in their acquired gender to be a fiction:

How can the Government abuse their position of power by creating a legal fiction allowing a biological man to marry a legal but non-biological woman, while maintaining that they support only the marriage of opposite sex couples, as the Minister said? How can we have a legal woman who is a man? How can any government create and dictate such a ridiculous and nonsensical category? It is against all reality, natural senses and scientific fact.¹⁰⁶

On Report, Lord Tebbit introduced an amendment, which would have provided:

Notwithstanding any other provisions of the Gender Recognition Act 2004, no two persons each possessing XX chromosomes nor each possessing XY chromosomes, nor each possessing genitalia appropriate to the same sex, may be married the one to the other.¹⁰⁷

This issue was also debated in Grand Committee. On Report, the House divided and the amendment was defeated by 121 votes to 46.

Lord Tebbit considered that the Bill opened the door to same-sex marriages.

In Grand Committee, the Lord Bishop of Winchester supported this point:

It is perfectly in order for myself and others to argue that if one does not believe that gender or sex is changed in gender reassignments—and it is interesting that we are using words such as "assign" or "reacquire"—then it is clear that in the current wording of the Bill, if a person marries someone with an acquired gender, one will have a same-sex marriage, which the Government have consistently and admirably said they do not intend to make legal.¹⁰⁸

Lord Goodhart disagreed on the basis that the ability to marry a person of the opposite sex is one of the most important features of gender:

If someone is recognised by law as having acquired a new gender, but has no possibility of marrying a person of his or her previous gender, that person loses a central element of his or her acquired gender.¹⁰⁹

¹⁰⁶ HL Deb 18 Dec 2003 c1312

¹⁰⁷ HL Deb 3 February 2004 c616

¹⁰⁸ HL Deb 13 January 2004 c11-12GC

¹⁰⁹ HL Deb 13 January 2004 15GC

On Report, the Labour peer, Professor Lord Winston, gave a full explanation of the complicated definition of sex¹¹⁰ and concluded:

There are so many different fluctuations in this broad spectrum of sexuality that I urge the House to be very cautious about defining it in terms of chromosomal, genital or any other simple definition. It simply is not medically just, and I am sure that it would produce bad law.¹¹¹

Lord Filkin set out the Government's position:

Marriage in our society is a status for two parties of the opposite gender in law. The Bill retains that principle, hence the basic nature of marriage as an institution.¹¹²

In Grand Committee, an amendment was moved by Baroness Buscombe which would have inserted a 'conscience clause' for registrars, similar to that for clergymen in the Church of England and Church of Wales. Baroness O'Cathain supported this and drew a comparison with the position under the *Abortion Act 1967*, where a conscience clause was given to public sector employees such as doctors and nurses who conscientiously objected to performing abortions. Baroness Hollis of Heigham confirmed that registration officers have no legal grounds on which to refuse to conduct marriages as this forms part of their job.¹¹³ The amendment was withdrawn.

At third reading, Lord Filkin again explained why a conscience clause was not necessary for ministers of religions other than the Church of England and the Church of Wales:

The issue at heart is that no minister of religion other than an Anglican clergyman—a Muslim or Baptist minister, for example—is obliged by law to solemnise a marriage. Nothing in the Bill changes that; they are at perfect liberty to continue to refuse to solemnise a marriage of anyone whom they know or believe to be a transsexual.¹¹⁴

c. *Parliamentary question*

The Government's position on the marriage of a person with a gender recognition certificate was confirmed in an oral answer:

¹¹⁰ See part III B of this paper, below.

¹¹¹ HL Deb 3 February 2004 c620

¹¹² HL Deb 3 February 2004 c622

¹¹³ HL Deb 14 January 2004 c85-91GC

¹¹⁴ HL Deb 10 February 2004 c1073

Lord Tebbit asked Her Majesty's Government:

Whether they regard the marriage of two persons each possessing the chromosomes and sexual organs of the same sex as being a same-sex marriage.

The Parliamentary Under-Secretary of State, Department for Constitutional Affairs (Lord Filkin): My Lords, the Government believe that marriage should be possible only between people of opposite gender in law. The Gender Recognition Bill will enable transsexual people who have gained legal recognition in their acquired gender to marry someone of the opposite legal gender. Marriages contracted by transsexual people, once their change of gender has been legally recognised, will be valid marriages between a male and a female, not same-sex marriages.¹¹⁵

4. Parenthood

A person's status as the father or mother of a child would be unaffected by the issue of a gender recognition certificate. This would mean that a person would remain, legally, the mother or father of a child despite the fact that they would be recognised as a man or woman respectively (**Clause 12**).

5. Social Security Benefits and Pensions

a. The Bill

Amendments to the law relating to social security benefits and pensions would be effected by **Clause 13** and **Schedule 5**. The provisions are technical and would seek, in general, to ensure that transsexual people are treated according to their acquired gender. One consequence would be that female-to-male transsexual people who have already reached the age of 60 (the current age at which a woman reaches pensionable age for the purposes of state retirement pensions) but not the age of 65 (the current age at which a man reaches pensionable for the purposes of state retirement pensions), would lose their immediate pension entitlement and would qualify only when attaining the age of 65. Conversely, a male-to-female transsexual person aged between 60 and 65, would be treated as attaining the pensionable age for a woman when a full recognition certificate is issued. The Explanatory Notes set out details of how the specified benefits and pension provisions would be affected.¹¹⁶

Press for Change has said:

A quick review of membership of the FTM Network shows only 13 transsexual men who into this group fall, that is who are between the ages of 60 and 65. A

¹¹⁵ HL Deb 11 February 2004 c1093

¹¹⁶ Bill 56-EN, paragraphs 45 to 78,
<http://www.publications.parliament.uk/pa/cm200304/cmbills/056/en/04056x--.htm>

breakdown shows that there are 2 members aged 64, 3 aged 63, 4 aged 61, and 4 aged 60. There are also 3 who will be aged 60 in the 2004, and 3 who will be 60 in 2005. Bearing in mind the 800 strong membership of the FTM network, Press For Change would gauge the actual number is around twice that.¹¹⁷

b. *House of Lords debate*

Lord Carlile of Berriew repeatedly drew attention to the problem facing older female-to-male transsexual people in relation to their pensions. He pointed out that these individuals have planned their lives on the basis that they would be treated as being female for life and so would get their pension at the age of 60. Lord Carlile urged that their pension rights should be protected.¹¹⁸

Baroness Hollis of Heigham confirmed that this situation would cease to exist in the future: the pension age for men and women will begin to be equalised from 2010 and that will be completed by 2020.¹¹⁹

On Report, Lord Carlile of Berriew moved an amendment which would have entitled female-to-male transsexuals to be treated, for the purpose of their retirement pension, as if no gender recognition certificate had been issued if they were at least 50 on the appointed day.¹²⁰ Baroness Hollis of Heigham made four points to refute this proposal:

First, that it is not fair to men in their birth gender if some men in their new acquired gender have a different entitlement. Secondly, in all logic one would have to extend the same principle to male to female transsexuals and therefore the majority of transsexuals could lose financially in this package if one takes the argument of the noble Lord. Thirdly, eligibility for income-related benefits is the same irrespective of gender acquired or at birth between the ages of 60 and 65. Finally, we are equalising gender state retirement ages.¹²¹

Lord Carlile of Berriew expressed his disappointment at this answer and pointed out that it was not satisfactory that a non-income related benefit would be replaced by an income-related benefit in some cases. Nevertheless, the amendment was withdrawn.¹²²

6. Discrimination

It is already unlawful to discriminate against a person in relation to employment and vocational training on the grounds that they intend to undergo, are undergoing or have

¹¹⁷ Press for Change, *Gender Recognition Bill, Briefing for House of Lords Grand Committee*, 7 January 2005, <http://www.pfc.org.uk/gr-bill/pfc-lgc.pdf>

¹¹⁸ HL Deb 18 December 2003 c1302

¹¹⁹ HL Deb 14 January 2004 c94GC

¹²⁰ HL Deb 3 February 2004 c627

¹²¹ HL Deb 3 February 2004 c630

¹²² HL Deb 3 February 2004 c631

undergone gender reassignment.¹²³ However, this is subject to exceptions based on 'genuine occupational qualifications'. If the nature of the job requires a woman, it is open to the employer to show that it is reasonable to treat a male-to-female transsexual person as being unsuitable for that job. The Women and Equality Unit publication, *A guide to the Sex Discrimination (Gender Reassignment) Regulations 1999* explains the effect of the Regulations:

