

# **DRAFT GENDER RECOGNITION BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the draft Gender Recognition Bill as published for pre-legislative scrutiny on 11<sup>th</sup> July 2003. They have been prepared by the Department for Constitutional Affairs to assist the reader of the draft Bill and to help inform debate on it. They do not form part of the draft Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### **SUMMARY AND BACKGROUND**

3. Transsexual people are not recognised in their acquired gender under the law of any part of the United Kingdom. Although transsexual people may obtain some official documents in their new name and gender, they are not entitled to have their birth certificates revised and they cannot enjoy any rights confined by law to people of the gender to which they feel they belong. Transsexual people cannot marry in their acquired gender. These issues were first considered by an Interdepartmental Working Group convened in 1999. The Government announced its intention to bring forward legislation in this area on 13<sup>th</sup> December 2002.
4. On 11<sup>th</sup> July 2002, the European Court of Human Rights delivered its judgements in the case of *Goodwin v The United Kingdom* and *I v The United Kingdom* (2002) 35 EHRR 18. The Court found that the UK had breached the Convention rights of these two transsexual people, under Articles 8 (the right to respect for private life) and 12 (the right to marry). The UK Government has a positive obligation under international law to secure the Convention rights and freedoms and must rectify these ongoing breaches.
5. On 10<sup>th</sup> April 2003, the House of Lords gave judgment in the case of *Bellinger v Bellinger* [2003] 2 All ER 593. Mrs. Bellinger, a male-to-female transsexual person, was seeking legal recognition of her 1981 marriage to a man. Their lordships were sympathetic to Mrs Bellinger's plight but ruled that the marriage was void. They declared that section 11(c) of the Matrimonial Causes Act 1973 was incompatible with the Human Rights Act 1998, and the result of this is that legislation is needed to enable transsexual people to marry in their new gender.

6. The purpose of the draft Gender Recognition Bill is to provide transsexual people with legal recognition in their acquired gender, subject to some specified exceptions. Legal recognition will follow from the issue of a gender recognition certificate by a Gender Recognition Panel. Before issuing a certificate, the Panel must be satisfied that the applicant:

- has, or has had, gender dysphoria,
- has lived in the acquired gender throughout the preceding two years and
- intends to continue to live in the acquired gender until death.

Where applicants have been recognised under the law of another country as having changed gender, the Panel need only be satisfied that the country in question has been approved by the Secretary of State. In practical terms, legal recognition will have the effect that, for example, a male-to-female transsexual person will be legally recognised as a woman for all purposes. On the issue of a gender recognition certificate, the person will be entitled to a new birth certificate reflecting the acquired gender and will be able to marry someone of the opposite gender to his or her acquired gender.

## **THE BILL**

7. In the Bill:

- *clauses 1 to 4, and Schedule 1*, establish a process for the issue of a gender recognition certificate, that is, for gaining recognition in the acquired gender. They create the Gender Recognition Panels and set out the requirements for making an application and the criteria by which the Panels will decide applications;
- *clauses 5 to 13, and Schedules 2 and 3*, set out the consequences of the issue of a certificate. They begin with the general principle that the transsexual person will for all purposes be regarded as being of the acquired gender and then describe the consequences in terms of registration in a new Transsexual Persons Register, the issue of a new birth certificate, the effect on marriage law, parenthood, discrimination, inheritance, the duties of trustees and property devolution; and
- *clauses 14 to 20* contain supplementary provisions. They include a prohibition on disclosure of information relating to a person's application for a certificate or a person's gender history. They also limit applications, for the first six months after the Bill comes into force, to those transsexual people who have been living in the acquired gender for at least six years.

## COMMENTARY ON CLAUSES

### Clause 1: Applications

8. This sets out who may apply for a gender recognition certificate, who determines that application and against what criteria. It also gives effect to *Schedule 1*.

9. Under *subsection (1)* applications may be made by someone living in the other gender (*subsection (1)(a)*), or by someone who is recognised as having changed gender in another jurisdiction (*subsection (1)(b)*). An applicant must be aged at least 18.

10. Under *subsection (3)* a Gender Recognition Panel will determine applications for a gender recognition certificate.

11. The criteria for a successful application under *subsection (1)(a)* ('living in the other gender') are set out in *subsection (4)*: the applicant must have, or have had gender dysphoria, have lived in the acquired gender for at least two years before making the application, intend to continue to live in the acquired gender for the rest of his or her life, and provide the evidence required by section 2. *Subsection (5)* provides that applications made under *subsection (1)(b)* must be granted if the Panel is satisfied that the legal recognition was given under the law of an 'approved country or territory'; otherwise they must be rejected. *Subsection (6)* provides the Secretary of State with the power to prescribe what is an 'approved country or territory'.

