

TRANSGENDER LAW

A SHORT HISTORY



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BEAUMONT SOCIETY

Founded in 1966 and taking the name of Chevalier d'Eon de Beaumont, the Beaumont Society started out as a social/support group and became a registered charity in 2010.

The Society “believes transgender people are entitled to be treated with dignity and respect in all aspects of their lives by family, friends and the wider non-transgender community, including businesses and services” and works towards this goal through a combination of outreach and education.

TALBOT v. TALBOT

In Talbot v. Talbot (1967) the Court annulled a marriage as both parties were legally women.

Mr Justice Ormrod: “Marriage is a relationship which depends on sex, not gender.”

CORBETT v. CORBETT

Corbett v. Corbett (1970) is a divorce case which set a legal precedent regarding the status of transgender people in the United Kingdom. Following the failure of his marriage to model and trans woman April Ashley, Arthur Corbett sought a way to end his marriage and avoid the inheritance issues which would normally arise. British divorce law at that time required proof of adultery or cruelty; mutual consent was not admissible grounds for divorce and, in any case, Ashley did not wish to be divorced. Instead a case was constructed on the premise that the marriage had never been legal in the first place (since she had been registered as a boy at birth) and should always therefore (and in perpetuity) be treated as male.

Medical opinion at the time was divided, and the judge (Lord Justice Ormrod), who was himself a medical man, constructed a medical test and definition, by which sex in such cases was to be determined.

INTERNATIONAL GENDER DYSPHORIA ASSOCIATION

The International Gender Dysphoria Association was founded by Dr Harry Benjamin in 1979.

Benjamin was one of the first physicians to work with “gender dysphoric persons”.

Since renamed the World Professional Association for Transgender Health (WPATH), it remains a professional and educational non-profit committed to promoting “evidence-based care, education, research, advocacy, public policy, and respect in transgender health”.

REES v. UNITED KINGDOM

In *Rees v. United Kingdom* (1986) a transgender man complained that UK law did not confer on him a legal status corresponding to his actual condition. The Court concluded that there was no violation of Article 8 (the right to respect for private and family life) as the changes demanded by the applicant would involve fundamentally modifying the system. Furthermore, the Court attached importance to the fact that the United Kingdom had borne the costs of Mr Rees’s medical treatment. However, the Court was conscious of “the seriousness of the problems affecting transsexuals and of their distress” and recommended “keeping the need for appropriate measures under review, having regard particularly to scientific and societal developments.” It also determined that there was no violation of Article 12 (the right to marry and found a family): the traditional concept of marriage was based on union between persons of opposite biological sex. States had the power to regulate the right to marry.

COSSEY v. UNITED KINGDOM

Cossey v. United Kingdom (1989) concerned a transgender woman, who had undergone gender reassignment surgery, and wished to marry her partner. The European Court of Human Rights concluded that there was no violation of Article 8 and that “gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex”. It also noted that an annotation in the birth register would not be an appropriate solution. And there was no violation of Article 12. Attachment to the traditional concept of marriage provided “sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage.”

PRESS FOR CHANGE

Founded in 1992 by Stephen Whittle and Mark Rees, Press for Change is a legal support and lobbying group “seeking respect and equality for ALL trans people in the UK, through case law, legislation, and social change”.

R v JOHN MATTHEWS

R v. Matthews (1996) was a landmark ruling which confirmed that vaginal rape of a trans woman may be prosecuted as rape rather than the lesser charge of sexual assault.

“This important and under-reported ruling confirmed that non-consensual penile penetration of the surgically-constructed vagina of a transsexual woman can, in law, be rape “if the other ingredients of the offence are satisfied.”

P v. S & CORNWALL COUNTY COUNCIL

P v. S and Cornwall County Council (1996) was a landmark case in the European Court of Justice (ECJ) which extended the scope of sex equality to discrimination against transgender people.

An Industrial Tribunal decided that the true reason for P's dismissal was her employer's objection to her intention to undergo a gender reassignment operation. The tribunal did not believe, however, that P had a remedy under the Sex Discrimination Act (SDA), because the SDA prohibits only adverse treatment for men and women because they belong to one sex or the other, not because they are transgender, and the tribunal was satisfied that P would have been dismissed for undergoing gender reassignment surgery whether she had been a man or a woman. The tribunal decided to ask the ECJ for a ruling on whether the Equal Treatment Directive is wider in scope than the SDA.

In its judgment, the ECJ pointed out that the Equal Treatment Directive stipulates that there should be "no discrimination whatsoever on grounds of sex", and that the right not to be discriminated against on the grounds of sex is one of the fundamental human rights whose observance the ECJ has a duty to ensure. Accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the Directive must also apply to discrimination arising from gender reassignment. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. Dismissal of a transgender person for a reason related to a gender reassignment is therefore in breach of the Directive.

When P's case returned to the Industrial Tribunal, her discrimination complaint was upheld. The Council agreed before the hearing was concluded to pay P an unstated amount in compensation.