The Sex Discrimination (Gender Reassignment) Regulations 1999 clarify [the law of England Scotland and Wales] relating to gender reassignment. They are a measure to prevent discrimination against transsexual people on the grounds of sex in pay and treatment in employment and vocational training. This reflects a ruling by the European Court of Justice that the dismissal of an employee undergoing gender reassignment is contrary to the European Equal Treatment Directive. The UK (and all Member States) is obliged to implement such European law. The effect of the Regulations is to insert into the Sex Discrimination Act 1975 a provision which extends the Act, insofar as it refers to employment and vocational training, to include discrimination on gender reassignment grounds. Thus, for the purposes of employment and vocational training, discrimination on grounds of gender reassignment constitutes discrimination on grounds of sex, and is contrary to the Sex Discrimination Act. Employers who breach the Sex Discrimination Act 1975 in respect of discrimination on gender reassignment grounds will be liable in the same manner they would, for example, for discrimination against a woman on grounds of sex.¹²⁴

a. *Report of the Joint Committee on Human Rights*

The Joint Committee on Human Rights recommended that protection against discrimination should be extended so that it would also be unlawful to discriminate against people in the fields of education, housing and the provision of goods, facilities and services on the ground that they have undergone, are undergoing or plan to undergo sex reassignment. The Committee also recommended that the Government should consider whether it would be appropriate to limit protection to people who have obtained a full gender recognition certificate, bearing in mind that there is no such limitation in the provisions of section 2A of the *Sex Discrimination Act 1975* which applies to employment and vocational training.¹²⁵

¹²³ *Sex Discrimination Act 1975* and *Sex Discrimination (Northern Ireland) Order 1976* (S.I. 1976/1042 (N.I. 15)), as amended by the *Sex Discrimination (Gender Reassignment) Regulations 1999* (S.I. 1999/1102) and *Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999* (S.R.1999 No.311)

¹²⁴ http://www.womenandequalityunit.gov.uk/legislation/discrimination_act/gender_paginated.pdf

¹²⁵ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, paragraph 103, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

b. *Government response*

The Government rejected the Joint Committee's recommendation for the Bill to be amended and indicated that a recently published European Commission draft directive might be a better vehicle for any extension of the law:

The Joint Committee is proposing a significant further extension of protection against discrimination. Achieving this in a workable way is not as simple as the Joint Committee suggests. If the Government agreed the need for any such extension, it would need to be properly worked up into appropriate legislation. This would involve an evaluation of the nature of the problem; consideration of the implications and practicalities, including the nature of new burdens on business and the necessity for exceptions in any particular circumstances; and proper consultation with stakeholders. Neither the nature nor the timing of the Gender Recognition Bill makes it an appropriate vehicle for such an extension.

The European Commission has recently published a draft directive on sex discrimination in the field of goods and services. Negotiations on this directive will provide the opportunity for us to develop an approach that is shared with our European partners. The process of finalising the draft directive will also enable the Government to consider the detailed implications of extending the law in this way and any exceptions which might be needed to make such a law workable. In the Government's view the question of extending anti-discrimination protection is better considered in that context, and once a recognition system is in place, rather than in the context of the current Bill.¹²⁶

c. *The Bill*

Clause 14 and **Schedule 6** would ensure that, in relation to employment and vocational training, it would not be possible to discriminate against anyone with a full gender recognition certificate on the basis of the 'genuine occupational qualifications' exceptions.

d. *House of Lords Debate*

In the House of Lords there was concern about how the discrimination provisions might affect churches and faith communities. Issues relating to religion are discussed more generally in part III A of this paper below.

In Grand Committee, the Lord Bishop of Winchester proposed that churches and faith communities should be safeguarded against the effect of discrimination legislation when acting on the basis of doctrine or the deeply held religious convictions of a significant

¹²⁶ Response to the Joint Committee on Human Rights' Nineteenth Report of Session 2002-03, *Draft Gender Recognition Bill*, 16 December 2003, paragraphs 18 and 19, <http://www.dca.gov.uk/constitution/transsex/jchrresp.htm>

number of the followers of the religion, in matters of employment, appointment, selection for training for ordination and ordination itself.¹²⁷ A similar amendment was moved by the Lord Bishop of Southwell, on behalf of the Lord Bishop of Winchester, on Report.¹²⁸ In each case the amendment was withdrawn.

Lord Filkin referred to the Equal Treatment Directive which must be implemented by the UK by October 2005, which will change the situation relating to discrimination in any event. He indicated that the Women and Equality Unit in the DTI would be consulting the Church on the way in which it will be affected by the directive and on what exemptions may be permitted in relation to clergy, both in terms of discrimination with regard to women and discrimination against transsexual people. Lord Filkin confirmed that this matter would be dealt with in the context of the regulation which implements the directive:

I say that that is the right place to deal with the matter, first, because one must consider the totality of the situation and, secondly, because, even if there were no Gender Recognition Bill, the Government and the Churches would have to face this issue as a result of the EU directive. Therefore, I believe that that is the right place for it to be tested.¹²⁹

On Report, Lord Filkin confirmed the existing position:

In so far as the present position in law is concerned, office holders are not covered under the existing employment protection that is accorded to transsexual people. This will change with the implementation of the equal treatment directive, but this Bill will itself make no change to the existing position. That is why we have said before, and we say again today, that the discussions that have taken place with the Church will continue in preparation for that implementation.¹³⁰

On Report, Baroness O’Cathain moved an amendment, which was subsequently withdrawn, which would have allowed a church to refuse employment to a person who would not consent to the disclosure of any entry in the gender recognition register:

In a religious group the staff are bound together by very strong beliefs on fundamental issues and shared values. These are beliefs not about mundane matters such as management style or marketing techniques, but about human nature, right and wrong and the nature of truth.

Churches teaches us that our sex is decided by God. They also teach that your sex is a matter of absolute truth, not personal choice. I ask, how could a Church employ a transsexual who effectively believes that God got his sex wrong? How

¹²⁷ HL Deb 14 January 2004 c97GC

¹²⁸ HL Deb 3 February 2004 c638

¹²⁹ HL Deb 14 January 2004 c100GC

¹³⁰ HL Deb 3 February 2004 c640

can they employ a person who, in their eyes, lives a lie by impersonating the opposite sex?¹³¹

Lord Filkin explained why the amendment was unnecessary:

[T]he amendments seek to ensure that a person who has acquired a new gender under the Bill or who will not consent to disclosure of their entry in the gender recognition register is covered by the exemptions in Section 19(3) and (4) of the Sex Discrimination Act. Those subsections allow discrimination against those who are undergoing or have undergone gender reassignment in relation to employment, authorisation or qualification for the purposes of an organised religion, provided that this is done to comply with a religious doctrine or to avoid offence to the religious susceptibilities of a significant number of the religion's followers.

I am happy to be able to reassure the noble Baroness and the House that no addition to Section 19 is needed, as the existing provisions already do all that is needed.

[...]

The amendments suppose that a person who has acquired a new gender under the Bill applies for employment or ordination for the purposes of an organised religion but refuses to consent to the register being consulted. In this situation, if the Church refuses employment or ordination, it is very likely that the discrimination would be held to have been on the ground that the person has undergone gender reassignment. The Church will therefore be entitled to seek to rely on the relevant part of Section 19.

The Church will succeed under Section 19 only if it can show that the restrictions imposed satisfy the tests laid down in Section 19. In other words, the Church will have to show that the restrictions were imposed to comply with a religious doctrine or to avoid offending the religious susceptibilities of a significant number of the religion's followers, which is, I think, the thrust of the noble Baroness's amendment. The fact that the Church had not seen the gender recognition register would not prevent it from seeking to rely on this examination.¹³²

On Report, Lord Goodhart moved an amendment, (which was subsequently withdrawn) to extend protection against discrimination to the provision of goods and services as well as employment. The amendment would also have inserted a specific reference to those who have obtained a gender recognition certificate as well as to those who have undergone or may intend to undergo gender reassignment. Lord Filkin confirmed that an extension of protection against discrimination would require further work in the context

¹³¹ HL Deb 3 February 2004 c635

¹³² HL Deb 3 February 2004 c636-7

of negotiations on the European Commission Draft directive on sex discrimination in the field of goods and services.¹³³

7. Sport

Clause 19 was introduced into the Bill on Lords Report following discussions between the Government, UK Sport and the International Olympic Committee (IOC) and extensive representations in House of Lords debates, most notably by Lord Moynihan, the shadow Minister for Sport. He expressed the view that sport needs to secure full exemption if competitive sport is to continue in its present form. He considered that the original terms of the Bill would have left sports governing bodies open to legal action if they attempted to exclude any transsexual athlete from competing in their acquired gender.