12. *Subsection (7)* gives effect to *Schedule 1* which makes provision for Gender Recognition Panels. The Panels will determine applications for gender recognition certificates. *Schedule 1* defines the constitution of the Gender Recognition Panel and prescribes the eligibility criteria for the legal and medical members to be appointed by the Secretary of State. The Secretary of State must appoint one of the legal members as the President and one as the Deputy President and may give directions setting out the procedures to be followed by the Panels.

### Clause 2: Evidence

13. This stipulates what evidence must be provided as part of an application for a gender recognition certificate. *Subsections (1) to (4)* set out what evidence is needed for an application on the basis of 'living in the other gender' (*clause 1(1)(a)*). The criteria for granting applications made on the basis of 'being recognised under a foreign law as having changed gender' (*clause 1(1)(b)*) are different. The evidential requirements for these applications are set out in *subsection (5)*.

14. All applications must be accompanied by the applicant's birth certificate and evidence concerning any changes in the name by which the applicant has been known (*subsections (6) to (8)*).

15. *Subsection (9)* provides the Panel with the flexibility to specify other evidence that will enable an applicant to meet the criteria and similarly provides the applicant with the right to supply other evidence pertaining to the criteria. When the Panels have been established there will be notes for applicants clarifying what evidence the Panel will regard as useful for satisfying the criteria set out in *clause 1(4)*.

### **Clause 3: Certificates**

16. This provides for the issue of a gender recognition certificate. *Subsection (1)* stipulates that, if an application is granted, the Panel must issue a certificate. *Subsection (14)* provides the Secretary of State with the power to specify the content and form of the certificates.

17. *Subsections (3) to (9)* set out the procedure to be used where an applicant is married. An applicant under *clause 1(1)(a)* will not be issued with a full gender recognition certificate if he or she is married. Similarly, an applicant under *clause 1(1)(b)* will not be issued with a full certificate if he or she is married to someone of his or her acquired gender, or if he or she is married to someone who is not of the acquired gender where the marriage took place before the applicant was recognised as being of the acquired gender. However, this will not prevent a married person from making an application to the Panel. If the Panel decides to grant the application of a married person, it will issue an interim gender recognition certificate. The issue of an interim gender recognition certificate makes the existing marriage of the applicant voidable at the application of either party to the marriage (*Schedule 3, paragraphs 4 to 7*) but has no effect beyond that. In order to obtain a full gender recognition certificate, and therefore full legal recognition under the Bill, the applicant must apply to the Panel, with evidence of the dissolution of the marriage (or death of the other party to the marriage), within six months of the date of that decree (or if the other party to the marriage dies, from the date of death). The Panel must grant the application if satisfied that the applicant is no longer married and issue a full gender recognition certificate.

18. *Subsections (10) to (13)* make provision for correction of a gender recognition certificate. The Panel will grant an application for a correction if satisfied that the certificate contains an error.

### **Clause 4: Supplementary**

19. *Subsection (1)* allows the Secretary of State to specify the form and manner of the application, for example how and where the application is to be made.

20. *Subsection (2)* makes provision for an application fee, the amount of which will be specified by the Secretary of State. The fee will not be refundable.

21. *Subsection (3)* provides the applicant with a right of appeal on a point of law to the High Court and *subsection (5)* provides the Secretary of State with the right to refer a case to the High Court if he considers that the grant of an application was secured by fraud.

22. *Subsection (4)* stipulates that if an application is rejected the applicant may not make a further application until six months have elapsed.

**Clause 5: General**

23. *Subsection (1)* states the fundamental proposition that, once a full gender recognition certificate has been issued to a person, the person's gender becomes for all purposes the acquired gender.

24. *Subsection (2)* provides amplification of *subsection (1)*, making clear that the recognition is not retrospective, so the certificate does not rewrite the gender history of the transsexual person, and that the new gender applies for the interpretation of enactments, instruments and documents made before as well as after the issue of a certificate.

**Clause 6: Registration**

25. This gives effect to *Schedule 2*.

26. *Paragraph 1* of *Schedule 2* requires the Registrar General to create a Transsexual Persons Register. This Register will not be open to public inspection or search.

27. *Paragraph 2* establishes that the issue of a gender recognition certificate leads to the making of an entry in the Transsexual Persons Register if the application for that certificate was accompanied by a certified copy of a birth register entry. In practice this will apply where the birth is registered in England and Wales. The birth register will be linked to the Transsexual Persons Register. A birth register entry for a person who also has an entry in the Transsexual Persons Register will be marked. This is to ensure that, when a person applies for a new birth certificate in the acquired gender, the Registrar General does not issue a birth certificate in the original gender. The new birth certificate however will not show the marking or disclose the fact that it is compiled from the Transsexual Persons Register. The system for connecting the two registers will not be open to public inspection or search.