X, Y & Z v. UNITED KINGDOM

In X, Y & Z v. United Kingdom (1997) the first applicant, X, a transgender man, was living in a permanent and stable union with the second applicant, Y, a woman. The third applicant, Z, was born to the second applicant as a result of artificial insemination by a donor. The applicants submitted that the lack of legal recognition of the relationship between X and Z amounted to a violation of Article 8 of the European Convention on Human Rights.

Whilst the Court concluded that there had been no violation of Article 8 (the right to respect for private and family life), it did nonetheless acknowledge the existence of family life between a transgender man and his partner's child.

“X has acted as Z's ‘father in every respect’ since the birth. In these circumstances the Court considers that [de facto] family ties link the three applicants.”

A, G. & D v. NORTH WEST

LANCASHIRE HEALTH AUTHORITY

A, D & G, three trans women, challenged North West Lancashire Health Authority's blanket ban on funding for gender reassignment surgery.

The High Court (1998) ruled in their favour, a decision upheld by the Court of Appeal in 1999.

Lord Justice May:

“Health Authorities have to make hard and often invidious decisions in the allocation of avowedly inadequate resources. But those decisions must proceed from proper assessments of the conditions competing for treatment. The decisions in the present cases did not so proceed, and I agree that they and the policies, so far as they relate to transsexualism, require reconsideration.”

SHEFFIELD & HORSHAM

V. UNITED KINGDOM

In *Sheffield and Horsham v. United Kingdom* (1998) the Court was not persuaded that it should depart from its judgment in *Rees v. United Kingdom* and *Cossey v. United Kingdom*, stating: “it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.”

The Court concluded that there was violation of Articles 8 (the right to respect of private and family life), 12 (the right to marry and found a family) and 14 (the prohibition of discrimination). However, “the Court reaffirms that the area needs to be kept under permanent review by the Contracting States”, in view of the “increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter”.

SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS

The Sex Discrimination (Gender Reassignment) Regulations 1999 extended the Sex Discrimination Act 1975 to cover discrimination on the grounds of gender reassignment.

The regulations define “gender reassignment” as “a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process”.

TRANS DAY OF REMEMBRANCE

Founded in 1999 in memory of Rita Hester, Transgender Day of Remembrance (TDoR) is an international event observed annually on 20th November to commemorate those murdered as a result of transphobia.

The Home Office's annual statistics for 2017/2018 show that police recorded 1,651 transgender identity hate crimes, an increase of 32% over the previous year.

Recent research by YouGov on behalf of Stonewall found that 79% of trans people do not report crime committed against them for fear of further discrimination.

BELLINGER v. BELLINGER

In *Bellinger v. Bellinger* (2001), the Court of Appeal concluded that the recognition of a change of gender was a matter for Parliament and in the absence of legislation the Court could not hold that a person had altered gender. The House of Lords upheld the decision in 2003, despite acknowledging "the humanitarian considerations underlying Mrs Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder".

GOODWIN v. UNITED KINGDOM

In *Goodwin v. United Kingdom* (2002) Christine Goodwin and another woman referred to as 'I' were transgender women whose cases were heard together by the European Court of Human Rights. Both applicants presented evidence that the refusal by the Government to provide legal recognition of their permanent change of gender led to multiple violations of their right to private life (Article 8) and their right to family life (Article 12) - the latter because of their inability to marry someone of the opposite gender. The Government argued that neither woman's right to marry was impinged because they were both free to marry other women (being legally men). The Court did not agree with the Government's arguments and ruled unanimously that previous decisions to award the UK a margin of appreciation could no longer apply. The judges decided that it would not place a disproportionate burden on society to require the Government to accommodate the needs of transgender people by issuing new birth certificates and permitting marriage to someone of the opposite gender.

GENDER RECOGNITION ACT

The 2004 Act allowed for trans people to apply to a Gender Recognition Panel to receive a Gender Recognition Certificate (GRC). If granted, a GRC entitles the applicant to “all the rights appropriate to a person of your acquired gender”.

Although the Gender Recognition Act was landmark legislation, the GRC application process has been much criticised, and has been described by some applicants as “severely outdated” and a “gruelling and intrusive” process.

PARRY V. UNITED KINGDOM

In *Parry v. United Kingdom* (2006) and *R and F v. United Kingdom* (2006), the applicants were respectively married and had children. In each case, one of them underwent gender reassignment surgery and remained with his/her spouse as a married couple. Following the introduction of the Gender Recognition Act 2004, the applicants who had undergone gender reassignment surgery made an application for the issue of a Gender Recognition Certificate, which could not be obtained unless they terminated their marriage.

The applicants complained in particular under Articles 8 (the right to respect for private and family life) and 12 (the right to marry) that they had been unable to obtain legal recognition of their acquired gender without terminating their marriage. The applications were declared inadmissible and the applicants were requested to annul their marriage because same-sex marriages were not permitted under English law.

The United Kingdom had not failed to give legal recognition to gender reassignment and the applicants could continue their relationship through a civil partnership which carried almost the same legal rights and obligations. The Court observed that, when the new system was introduced, the legislature was aware of the fact that there were a small number of transgender people in subsisting marriages but deliberately made no provision for those marriages to continue in the event that one partner made use of the gender recognition procedure. The Court found that it could not be required to make allowances for that small number of marriages.