Clause 19 would enable UK sporting bodies to continue to make decisions about whether individual transsexual people may take part in sports competitions. Sporting bodies would be able to prohibit or restrict the participation as competitors of persons with an acquired gender, in order only to secure fair competition or the safety of competitors. The Government announced that the wording of the amendment would be revisited after the IOC finishes consulting sport's international governing bodies on the issue. The IOC Executive Committee will be making their final decision at their February meeting.

Announcing the amendment, Lord Filkin said:

This amendment is designed to ensure sporting bodies can uphold safe and fair competition.

In the same way as a sporting body is perfectly entitled to exclude a person taking performance-enhancing drugs, for reasons of competitive parity, they would be entitled to exclude a male-to-female transsexual person if competitive parity or the safety of other competitors was at stake.

Sporting bodies already deal with the issues raised by the participation of transsexual sportspeople, and this Bill will not affect the flexibility that sporting bodies have.¹³⁴

In the House of Lords, on Report, both the Conservative peer Baroness Buscombe and the Liberal Democrat peer Lord Goodhart welcomed the amendment.

¹³³ HL Deb 3 February 2004 c633

¹³⁴ Department for Culture, Media and Sport Press Release, 004/04 , *Gender Recognition Bill – Exemption For Sport*, 22 January 2004, http://www.culture.gov.uk/global/press_notices/archive_2004/dcms004_2004.htm

8. Miscellaneous

a. *The Bill*

There would also be provisions affecting succession, peerages, trustees and personal representatives, orders where expectations of the disposition or devolution of property are defeated, gender-specific offences and foreign gender change and marriage (**Clauses 15 to 18 and 20 to 21**).

b. *House of Lords debate*

After a debate on Report about how titles would be affected, Lord Evans of Temple Guiting confirmed:

In fact, all of us are in the gift of Her Majesty. She, alone, can confer a title and she, alone, can alter the form of address that a holder uses. However, that does not mean that an amendment to the Bill is necessary. The Government have, since Committee, consulted the Palace and the Garter Principal King of Arms. We are in agreement that the best way to proceed in such rare cases—I underline "rare"—would be for the holder of the title to petition Her Majesty to ask that she change the form of address.¹³⁵

The Earl of Mar and Kellie, Liberal Democrat Spokesperson for Scotland, attempted to have Scottish gender-specific legislation specifically identified in the Bill, in place of the general provision. The Government resisted on the basis that if further offences were created or if the definition of existing offences were changed to include or exclude a gender-specific element, any specific list would require amendment.¹³⁶

C. Supplementary

1. Prohibition on disclosure of information

a. *Report of the Joint Committee on Human Rights*

The Joint Committee on Human Rights agreed with the Government that it is appropriate to make it a criminal offence to disclose improperly information about applicants and their applications, in order to give adequate protection to the right to respect for private life under the European Convention on Human Rights, Article 8.1.¹³⁷

¹³⁵ HL Deb 3 February 2004 c651

¹³⁶ HL Deb 3 February 2004 c655

¹³⁷ Joint Committee on Human Rights, *Draft Gender Recognition Bill*, 20 November 2003, HL Paper 188-I & II, HC 1276-I & II, paragraph 66, <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>

b. *The Bill*

It would be an offence for a person acting in an official capacity who has obtained information about a person's gender recognition application or gender history to disclose that information to any other person (**Clause 22**). The definition of a person acting in an official capacity includes employers and voluntary organisations. There would be various exemptions to the prohibition on disclosure, but the Bill no longer includes the exemption contained in the draft Bill relating to the disclosure of information in the course of official duties (which had been criticised for being too wide). The offence would be punishable by a fine of up to £5000.

c. *House of Lords Debate*

This Clause provoked much debate, principally because it would make disclosure of information about a person's gender recognition a criminal offence in certain circumstances.

In Grand Committee, Baroness O'Cathain pointed to the potential difficulties for employers in providing references.¹³⁸

At third reading, Lord Marlesford moved an amendment to remove this clause. He explained why he thought the clause was unnecessary:

I do not believe that Clause 22 is necessary. Those people who come across information on gender change in their official capacities, whether, for example, they be medical people or civil servants, are already bound by ethical conventions, professional rules and laws of confidentiality. No doctor or nurse gossips about his or her patients. Civil servants are bound by the Official Secrets Acts 1911 and 1989.

[...]

The clause does not cover malicious gossip, but it does cover a wide range of people, other than civil servants, who might have totally legitimate reasons for needing to know.¹³⁹

Lord Filkin defended the clause on the basis that it was important to respect the private lives of transsexual people:

On the one hand, there is the right of transsexual people to respect for their private lives, their interest in personal security and some level of control over what is sensitive personal information. On the other hand, by including specific exemptions and by staying out of the private sphere, the rights and freedoms of

¹³⁸ HL Deb 14 January 2004 130GC

¹³⁹ HL Deb 10 February 2004 c1080-81

others are protected. Clause 22 and its subordinate limits have been carefully balanced to meet both our obligations under the Human Rights Act and our obligations in terms of decency and the rights of others.¹⁴⁰

Lord Marlesford remained unconvinced but his amendment was defeated by 145 votes to 108.

Baroness O’Cathain was concerned, throughout, at the effect this provision might have in the context of religious conscience.¹⁴¹

On Report, the Lord Bishop of Southwell moved a probing amendment in the name of the Lord Bishop of Winchester, which he said was needed to ensure that members of religious bodies who are responsible for decisions on matters relating to appointments, training for ministry and ordination, could be told in confidence the relevant facts, without the risk of someone committing a criminal offence.¹⁴²

Baroness Hollis of Heigham confirmed that the Government was discussing the position with the Church of England and would be interested to hear the views of other religious organisations.¹⁴³

2. Power to modify statutory provisions

The Secretary of State would have power to make an order modifying the operation of any enactment or subordinate legislation in relation to persons who have acquired a new legal gender under the Bill or any description of such persons (**Clause 23**). Before an order is made under this section, appropriate consultation must be undertaken with persons likely to be affected by it. This consultation requirement was agreed on Report in the House of Lords.¹⁴⁴

The Explanatory Notes give the Government’s view of this provision:

This power is strictly limited and is provided due to the entirely novel nature of this legislation. Legislation has made distinctions on the basis of gender for centuries, and the use of gender-specific terms, though it has reduced, nevertheless continues in some contexts. Though a thorough analysis has been conducted of areas in which the facility to change gender may cause difficulties or complexities, this clause acknowledges the possibility that other instances may come to light in the future. Subsection (5) provides that, before an order is made under this section, there must be appropriate consultation with persons likely to be affected by it.

¹⁴⁰ HL Deb 10 February 2004 c1085

¹⁴¹ See also part III A of this paper, below.

¹⁴² HL Deb 3 February 2004 c661

¹⁴³ HL Deb 3 February 2004 c661-2

¹⁴⁴ HL Deb 29 January 2004 c389-90

This power is also extended, for the same reasons, to Scottish Ministers and Northern Ireland departments should they need to modify legislation that falls within the devolved competence of the Scottish Parliament or the Northern Ireland Assembly respectively.¹⁴⁵

3. Special rules for the first two years

a. *The Bill*

In the first two years after the Bill comes into effect, a special procedure would be available. The Explanatory Notes refer to this as a ‘fast-track’ process.¹⁴⁶ Applicants would have to satisfy the panel that they have lived in their acquired gender for six (rather than two) years and that they either have or have had gender dysphoria, or that they have undergone surgical treatment for the purpose of modifying sexual characteristics. The rules on medical evidence would also be modified (**Clause 27**).

This process would be exclusive for the first six months after commencement of the Bill. The Explanatory Notes state that this is so that those transsexual people who have lived in their acquired gender for at least six years will have their applications considered first.¹⁴⁷ After six months and up to two years after commencement, applications by transsexual people who can show that they have lived in the acquired gender for six years will be considered under the ‘fast-track’ procedure but applications from transsexual people who have lived in the acquired gender for two years will also be considered, under the normal procedure.

b. *House of Lords debate*

In the draft Bill and in the Bill as introduced to the House of Lords, the fast-track procedure would have been available only in the first six months after commencement. Announcing the amendment on Report, Lord Evans of Temple Guiting said:

The noble Lord, Lord Goodhart, expressed the view in Committee that six months might be too short a time, taking into account the fact that some transsexual people may not become aware of the simplified procedure or that there might be extraneous circumstances outside their control which prevent them applying within the period.