28. *Paragraph 3* provides that the relevant index kept in the General Register Office must include entries in the Transsexual Persons Register. Though the index will be searchable, it must not disclose that the entries pertain to the Transsexual Persons Register.

**Clause 7: Marriage**

29. This gives effect to *Schedule 3*.

30. *Paragraphs 1 and 2* of *Schedule 3* adjust the restrictions on marriage under section 1 of the Marriage Act 1949. A woman may not, for instance, marry her ex-husband's father. These adjustments will mean that where one party to the marriage is regarded as being of the acquired gender, the restrictions cover relationships flowing from any previous marriage in the birth gender, i.e. a woman who is a male-to-female transsexual person may not marry her ex-wife's father.

31. *Paragraph 3* amends the Marriage Act 1949 to provide an additional exception to the obligation on clergymen in the Church of England and the Church in Wales to solemnise marriages.

32. *Paragraphs 4 to 7* amend the Matrimonial Causes Act 1973 so that if at the time of the marriage one party to the marriage did not know that the other was previously of another gender, the former may seek to annul the marriage. The amendments also provide that if either party to the marriage has been granted an interim gender recognition certificate, the marriage is voidable (see *clause 3(3) to (9)*).

### **Clause 8: Parenthood**

33. *Subsection (1)* provides that though a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child. This is an exception to the proposition stated in *clause 5(1)*.

34. *Subsection (2)* provides that, where two women present for treatment under the Human Fertilisation and Embryology Act 1990, and, subsequently, the non-child-bearing woman is recognised in the acquired gender (that is, as a man), that man will be treated as the father of the child.

### **Clause 9: Discrimination**

35. This amends the Sex Discrimination Act 1975. That Act, as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999 (S.I. 1999/1102), already makes it 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 undergone gender reassignment. However, this is subject to exceptions based on ‘genuine occupational requirements’. If, for example, 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 amendments made by *clause 9* mean that these exceptions will not be available once a person has been recognised in the acquired gender. They are then, for the purposes of employment, to be treated in their acquired gender, without equivocation. The argument from ‘genuine occupational requirements’ can still be made where a person is intending to undergo, is undergoing or has undergone gender reassignment but has yet to gain legal recognition in the acquired gender.

### **Clause 10: Succession etc**

36. This applies *clause 5* to the disposal or devolution of property unless the will or instrument disposing or devolving the property indicates otherwise.

**Clause 11: Peerages**

37. This provides a further exception to the proposition stated in *clause 5(1)*. The descent of any peerage or dignity or title of honour will take place as if a person recognised in the acquired gender were still of the birth gender. The same rule applies to any property that passes with it, unless the will or other instrument governing the property departs from this rule by express provision.

**Clause 12: Trustees and personal representatives**

38. A trustee or personal representative is responsible for conveying and distributing property from a trust or estate. This clause relieves a trustee or personal representative from any fiduciary duty to inquire whether a gender recognition certificate has been issued to any person or revoked, even if that fact could affect entitlement to property which he is responsible for distributing.

**Clause 13: Orders where expectations defeated**

39. This makes provision for any situation where the disposition or devolution of property is different from what it would be but for the fact that a person is regarded as being of the acquired gender. If, for example, an instrument governs succession by reference to the oldest male descendant of the settlor, and there is an older sister whose gender becomes male under the Bill, then the person who was previously the ‘oldest male descendant’ may cease to enjoy that position. *Subsection (2)* allows a person who is adversely affected by the different disposition or devolution of the property to make an application to the High Court. The High Court, if it is satisfied that it is just to do so, may make such order as it considers appropriate.

**Clause 14: Prohibition on disclosure of information**

40. *Subsections (1) and (2)* establish that it is an offence to disclose information about a person’s application for a gender recognition certificate or a successful applicant’s gender history. This information is termed ‘protected information’ under this Bill. *Subsection (3)* provides that the prohibition extends only to information acquired in ‘an official capacity’ and so does not cover information acquired purely in a private capacity.

41. *Subsection (4)* provides a range of exceptions to the general prohibition on disclosure. *Subsections (5) and (6)* make provision for the Secretary of State to prescribe further circumstances in which disclosure does not constitute an offence. The Criminal Records Bureau, for example, may need to know that a person was previously of a different gender.