GRANT v. UNITED KINGDOM

In *Grant v. United Kingdom* (2006) the European Court of Human Rights held that denying a state pension at age 60 from a transgender woman was a breach of the right to respect for private life contrary to Article 8.

EQUALITY ACT 2010

The Equality Act 2010 officially added “gender reassignment” as a protected characteristic.

s. 7 Gender reassignment

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
 - (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

TRANS PRIDE

The first Trans Pride March to take place in Europe was held in Brighton in 2013.

The three-day event is now celebrated annually with the intention of promoting “equality and diversity through visibility”.

MB V SECRETARY OF STATE FOR WORK AND PENSIONS

The appellant MB, a trans woman who had undergone gender reassignment surgery, had been denied a Gender Recognition Certificate (GRC) as she remained married to her wife. Upon reaching the pensionable age for women (60 years) MB's application for a pension was rejected as she had not been granted a GRC.

The case went to the Supreme Court (2016) which referred it to the Court of Justice of the European Union (CJEU), since it concerned the Council Directive 79/7/EEC - Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security.

The CJEU gave its judgment in 2018:

“The Court decided that the precondition of the marriage annulment in order to receive the general recognition certificate and in turn to access the pension, was a barrier that only affected persons with gender reassignment. Therefore the UK legislation treated a person of changed gender after marriage less favourably than a person without a change of gender after marriage. The purpose of the pension scheme was to provide protections to persons of old age, whether married or unmarried. The Court found that the UK legislation amounted to direct discrimination on grounds of sex, as prohibited by Art. 4(1) of Directive 79/7/EEC.”

TRANS EQUALITY LEGAL INITIATIVE

Formed in 2016 the Trans Equality Legal Initiative aims “to provide the ultimate forum for the discussion of trans rights in the United Kingdom. Covering important legal areas such as healthcare, education, justice and international protection, the initiative will be at the forefront of trans rights, bringing together experts and activists from across the legal and LGBT spheres.”

TRANSGENDER EQUALITY INQUIRY

The Women and Equalities Commission launched an inquiry into transgender equality, which published its findings and recommendations in 2016.

Committee Chair Maria Miller wrote:

"The committee took evidence on a very wide range of issues. As well as health, equality and criminal justice, we looked at education, data protection, service provision, official documents, sport - and more. Although Britain leads the world in recognising lesbian, gay and bisexual rights, we are still failing trans people in so many ways. The glamorous stories of trans celebrities are in stark contrast to the day to day experiences of many ordinary individual trans people. Our report challenges attitudes towards trans people and calls for them to be treated equally and fairly."

The report noted that "across the board, government departments are struggling to support trans people effectively" and made 30 recommendations including the updating of the Gender Recognition Act 2004

"The Gender Recognition Act 2004 was pioneering but is now dated. Its medicalised approach pathologises trans identities and runs contrary to the dignity and personal autonomy of applicants. The Government must update the Act, in line with the principle of gender self-declaration."

IRWIN MITCHELL

In 2017 the law firm Irwin Mitchell launched a landmark transgender policy. The policy aimed to help establish "a working environment that is free from discrimination, harassment or victimisation because of gender identity"

The policy covers the firm's 3,000 staff over 13 offices and includes contractors and temporary workers.

"It highlights issues such as confidentiality rights to ensure privacy is respected, and acknowledges that the experience and needs of colleagues will vary between individuals."

SOUZA V. PRIMARK

In *Souza v. Primark Stores Ltd* (2017) a trans woman took her employer to a tribunal with a claim of discrimination and harassment.

“The tribunal agreed that Ms de Souza had been subjected to harassment related to gender reassignment and direct discrimination because of her employer’s failure to investigate her complaints properly and to deal with them appropriately. It said it was ‘shocking’ that Primark could not devise a way of keeping Ms de Souza’s birth name off the rota sheets and out of the knowledge of her supervisors and others.”

Damages of £47,433.03 were awarded.

ICD-11

In June 2018 the World Health Organization’s International Statistical Classification of Diseases and Related Health Problems was updated, reclassifying gender incongruence as a “sexual health condition” rather than a mental disorder.

“The rationale was that while evidence is now clear that it is not a mental disorder, and indeed classifying it in this way can cause enormous stigma for people who are transgender, there remain significant health care needs that can best be met if the condition is coded under the ICD.”

GENDER RECOGNITION ACT CONSULTATION

In July 2018 the Government Equalities Office launched a consultation on the reform of the Gender Recognition Act. They summed up their findings thus:

“For many trans people, and organisations that support trans people [...] the legal recognition process is no longer delivering. Since the GRA came into force, 4,910 people have successfully acquired a GRC – this is fewer than the number of trans men and trans women who responded to the Government’s LGBT survey (around 6,900), and is far fewer than the estimated size of the trans population in the UK. The results of the survey show that only 12% of the trans survey respondents who had started or completed their transition had used the process set out in the GRA. Of those who were aware of the process, but did not have a GRC and had never applied for one, only 7% said they would not be interested in going through the process. This therefore suggests that there is interest in using the GRA system to obtain legal recognition of gender, but the process itself is not being used.”