In considering the noble Lord's arguments, I also considered a situation in which a married transsexual person who will have to end the marriage before he or she acquires full recognition may wish to wait for civil partnership legislation to come into effect so the relationship can be put back on a legal footing almost immediately. I am therefore proposing that the simplified procedure should be

¹⁴⁵ Bill 56-EN paragraphs 92 and 93

¹⁴⁶ *Ibid* paragraph 95

¹⁴⁷ *Ibid*

available for the first two years of the operation of the gender recognition panels. That should provide sufficient time for a transsexual person to find out about the process, prepare an application and make all the necessary arrangements, especially where a spouse or children of the family are involved.

The simplified procedure will be exclusive for the first six months. It is only fair that applications from those transsexual people who have lived in the acquired gender for a long time have their applications dealt with first. For a further 18 months the simplified procedure will run alongside the standard application procedure.¹⁴⁸

III General areas of concern in House of Lords debates

In addition to concerns raised in debates on the matters referred to in Part II of this paper, general concerns were raised by some peers in the following areas, most of which overlap with matters already specifically mentioned.

A. Religious issues

Religious issues were debated in the context of proposed amendments to a number of clauses, including in relation to the 'conscience clause' which would provide that a clergyman in the Church of England or the Church of Wales would not be obliged to solemnise the marriage of a person whom he reasonably believes has a gender recognition certificate.¹⁴⁹ A selection of comments pertinent to religious issues is included in this section of the paper.

At second reading, the Lord Bishop of Winchester acknowledged the need for the greatest possible sympathy and assistance to be given to those who suffer the effects of gender dysphoria.¹⁵⁰ Nevertheless he also expressed his concerns with a number of the Bill's provisions.

He commented:

There is, too, deep anxiety in the Churches and the faith communities about their human rights in matters of employment, appointment, selection for training for ordination and ordination itself and its various equivalents. ... What conscientious rights and safeguards will there be for bishops and their equivalents in other Churches and other faiths—and for whole congregations in those Christian and other bodies where the whole congregation makes an appointment—where,

"male and female created He them",

¹⁴⁸ HL Deb 3 February 2004 c669

¹⁴⁹ Clause 11 and Schedule 4, see part II B 3 above

¹⁵⁰ HL Deb 18 December 2003 c1294

is held to be intrinsic to the community's beliefs? That goes not only for Christians but for Jews and Muslims, too, and where ministers and others are required to exemplify the community's teaching.¹⁵¹

At second reading, the Lord Bishop of Winchester also pointed out that a civil partnership would not be the equivalent of marriage for a couple, one of whom has subsequently been recognised in an acquired gender, and would not be what they had committed themselves to.¹⁵²

The issue of how the clergy would be able to discover whether a person is a transsexual person was raised repeatedly. In Grand Committee, Baroness O'Cathain said:

The Bill takes away the ability of a Church to know whether a person who presents himself for marriage, membership or even employment in the Church is of the sex that he claims to be. The same is obviously true for mosques, synagogues and temples.¹⁵³

She proposed that a minister should be entitled to seek a copy of a birth certificate which showed clearly whether the person it related to was a transsexual person, for the purposes of exercising certain functions relating to religion.

Baroness Hollis of Heigham felt that disclosure of personal details was an issue best left to the individual:

It would be puzzling—and this is where I am somewhat disconcerted—knowing the views of a religious minister or religious organisation, if a transsexual person who was an adherent of that same religious faith were to seek to force the conscience of a co-believer; or indeed, knowing the views of that minister or organisation, if a transsexual person were to conceal the fact that he or she had been recognised in the acquired gender. I think that when such issues arise between members of a religious community—issues of conscience—the state should have as minimal a role as possible.

[...]

I do not understand why we should assume that a person who is asked this question—a person who is a member of the same religious community—will refuse to answer or will lie, particularly to his priest. Essentially, I cannot believe that a member of a faith group will base his faith on bad faith.¹⁵⁴

¹⁵¹ HL Deb 18 December 2003 c1296

¹⁵² HL Deb 18 December 2003 c1296

¹⁵³ HL Deb 14 January 2004 c71GC

¹⁵⁴ HL Deb 14 January 2004 C78-9GC

On Report, Baroness O’Cathain set out her view that the Bill takes away rights from religious people:

By giving transsexual people an officially altered birth certificate, it creates an official way of concealing their true sex from religious groups that they might try to join. That is an issue of great religious importance. As Christian teaching is that sex is determined by God from conception, Christians believe that to reject one’s God-given sex is to reject God’s will for one’s life. They also believe that the male and female sexes reflect the image of God and that to attempt to switch the two is a desecration of the image of God in oneself.

If one is in a Church that teaches that, it matters very much whether a person really is the sex that they claim to be. If someone considering an application for membership, which means being an integral part of the Church’s fellowship, has any doubts, they need a way of getting to the truth. At present, a person who attempts to conceal his true sex from a Church does not have the assistance of the state.¹⁵⁵

The Lord Bishop of Worcester indicated that the Church’s view was not necessarily unanimous on the conscience clause which enables clergy of the Church of England to refuse to conduct a marriage for someone they reasonably believe to be transsexual:

I wish to place on record that I and many others feel considerable discomfort at those regrettably frequent occasions when we come to the House as agents of the country’s religious communities and ask for our consciences to be protected from a proposed law.

We need to recognise that the clause, which is an attempt to balance some difficult matters, makes it possible for a person who will have been through a nightmarish life experience to endure the suspicion and then rejection of their request to marry. Some of the stories that have come our way and some of the people I know, who are the subjects of the Bill, are asking no more than that they should be protected from being suspected, inquired into and perhaps gossiped about. The clause, for all its right protection of the consciences of some clergy, actually troubles the consciences of many others of us by what it puts certain people through in their request to be married.

I am not pressing the matter to a vote and I respect the attempts that the Government have made to produce a form of words which is acceptable. I also accept that if there is no conscience clause in the Bill there will be far stronger opposition to it than would otherwise be the case. However, I would not feel that I have done my job in the Chamber if I did not place on record the discomfort of a considerable number of people, when religious communities ask for their

¹⁵⁵ HL Deb 29 January 2004 c426

consciences to be protected from what society's conscience has come to think is right.¹⁵⁶

The Lord Bishop of Worcester reiterated his views at a later point in the debate, in the context of a proposed amendment relating to exemption, in certain circumstances, for religious bodies from discrimination legislation:

As we debate the matters, a picture is being built up in which organised religion always takes one view of the question. What will be the situation of the Government in the discussions, when they are faced with people who purport to represent the views of a religious body but actually represent only part of that body, in which there are others who hold the opposite point of view with equal force?

I do not know whether it is known in the House, but when the House of Bishops of the Church of England discussed this subject, it was clear that we had to acknowledge the existence in the Church of England of two equally strongly held doctrinal positions on the matter. I shudder at the thought of government having to adjudicate on the doctrinal position of an organised religion. I recognise that the words,

"religious susceptibilities of a significant number of its followers",

are already enshrined in statute. But they are highly dangerous. When I hold a religious sensibility, to me a significant number is one. I do not think that that is true of other people's religious convictions, but I notice that other people behave in similar ways.

For the Government to confer on religious bodies the right to create membership qualifications that go against the convictions of the society in which those religions function, and to be protected when they do so, is a dangerous precedent. I urge the Minister to bear in mind in the conversations that will proceed in the coming months that, like gender, organised religion is a complex matter. The convictions and doctrines of organised religion are also complex. I am well aware of a significant number of members of the Church of England who find the collection of exemptions along these lines deeply offensive.¹⁵⁷

On Report, Baroness Hollis of Heigham suggested a possible way in which religious organisations could obtain information about whether or not a person has a gender recognition certificate. She suggested that a church could ask to see the person's baptismal certificate.¹⁵⁸

¹⁵⁶ HL Deb 3 February 2004 c626-7

¹⁵⁷ HL Deb 3 February 2004 c642-3

¹⁵⁸ HL Deb 3 February 2004 c659

At third reading, Baroness O’Cathain moved an amendment which would have allowed religious organisations to prohibit or restrict participation, by people with an acquired gender, in its religious activities or ceremonies, if the prohibition was necessary to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of the religion’s followers.

Explaining the reason for moving the amendment, Baroness O’Cathain said:

I received a letter yesterday from the noble Lord, Lord Filkin, for which I am grateful, in which he admits that under the Bill Churches can be taken to court over their beliefs. He says that it is the Government's opinion that such litigation "probably" would not succeed on the grounds of sex discrimination. Such litigation puts Churches under huge pressure.

[...]

All my amendment seeks to do is to allow people of faith to worship God and conduct their own religious activities according to their own faith. Their faith teaches them that one's sex is fixed at birth and cannot be changed. That perfectly reasonable belief is very common among religious people and, indeed, among the general public as evidenced by the hundreds of letters that have been written to support the thinking behind this amendment. There are thousands of people out there who are genuinely worried about this.