**Clause 19: Applications within six months of commencement**

42. *Clause 19* creates a ‘fast-track’ procedure for the first six months after commencement. Under *subsection (2)*, these applicants will have to satisfy the criteria set out in *clause 1(4)* as modified, that is, satisfy the Panel that they have lived in the other gender for six (rather than two) years; and that either they have or have had gender dysphoria, or that they have undergone surgical treatment for the purpose of modifying sexual characteristics.

43. Under *subsections (3) and (4)*, the requirements for medical evidence stated in *clause 2(1) to (3)* will not be applied to these applicants. Instead, if a person is applying on the basis of having or having had gender dysphoria, the application must be accompanied by one medical report providing details of the diagnosis of gender dysphoria and details of treatment that the applicant has undergone, is undergoing, or that has been prescribed or planned for the applicant to undergo. If a person is applying on the basis of having undergone surgical treatment for the purpose of modifying sexual characteristics, the application must be accompanied by one medical report containing details of the treatment undergone and any further treatment which has been prescribed or planned.

### **EFFECTS OF THE BILL ON PUBLIC EXPENDITURE**

44. The Bill establishes Gender Recognition Panels. It is expected that the cost of establishing these Panels together with the cost of running the Panels in the first year will be under £1.5m. It is probable, depending on the parliamentary timetable, that this cost will fall over two financial years. The ongoing cost of running the Panels will be around £0.25m per year. These costs will be met from within the departmental spending limit. Officials in the Department for Constitutional Affairs are working with other Government Departments to identify and specify any other costs resulting from the Bill. The Office for National Statistics have identified an initial cost (estimated at around £0.2m) in setting up a Transsexual Persons Register and making arrangements for the issue of new birth certificates. The cost thereafter can be absorbed into the normal operational budget. There are no additional costs for the Department for Work and Pensions. All these costings are being finalised as a matter of priority.

### **EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER**

45. Administrative staff will be needed for the secretariat of the Gender Recognition Panels. It is possible that existing staff in the Department for Constitutional Affairs can be moved to the secretariat. Hence, there may be no effect on the levels of public sector manpower. In any event, it is estimated that the secretariat will consist of 9 staff in the first year when it is at its busiest.

### **REGULATORY APPRAISAL**

46. A partial Regulatory Impact Assessment (RIA) has been prepared. This will be placed in the Library of the House and on the Department's website. The RIA shows that there is no evidence of a significant impact on any business sector.

## **COMMENCEMENT**

47. The provisions in the Bill will come into force on a day appointed by an order of the Secretary of State.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

48. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined in Section 1 of that Act). The statement has to be made before second reading.

49. As mentioned in paragraph 4 above, the Gender Recognition Bill is intended to remedy the breaches of the Convention found by the European Court of Human Rights in *Goodwin and I*, and by the House of Lords in *Bellinger v Bellinger*, by giving transsexual people their rights under Articles 8 and 12 of the Convention. The European Court recognised in *Goodwin* that the most appropriate means of achieving legal recognition for transsexual people remained a matter within the state's margin of appreciation. The European Court also indicated that it is for the state to determine the conditions under which gender recognition should be accorded or under which existing marriages should cease to be valid, and the formalities for future marriage including information to be disclosed to intended spouses. The Department considers that the Bill as a whole achieves the Convention-compatible result of establishing a coherent system for giving full legal recognition to transsexual people while safeguarding the rights of other potentially affected individuals.

50. The Bill contains provisions requiring the termination of marriages prior to the grant of full gender recognition certificates. The Department has considered the impact of these provisions on the Article 8 (private and family life) rights of these individuals and their families. The Convention allows the state a wide margin of appreciation in this respect. Other approaches to the issue of existing marriages may therefore be justifiable. But the Department is of the view that the Bill's approach, which requires transsexual people to accept the ending of a male-female marriage as a condition for registration in the new gender, is justified under Article 8(2). For similar reasons, the Department considers that the requirement to end existing marriages is compatible with Article 12 (right to marry). That Article specifically subjects the exercise of the right to national laws. While the essence of the right must be preserved, the Department considers that requiring this category of marriage to end, in these particular circumstances, is a permissible use of national law.

*These notes refer to the draft Gender Recognition Bill  
as published for pre-legislative scrutiny on 11<sup>th</sup> July 2003*

51. The Department has also considered the extent to which the provisions on disclosure of information relating to transsexual people (*clause 14*) interferes with the right to freedom of expression in Article 10 of the Convention. The Department is of the view that the protection of information in *clause 14* is necessary in order to give full effect to the privacy rights of transsexual people as required by the European Court of Human Rights and is justified under Article 10(2).