The question is, should you be sued in the secular courts merely because of your beliefs and the way you worship God? ¹⁵⁹

Views were expressed for and against the amendment. Lord Lester of Herne Hill explained his opposition to the amendment:

The only way in which the Gender Recognition Bill confers a legal entitlement on transsexuals not to be discriminated against is in the employment and related field.¹⁶⁰

The Earl of Erroll supported the amendment:

The Bill should defend churches from transsexuals who would discriminate against church congregations' beliefs.¹⁶¹

Lord Filkin addressed various points made. He confirmed that it was not necessary to include a conscience clause for ministers of religions other than the Church of England

¹⁵⁹ HL Deb 10 February 2004 c1061-2

¹⁶⁰ HL Deb 10 February 2004 c1066

¹⁶¹ HL Deb 10 February 2004 c1070

and the Church of Wales and that churches would still be able to discriminate against transsexual people:

(T)he freedom for religious organisations to discriminate against transsexuals sought by this amendment already exists. Many will say that it should not, but that is not what we are debating. In fact, the ability to discriminate is there in law already.¹⁶²

The amendment was defeated but by the closest division on the Bill (149 to 144). Significantly, the Lord Bishops of Worcester, Manchester and Newcastle did not support the amendment.

In his summing up at the end of the third reading debate, Lord Filkin pointed out the significance of the fact that three of the Lord Bishops had voted with the Government and against Baroness O’Cathain’s amendment. He said:

The calumnies that have sometimes been put about that we have been riding roughshod over the sensitivities of organised religion are untrue.¹⁶³

B. Medical issues

Medical issues were debated several times in the context of proposed amendments to various clauses, and particularly in relation to the sex/gender question. This question was central to whether individual peers believed the whole purpose of the Bill to be at all possible and to whether they believed there should be a requirement that applicants should undergo gender reassignment surgery. A selection of comments pertinent to medical issues is included in this section of the paper.

At second reading, Lord Carlile of Berriew, referred to gender dysphoria as follows:

When I started my involvement in these matters people used to ask me whether it was a psychological matter, a somatic matter, a psychosomatic matter or something else, as if one could pigeon-hole gender dysphoria as akin to measles (a physical illness) on the one hand or schizophrenia (a mental illness) on the other hand. After 20 years of research into this matter and a huge amount of reading, one cannot pigeon-hole this condition in any particular way. It is a whole person, whole body condition.¹⁶⁴

Cross-bencher Lord Chan, a paediatrician, focussed mainly on the clinical diagnosis of transsexual people. He stated that the medical profession is divided on the issue of transsexualism:

¹⁶² HL Deb 10 February 2004 c1074

¹⁶³ HL Deb 10 February 2004 c1090

¹⁶⁴ HL Deb 18 December 2003 c1300

The term is used to describe, and has wide international recognition as, a mental and behavioural disorder in the World Health Organisation's International Classification of Diseases (10th edition). However, there are other classifications, such as in the United States, where the terms gender dysphoria or gender identity disorder are used, but they are also classified as behavioural disorders.¹⁶⁵

[...]

More medical research is needed into transsexual people in order to provide them with appropriate support. The Gender Recognition Bill assumes that the condition is already a discrete and clearly agreed medical condition, which is not the case.¹⁶⁶

Lord Chan commented on the ruling of the European Court:

The ruling of the European Court supports a situation in which personal feelings and beliefs are given precedence over verifiable medical evidence. In support of that are four reports, which I have read, of men who were labelled as transsexual or having a gender identity disorder, but who no longer feel that they are women, and, a few years later, function normally as men. That demonstrates that the condition of some transsexuals is not permanent or lifelong.¹⁶⁷

Lord Chan expressed the view that there should be a requirement of reconstructive surgery both to evidence the commitment of the individual wanting to have gender reassignment and to give less committed individuals an opportunity to reconsider their position.

Baroness O’Cathain, drew attention to research conducted on the nature of gender dysphoria:

[A] large body of research and experience composed among others of members of the medical profession, maintains that the condition is a delusion—a fantasy. The problem is psychological, not physical. Psychologists agree about that. For decades gender dysphoria has been well known as a psychological condition. There is no evidence for changing that view, apart from a form of political correctness. ... I am sure that these views will be challenged, but I draw your Lordships' attention to a letter in the Daily Telegraph on 15th July last year from medical professionals at the Portman Clinic. It states:

"The experience of many psychiatrists, psychoanalysts and psychotherapists working with transsexual patients is that they are individuals who, for complex reasons, need to escape from an intolerable psychological reality into a more

¹⁶⁵ HL Deb 18 December 2003 c1306

¹⁶⁶ HL Deb 18 December 2003 c1308

¹⁶⁷ HL Deb 18 December 2003 c1307

comfortable fantasy. By attempting to live as a member of the opposite sex, they try to avoid internal conflict, which may otherwise prove to be too distressing".

The letter continues:

"It is a measure of the urgency and desperation of their situation that they frequently seek surgery to make their fantasy real. By carrying out a 'sex change' operation on their bodies, they hope to eliminate the conflict in their minds".

The very important part, according to the eight medical people, is that:

"Unfortunately, what many patients find is that they are left with a mutilated body, but the internal conflicts remain".¹⁶⁸

Baroness O'Cathain questioned whether the Bill is the appropriate way to help transsexual people:

If a person is paranoid and believes that he is being chased by secret agents, we do not hire a 24-hour bodyguard and buy them elaborate security devices. Similarly, if a person suffers from agoraphobia, we do not brick them into their home. Yet, instead of getting them all possible psychological help, surgeons trap transsexual people in their delusion by performing sex re-assignment surgery.¹⁶⁹

At second reading, Lord Filkin set out the Government's position:

The Government have discussed the Bill with the key organisations representing the profession, including the BMA, the GMC, the Royal College of General Practitioners, the Royal College of Psychiatrists and the British Psychological Society. Clearly, there are elements of the medical profession that maintain that there is no convincing evidence of a physiological cause for transsexualism and that to recognise the new gender is to pander to psychological delusion, as has been argued in this debate.

The opinion of the Chief Medical Officer is strongly that gender dysphoria is a medical condition and that treatment is available on the NHS as a consequence. A point I should mention now is that, in the Goodwin and I judgment, the European Court of Human Rights took the view that the continuing debate over the nature and aetiology of transsexualism should no longer stand in the way of transsexual people enjoying their human rights as others do. I think that that is food for thought in our debate.¹⁷⁰

¹⁶⁸ HL Deb 18 December 2003 c1309

¹⁶⁹ HL Deb 18 December 2003 c1310

¹⁷⁰ HL Deb 18 December 2003 c1325

In Grand Committee, Lord Filkin confirmed that the Government consider the issue of gender to be a legal one and that the medical diversity is not central to the debate.¹⁷¹

On Report, Professor Lord Winston detailed the complicated definition of sex:

It is not just a question of chromosomes. It is possible of course to have chromosomal sex and it is probable, though by no means certain, that all of us in this Chamber have chromosomes that are either XX or XY. However, even in the case of Turner's Syndrome, which my noble friend has just described, it is possible to have an XY mosaic, with some of the cells carrying a Y chromosome and some having a deleted X chromosome. The variations of that syndrome mean that people may have different degrees of masculinity or femininity.

Most practising doctors in the field would describe sex on six, totally separate, definitions. Those definitions can be chromosomal but, more importantly, they are genetic. It emerges that genes on the Y chromosome are not the only genes that define sex. Although the SRY gene is by far the most common and important, there are genes on chromosome 17, chromosome 11, chromosome 10, chromosome 6 and chromosome 3 that can, in exceptional circumstances, determine sex of various kinds. Those people can carry on a completely normal life.

Genetic sex is therefore no less important than chromosomal sex, but that is not the end of the story. There is also hormonal sex. Some people will produce hormones that will tend to feminise them, while others will be masculinised. That can happen in utero. Good evidence has emerged from Professor Waters of Monash University in Australia—he is now long retired—that suggests that some people who become transsexuals later in life have been exposed to an abnormal surge of either male or female hormones during pregnancy. That has caused them to have a different psychological sex from their genital sex. Psychological sex of course depends on brain function. That also varies greatly and is probably genetically determined, but so much exploration of that subject is being conducted that is not fully understood.

Genetics is rapidly changing our understanding of where sex is determined. But to define it simply as genital, hormonal or, as the noble Lord, Lord Tebbit, seeks to do, as gonadal, is a travesty of what really happens.¹⁷²

C. Effect of recognition on others, especially families

At second reading, Baroness Buscombe drew attention to the potential conflict of the human rights of a transsexual person who has not undergone surgery with those of

¹⁷¹ HL Deb 13 January 2004 c5GC

¹⁷² HL Deb 3 February 2004 c619-620

someone of their acquired gender who might have to share, for example, a prison cell, nurses' quarters or sports changing facilities.¹⁷³

Lord Filkin replied:

Many human rights issues were touched on. The noble Baroness, Lady Buscombe, talked about sporting facilities and changing facilities. For a start, most people—not all—will have had surgery. The fundamental issue is that this is already happening. There are transsexuals in our society, the vast majority of whom do not wish to draw attention to themselves or cause embarrassment to others. Therefore, whether or not the law is changed, these issues are being coped with in society as we speak.¹⁷⁴

Baroness Buscombe subsequently expressed concern about the lack of balance between the rights of the transsexual person and the rights of third parties affected by the actions of the transsexual person, particularly the spouse and children of the transsexual person. She proposed that the Gender Recognition Panel should be able to hear evidence from the spouse and children of the applicant and that before issuing a certificate, the Panel should have due regard to the effect of issuing the certificate on the spouse or children of the applicant.¹⁷⁵

The Lord Bishop of Winchester supported this proposal:

The amendment of the noble Baroness merely lays down that the panel should give "due regard". That is an entirely proper request to make of the panel, granted that, if the proposition were to be agreed, a number of parties and institutions have rights alongside that of the transgender person.¹⁷⁶

However, for the Government, Lord Filkin said that the proposed amendment threatened to change the nature of the application for gender recognition.¹⁷⁷ There was no intention to make this into a contested hearing. Lord Goodhart considered that, by the time an application was being made to the Panel, it was too late to introduce representations from the applicant's family:

It is clear that all members of the family should be aware of someone contemplating gender reassignment at an early stage. The result of discussion at an early stage may be that the person wishing to change gender decides not to go ahead with the plan for family reasons or to defer gender change until a later stage. However, once we have reached the application stage, firm decisions have clearly already been taken. It is most unlikely that any matters would be

¹⁷³ HL Deb 18 December 2003 c1292

¹⁷⁴ HL Deb 18 December 2003 c1321

¹⁷⁵ HL Deb 13 January 2004 c32GC, HL Deb 29 January 2004 c381

¹⁷⁶ HL Deb 13 January 2004 c36GC

¹⁷⁷ HL Deb 13 January 2004 c36GC

improved by denying the great efforts and difficulties that the applicant has gone through and by insisting that the status quo be preserved. It is too late. Once we have reached the application stage, the status quo cannot be preserved.¹⁷⁸

On Report, Lord Filkin set out the way in which the views of the family should be taken into account:

In the guidance that will be given to the panel, we will make it clear that, if an applicant is married and/or has children, it is particularly important to recognise the burden placed on that person by the social situation that they are in and to test whether they have thought through the seriousness of the change that they are making and the effect that it will have on others, as well as themselves. Therefore, if there is guidance to the panel that it is to look for evidence that that has been properly tested, it leaves the door wide open for the applicant to put evidence from the wife and child into the panel's processes. More importantly, it gives a clear signal, at the start of the process, that the applicant will be tested at the end of the process on whether the issues of concern to the family have been properly considered as part of a therapeutic process. That will not be done in order to balance the interests of the family against the application—that cannot happen, for the reasons that I gave—but to see whether there is a greater risk of impermanence because of the social pressures on the applicant as a consequence.

[...]

In any event, any decision by the panel is only an interim one, for a married couple. A divorce cannot take place until the court has considered whether appropriate ancillary relief decisions have been made and the interests of the children recognised. The court process for married applicants also has a check. Unless the court is satisfied that the normal divorce tests of ancillary relief and care for the children are met, the applicant cannot change the interim gender certificate into a permanent one. There are, in a sense, two tests. That allows us to build up a robust process that is fair to the applicant but is also fair to the wife and children.¹⁷⁹

D. Reversal of recognition in acquired gender

In Grand Committee and on Report, Baroness O’Cathain sought to limit the number of times a decision by the Panel might be reversed.¹⁸⁰ The Lord Bishop of Winchester drew attention to the statement by the Interdepartmental Working Group on Transsexual People that many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives.¹⁸¹

¹⁷⁸ HL Deb 13 January 2004 c38GC

¹⁷⁹ HL Deb 29 January 2004 c387

¹⁸⁰ HL Deb 13 January 2004 c58GC, HL Deb 29 January 2004 c377-8

¹⁸¹ HL Deb 13 January 2004 c60GC

Lord Filkin said that it was not the Government's position that many people change their minds or oscillate between the two. He put the figure at about one per cent.¹⁸²

Lord Filkin confirmed that the Panel would need to be convinced that a person is committed to a permanent change of gender before granting any application.¹⁸³

E. Criminal records

At second reading, Baroness Buscombe questioned whether the police, when conducting a criminal investigation, would be able to track down the original birth certificate of the person under investigation if there is no indication that the person concerned is a transsexual person.¹⁸⁴

Lord Filkin commented:

The [Criminal Records Bureau] will have access to information about any offences committed by a transsexual person in their previous gender and identity. The CRB will, therefore, be able to continue its lawful function and transsexual people will not be able to evade traces made by the bureau.¹⁸⁵

F. Availability of historical records

In Grand Committee, Baroness Buscombe pointed out that there was no provision about when details held in the Gender Recognition Register could be made public and questioned whether they should become public after 75 years.¹⁸⁶ On Report, Baroness Buscombe proposed that records should not be available to the public during the lifetime of the registered person concerned.¹⁸⁷

In reply, Baroness Hollis of Heigham referred to the general consultation on civil registration records and suggested it was better to consider the issue of opening historic records alongside those other registration issues.¹⁸⁸

IV Sewel Motion

On 5 February 2004, the Scottish Parliament passed the following Sewel motion:

¹⁸² HL Deb 14 January 2004 c65GC

¹⁸³ HL Deb 13 January 2004 c59GC

¹⁸⁴ HL Deb 18 Dec 2003 c1293

¹⁸⁵ HL Deb 18 Dec 2003 c1322

¹⁸⁶ HL Deb 14 January 2004 c68GC

¹⁸⁷ HL Deb 29 January 2004 c421

¹⁸⁸ HL Deb 14 January 2004 c69GC

That the Parliament endorses the principle of giving transsexual people legal recognition of their acquired gender and agrees that the provisions in the Gender Recognition Bill that relate to devolved matters should be considered by the UK Parliament thereby ensuring a consistent UK approach and early compliance with the rulings of the European Court of Human Rights with respect to the Convention rights of transsexual people under Article 8 (right to respect for private life) and Article 12 (right to marry).¹⁸⁹

V Comment on the draft Bill and Bill

A. Press for Change

Press for Change describes itself as the largest representative organisation for transsexual people in the UK.

In its official press release when the draft bill was first published, Press for Change broadly welcomed the draft Bill, with a proviso about the requirement that transsexual people who are already married would be required to dissolve their marriages before completing the legal recognition process. Claire McNab, vice-president of Press for Change, said:

Thirty-three years after the High Court made us non-people, the end of our legal nightmare is now in sight. The draft Bill is a carefully considered and well-balanced proposal, which will allow transsexual people the same legal status as everyone else in the country – a legal gender which matches our actual gender.

The bill will benefit only a few thousand people, but it is an important measure to restore the human rights of a vulnerable minority in our society. We congratulate the government for their efforts to right a serious injustice.

We are particularly pleased that change of gender will be recognised for all purposes. The government's own working group recognised three years ago that half-measures would be unworkable.

We hope that the final bill is placed before Parliament early in the next session. We've waited long enough already.

We are deeply disappointed that married transsexual people will have to choose between legal recognition and keeping their families together. No-one should be required to choose between their right to privacy and their right to have a family, and no-one else in the UK faces such a choice.

¹⁸⁹ Scottish Parliament Official Report, 5 February 2004, c5672

This is a heavy blow to those families where a marriage has survived gender transition, and we hope that ministers will remove this provision before the bill is finalised.¹⁹⁰

However, a message to members on the Press for Change website sets out further concerns, including:

Improvements are definitely needed. Like most drafts, this draft bill is not perfect. Here are some of its flaws:

The final composition of the gender recognition panels could be over-medicalised -- we will want that aspect tightened up, though that may be achieved either by a change to the draft bill or by an administrative decision -- we'd prefer a change in the bill, but not everything can be bolted down in law.

The cost of the recognition process could get quite high for applicants, especially if we all have to get reports from consultants. We want to ensure that it remains affordable, especially because so many trans people's lives have been economically blighted by years of marginalisation.

There is no provision for existing marriages between two trans people: the draft bill would require their currently valid marriage to be dissolved before they were allowed to remarry each other!¹⁹¹

In its statement, *Gender Recognition: the best we can get*, Press for Change urged the transsexual community to recognise the choice they faced:

The choice we face is not between this bill and some perfect bill. An ideal bill which resolves all our concerns and solves all our problems is not on offer: the choice is between this bill and nothing.¹⁹²

They indicate their thinking at that time on priorities:

- To ensure that people are not excluded from the recognition process, for example, on the grounds of prohibitive costs or because they are in an existing marriage which they do not wish to end. However Press for Change made the following comment:
- [...] we have ruled out seeking retrospective recognition for those couples whose marriages were illegal because they did not have a Gender Recognition

¹⁹⁰ <http://www.pfc.org.uk/gr-bill/pressrel.pdf>

¹⁹¹ Responding to the Government Announcement. The hows and whys of handling the publicity around the draft *Gender Recognition Bill* ... and what happens next, Claire McNab, 11 July 2003, Claire McNab, 11 July 2003, <http://www.pfc.org.uk/gr-bill/resp.htm>

¹⁹² Gender Recognition: the best we can get, Claire McNab, 19 October 2003, <http://www.pfc.org.uk/gr-bill/grb-best.htm>

Certificate (GRC) at the time. Retrospective recognition would offer no practical benefit to the couples concerned, would be very hard for government to concede, and could create many problems for the legal rights of all trans people.

- To seek amendments which will improve the details of the recognition process and the rights of those who gain gender recognition. Examples include:
 - Tightening the penalties for unauthorised disclosure of the information that a person holds a Gender Recognition Certificate.
 - Removing the anomaly affecting two transsexual people who married each other.
 - Tightening the rules around disclosure of transsexual status in court cases, so that it can only be raised if a judge rules that it is relevant and necessary.
 - Altering the rules on the fast-track process for Gender Recognition, so that those who would be eligible in that period but do not get their applications in on time can still use the fast-track process if they apply later.¹⁹³

Press for Change also criticised the provision which would effectively impose a six-month time limit on an IGRC, which was not considered by the Joint Committee on Human Rights:

Effectively, this points a gun at the heads of a married couple. The interim GRC will lapse if a dying spouse fails to die within six months, or a healthy couple will have to make a sudden decision to end their marriage.

This is a brutal, nasty and wholly unnecessary provision. An interim GRC provides no rights at all, except the right to annul a marriage. It is hard to see any harm that could have been caused by the absence of an expiry date.

[...]

Whatever the reason, this proposal adds insult to the injury of the requirement to end a marriage: it deprives married couples of the opportunity to take their time in deciding whether or not to end their marriage.

At its worst, a couple where the non-transsexual partner is dying would still be advised to annul their marriage in case the death occurs after six months, and the certificate has expired. Words cannot express my revulsion at a law which would place anyone in that situation.

[...]

¹⁹³ *Ibid*

Couples are being given a deadline to annul their marriage. If they meet the deadline, they may have no legal protection for their relationship; if they don't meet it, the transsexual spouse will have lost the interim GRC.¹⁹⁴

B. Gender Identity Research and Education Society (GIRES)

GIRES describes itself as a Charity which is dedicated to the welfare of trans individuals. It congratulates those, particularly Press for Change, who have worked so hard to bring the proposed legislation to this point and supports the work that has been done, but it highlights some concerns, including:

The term 'acquired' gender is misleading. This may not seem to be a substantive point, but vocabulary is important in shaping the way that people think about issues. 'Gender identity' is not something you acquire, but rather an innate psychological identification as male or female, which pre-exists the transition process. An individual undergoing that process adopts the opposite gender role and aligns the phenotype (to a greater or lesser degree) with the core gender identity. So it isn't the gender identity that changes. In fact, physical characteristics are brought into line with the core gender identity, and an appropriate gender role is adopted ... The terms used need to reflect that reality. Since the Bill refers to Gender Recognition, perhaps 'newly recognised gender' would be more appropriate.

Gender Dysphoria (GD) is not synonymous with Transsexualism ... GD refers specifically to the personal experience of the dissonance between the phenotype and associated gender role, on the one hand, and the innate gender identity on the other hand. It is only when this dissonance is profound and persistent that it may be regarded as transsexualism which is usually accompanied by transition to the opposite gender role.

Existing marriages which were contracted before the transition of one partner, should be protected. In this, of course, we echo the feelings of the entire trans community. The argument for ending these marriages is that they are regarded as single-sex relationships and, accordingly would be incompatible with the law. Application for a Gender Recognition document would, therefore, have to be accompanied by divorce. We would oppose this as it obliges trans individuals and their spouses, either to end their marriage, or it obliges the trans partners to remain assigned to the wrong gender at a time when others are claiming their new status as a fundamental human right. Many will undoubtedly choose to remain married and will forgo the opportunity to obtain legal status in their core gender identity.

This Bill is responding, quite properly, to the breach of human rights which hitherto has existed, in that trans individuals have been unable to have a

¹⁹⁴ *The Good, The Bad and The Ugly of the New Gerbil*, Claire McNab, 30 November 2003, <http://www.pfc.org.uk/gr-bill/ugly.htm>

document which recognised their innate gender identity. That is clearly now accepted as unjust and unequal treatment. But forcing a choice between two unacceptable propositions is, in and of itself, an abuse of human rights. The law would be giving with one hand, and removing with the other, an essential element of equality and dignity; the law would therefore, in these cases, be inconsistent, either with Article 8 or with Article 12 of the European Convention on Human Rights. In either case this would appear to breach Article 14. The net result is that two otherwise identical people, one married, one not, will have different employment rights. The trans person who remains married cannot avoid the 1999 employment restrictions, which the unmarried person escapes (Sex Discrimination [Gender Reassignment] Regulations 1999 [S1 1999/1102]). Trans people, in pre-existing marriages, therefore without a gender recognition certificate, may be regarded as a risk to vulnerable people, whereas those with such a certificate, whose marriages are rendered void, will not be so regarded.

[...]

Concerns have also been expressed with regard to the efficacy of the 'prohibition on disclosure of (protected) information' and, therefore, the security of the Register. Reassurance that there can be no inappropriate sharing of this information, is sought. Concerns have recently been heightened by the intention of the DCA to enter into consultation regarding a draft statutory instrument to provide yet further exemptions from the disclosure rules under the Bill, thus looking to broaden, even further, access to the gender change register. We suggest that no further exemptions to the protection of these data are permitted.

Clarity is sought on who is eligible to be a member of the Gender Recognition Panels, and how the members will be selected. Our recommendation is that people of impeccable objectivity are selected, who are knowledgeable about gender identity and transsexual issues, and that these criteria are incorporated into the Bill.

There are concerns about the possible cost to trans people of obtaining new recognition. We are aware that many are on very low incomes. We suggest that the cost should be specified and be no more, say, than the cost of renewing a passport. Since the provision of medical documents will, in most cases, be expensive, would it not suffice to have a single document from the GP, who is likely to have had the longest and perhaps the most frequent contact with the individual.

The full text of the GIRES response to the draft *Gender Recognition Bill* is available on the GIRES website.¹⁹⁵

¹⁹⁵ http://www.gires.org.uk/Web_Page_Assets/frontframeset.htm

C. The Gender Trust

The Gender Trust describes itself as the UK's largest charity providing support to transsexual, transgendered and intersex people and their families. It gave a reserved welcome to the draft Gender Recognition Bill announced by the Department for Constitutional Affairs.¹⁹⁶

In its submission to the Joint Committee on Human Rights, the Gender Trust made the following points:

The Bill proposes that trans people should be registered following assessment by a novel form of medico-legal tribunal, with the consequence that, without assessment and registration, various civil rights will be withheld. No other minority group in this country is required to be registered on a centralised national database accessible by the State and others in order to receive basic civil rights enjoyed by the majority, as opposed to gaining a benefit or advantage, or because of a criminal offence or court judgment. Many trans people will fear the consequences and stigma of being included on a register after "assessment" by a tribunal and will mistrust the process. Registration of an ethnic group, or of gay or lesbian people would be unacceptable and such is unacceptable when applied to the trans community.

Those who do not have a "gender recognition certificate" will remain lawfully discriminated against under employment rights restrictions contained in the provisions of the Sex Discrimination Act 1975 added by amendment (by S.I.) in 1999, even if, in all other respects, their situation is identical to trans people with a certificate. Among others, married people will be entitled to lesser employment rights than others. The employment restrictions are flawed and should be repealed.

Discrimination against trans people in respect of basic goods and services is endemic and lawful and this Bill wholly omits provision in this area. Further, trans people will be the only minority group against whom indirect employment discrimination remains lawful by the end of 2003. The text sets out recommendations in a human rights context.

The "concessions" currently in place for trans people to have primary documentation (e.g. passports and driving licenses) amended to coincide with gender presentation may be withdrawn or made conditional on having a gender recognition certificate (therefore be unavailable to many). "Ring-fencing" of such "concessions" is essential to personal safety and privacy abroad and at home, but the Bill makes no provision.

The Bill recognises 'acquired' gender "for all purposes". The Trust is concerned that this will lead to ineligibility for (broadly) medical services (such as for

¹⁹⁶ *Cautious welcome for Transsexual Rights Bill*, 11 July 2003 <http://www.gendertrust.org.uk/index1.htm>

"gendered" cancers) based on "legal" sex rather than based on the actual morphology and bodily needs of the individual. The Trust proposes a rule of construction to resolve such basic issues at minimal cost.

This is the only piece of legislation in UK law that requires people to terminate a marriage in order to qualify for basic rights. The termination requirement is discussed in a human rights context for all concerned, not merely the trans person.

The Bill contains provisions for preventing disclosure of information but this only applies in limited instances. There are wide exemptions which would ensure frequent violations of the right to privacy. Furthermore in the Trust's view there must also be tight restrictions on the collection and holding of such information, not merely its disclosure.

A critique of other aspects of the Bill's procedural mechanism is presented, including issues such as the apparent exorbitant jurisdiction over foreign nationals, the excessive cost of applications, and matters concerning legal aid and legal representation.¹⁹⁷

D. The Evangelical Alliance

The Evangelical Alliance states that its press and media office is strategically placed as a credible voice to represent and express Christian concerns across a wide range of issues. In a press release dated 10 July 2003, the Evangelical Alliance criticised the Government's approach:

The Alliance has championed basic human rights of minority groups, such as transsexual people, and agrees that there are valid justice issues to be considered on a case by case basis. But it still questions whether it should be a human right, enshrined in legislation, for a man, for example, to pass himself off as a woman and insist that the rest of society collude in what amounts to deception.

[...]

The Alliance believes the proposals to be unworkable and calls on the Government to stick to the parallel civil partnerships legislative approach considering transsexual partnerships. That is, not to allow transsexual same-sex relationships to be described as 'marriage', which must be retained uniquely as the union between one biological man and one biological woman. This is what both orthodox Christianity and the major faiths, as well as existing law, insist upon.

Dr Don Horrocks, the Evangelical Alliance's Public Affairs Manager who edited a report on transsexuality for the Alliance in 2000, said that "the impression is

¹⁹⁷ <http://www.gendertrust.org.uk/index1.htm>

rapidly growing that in caving in to such extreme minority agendas, the Government has become obsessed with narrow sectional interests. Arguably, Britain now has the most marriage and family-hostile system in Europe."

Dr Horrocks warned that one implication of the proposed Bill could be that third parties find themselves in front of civil courts if a transsexual person feels offended that their self-selected gender is not recognised and accepted. In addition, there are countless implications for society if original birth records cannot be accessed and gender can be altered with a relative minimum of formality.¹⁹⁸

The Evangelical Alliance voiced more criticisms in a press release dated 2 December 2003:

"The Government has stated that it will never legislate for 'same-sex marriage' but this undoubtedly will be one of the implications of the Gender Recognition Bill," says Dr Don Horrocks, the Alliance's Public Affairs Manager. "This Bill is anti-family and will also undermine marriage and normal family relationships."

Dr Horrocks believes that the Gender Recognition Bill, which will permit transsexual people to be legally recognised in the gender they select, "is being rushed through with little consideration for the long-term damage that it may cause to society and transsexual people themselves. Under the proposed legislation a person will be able to change their birth certificate, with one likely consequence being the 'marriage' of two biological men, or women."

Dr Horrocks edited a book entitled 'Transsexuality', which is an acknowledged vital contribution to the Gender Recognition debate. He says the Evangelical Alliance does not dispute that transsexual people should have legal protection and that their human rights should be defended.

"However, we believe this Bill is fuelled by a flawed decision in the European Court of Human Rights and fundamentally ignores scientific fact and common-sense in favour of extreme political correctness. We believe that this Bill will seek to force society to collude with deception."¹⁹⁹

E. The Christian Institute

The Christian Institute is a registered charity which states that it seeks to promote the Christian faith in the United Kingdom. It opposes the Bill:

¹⁹⁸ *New Gender Recognition Law highly dangerous*, the Evangelical Alliance, 10 July 2003, http://www.eauk.org/CONTENTMANAGER/Content/press/EA_030711a.cfm

¹⁹⁹ *Gender Recognition Bill pulls the wool over the public's eyes, says Evangelical Alliance*, 2 December 2003, <http://www.eauk.org/CONTENTMANAGER/Content/press/genderrecognition.cfm>

The Gender Recognition Bill rests entirely upon the lie that people can change their sex. And so it allows transsexuals to re-write history. A man will be able to obtain a birth certificate declaring he was born a woman, or a woman that she was born a man.

[...]

Christians regard a person's sex as *determined by God* from conception. Therefore a transsexual is living in breath-taking defiance of their Creator. As long as a transsexual persists in denying their true sex, they persist in sin. Christians can no more accept a transsexual living in their assumed sex, than they can an habitual adulterer or gambler.

[...]

The Government is attempting to abolish the truth. It is enshrining a lie in law. It will be a criminal offence to tell the truth. A person's sex cannot be changed by the votes on a Gender Recognition Committee. God alone decides what sex we are at our conception. Christians must speak out against this Bill *and* argue for protection for Christians.

The Bill gives transsexuals as much encouragement as possible to live in their assumed sex. Yet surely we should not be encouraging people in healthy bodies to mutilate themselves, but rather help them to return to living in their true sex?

The Government must ditch this outrageous Bill. But even if it does not we will continue to fight to preserve the religious liberties of churches and religious organisations.

Amongst other things:

- All ministers and registrars need the legal right to refuse to conduct a wedding service involving a transsexual.
- Churches and religious organisations need clear legal protection from future legal action by transsexuals, including the right not to employ them.
- Ministers need access to the original birth certificates of all candidates for marriage, membership or employment.²⁰⁰

²⁰⁰ *Gender Recognition Bill*, The Christian Institute,
http://www.christian.org.uk/transsexualism/briefing_16jan04.pdf

F. Liberty

Liberty welcomed the broad contents and objectives of the Bill but raised several concerns and drafting recommendations. Liberty expressed particular concern at the creation of a six-month time limit on an IGRC and the removal of immediate pension entitlements for some trans men. The recommendations made by Liberty include:

- There should be some flexibility built into the requirements for determination of applications under Clause 2 to take account of exceptional circumstances.
- Contemporaneous medical reports should be acceptable as the evidence required by the Gender Recognition Panel.
- The Panel's power to request further information should not be exercisable until after initial consideration of the mandatory reports and additional information submitted by the applicant; should only be exercisable where the Panel was otherwise minded to reject an application; should be fully reasoned; and should be confined to specified types of evidence.
- IGRCs should be given equal status to full gender recognition certificates in all areas, save the law of marriage.
- The system of IGRCs should be further amended should the Government seek to create the institution of civil partnerships, so that partners to an existing valid marriage may transform that into a civil partnership upon obtaining a full gender recognition certificate.
- Partners to a current valid marriage in which both partners have acquired new genders should be entitled to obtain full Gender Recognition Certificates without terminating such marriage.
- The six-month time limit for IGRCs should be abolished.
- The Government should do all in its power to limit costs to applicants: fees should be set as low as possible with all efforts being made to streamline the operation of the Panel system; and the Government should subsidise completely the operation of the system for anyone making a fast track application.
- There should be a general obligation on Panels to give reasons, the provisions relating to the High Court's jurisdiction and powers should be clarified and Parties to appeals should be anonymised.
- Provision should be made to prohibit discrimination against trans people in the supply of goods and services, and responsibility for administering such discrimination law should be entrusted to a unified anti-discrimination and human rights body.
- Clause [22] should be amended to provide for an offence of disclosure by any party deliberately causing harm or distress; for a reformulated defence on consent; for increased sanctions; and for civil law remedies for breach of privacy.²⁰¹

²⁰¹ Liberty's briefing on the *Gender Recognition Bill* for Second Reading in the House of Lords, December 2003, <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2003/pdf-documents/dec-03-gender-recognition-bill-2nd-reading-lor.PDF>