

**Women and Equalities Committee Call for evidence
on the Gender Recognition Act**

INTRODUCTION

1. I am a barrister practising in employment and discrimination law from Old Square Chambers, London and Bristol. I have contributed to the formal response from the Employment Lawyers' Association, but this is my personal response.
2. I believe I can offer a unique perspective as I am a trans woman who finally transitioned in 2011 after many years of personal struggle. In 1990 I suffered highly unpleasant anti-trans discrimination which ended what appeared to be a promising managerial career in the rail industry. After a period of distress I turned to law and was called to the Bar of England and Wales in 1995. I was certainly the first, and I believe still the only male to female trans discrimination barrister.
3. Following my transition I have made transgender discrimination part of my practice and regularly advise both employers and employees on trans law. I have appeared in a number of cases with trans issues which have achieved publicity and dealt with trans issues, amongst which are *A v Telford NHS Trust*, *O'Donnell v Times Newspapers Ltd*, and, most recently, I appeared for the claimant in the landmark case of ***Taylor v Jaguar Land Rover*** in which the Birmingham employment tribunal found that Non binary and genderfluid individuals were included in the protected characteristic of gender reassignment.
4. I speak regularly on trans and trans law issues. I am shortly to publish 'A Practical Guide to Transgender Law' written jointly with a Chambers' colleague and the assistance of a number of others.

5. Beyond a personal belief that all individuals who respect the rights and freedoms of others should be able to live in society in peace and with respect in turn, I do not maintain a 'campaigning' stance on trans issues and I recognise that, on occasion, the rights and freedoms of one protected characteristic may conflict with those of another, and that care, openness and generosity may be necessary to debate such matters and identify the correct solution.

EXECUTIVE SUMMARY

6. Gender change should be conducted by a non-medicalised formal process akin to registering a birth or a death.
7. The greatest legislative problem is the uncertainty over the meaning of legislation, and which sex/gender trans people belong to.
8. Parts of the debate about trans rights and protections have become extremely toxic (from both extremes) leading to misleading material being put into the public domain.
9. The Landmark case of Taylor v Jaguar Land Rover has moved the debate about complex gender identities on. Whilst useful, the case contributes to a haphazard growth of rights and points up the gaps in other provisions such as the GRA.

QUESTION 1

Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?

10. I can only answer this from my perspective. I would have no difficulty in qualifying for a GRC but have not taken any step since my social transition in 2011 to apply for one.

My reasons are:

- 10.1 I find the idea of submitting my personal sense of 'self' to a panel for 'validation' offensive and insulting.
- 10.2 It does not appear to me to determine any rights which are significant to me. I am open about my trans history and have the same friends and profession as I had before transition.
- 10.3 I do not require a GRC for any form of personal 'validation'.
- 10.4 I do not like the fact that, if I obtained a GRC I might be the cause of, for example, and HR adviser collecting a criminal record for a mistake in connection with revealing my history under s22 of the GRA. I believe that education should be the first route to acceptance, followed, if necessary, by a civil discrimination claim.
- 10.5 I would be entirely comfortable with a formal process to register a changed identity such as the registration of a birth or a death.
- 10.6 Tinkering with the existing system is not a step forward.

It should be remembered that the EqA 2010 grants significant rights and protections to those proposing to undergo gender reassignment. This is a process of self-declaration (to an employer) and no particular difficulty has been noted with that part of the Act. So why can the GRA not work in a similar way?

QUESTION 2

Are there challenges in the way the Gender Recognition Act 2004 (GRA 2004) and the Equality Act 2010 (EqA 2010) interact? For example, in

terms of the different language and terminology used across both pieces of legislation?

11. The interaction is a mess. Baroness Hale in *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21 expressed the hope that the GRA would provide a means of dealing with ‘these demarcation questions’ but it does not, or at least not clearly.
12. The question of whether a person has the protected characteristic of ‘gender reassignment’ (subject to the change in *Taylor v Jaguar*) is relatively straightforward, but the question of whether a binary trans individual should be regarded as a man or a woman for EqA purposes is much less easy.
13. There appear to be four options:
 - 13.1. OPTION 1: One view is that the EqA 2010 does not deal with the sex of a transgender person. They will, for all EqA 2010 purposes, always be their cis/natal sex, male or female. This position is inconsistent with protection of transgender persons and their accommodation in society but it is a possible reading of the Equality Act as far as provisions based on ‘sex’ is concerned.
 - 13.2. OPTION 2: Another view is that a transgender person should be considered to be of their affirmed sex for the purposes of the EqA 2010 ONLY if they have a GRC, as a result solely of 9(1) GRA 2004. This, however, leads to significant anomalies and logical problems as will be shown below. If this interpretation is correct, two transgender people could have otherwise identical circumstances, (i.e. have transitioned for the same period of time and undergone the same degree of transition), and yet be regarded differently for the purposes of the EqA 2010 solely because one has a GRC and one does not.

13.3. OPTION 3: A third view, consistent with s9(3) GRA 2004 is that possession of a GRC is IRRELEVANT to consideration of an individual's rights or position under the Equality Act 2010 and PERCEIVED gender or sex in the particular circumstance under question is all that matters. This, however, leaves a person's gender or sex to be defined by the perception of an alleged discriminator. The EqA recognises the concept of discrimination on the basis of perception (e.g. where a straight person is bullied because they are perceived as gay, or a white person is rejected for a job because they have an African name), albeit perceptive discrimination requires a Tribunal to establish what sex the alleged discriminator perceived the complainant to be.

13.4. OPTION 4: A fourth view is that an individual is the sex and/or gender in which they identify for the purposes of the EqA 2010, regardless of whether they have taken steps to transition and regardless of whether or not they hold a GRC. This also has potential difficulties given that they may present differently from how they identify, also discussed below.

Who is the correct comparator for the purposes of the EqA 2010 and potential inconsistency with the GRA 2004?

14. This is a matter of debate.

15. When considering sex discrimination (leaving aside for a moment consideration of the GRA 2004) is a transgender woman who does not hold a GRC but who does fall within the s7 EqA 2010 definition of transsexual, male or female for the purposes of the EqA 2010? Some would say that, as she identifies as female, she is a woman for the purposes of the EqA 2010 (OPTION 4). Others would say that the transwoman is biologically male and therefore is male for the

purposes of the EqA 2010 (OPTION 1). The EqA 2010 does not provide a clear answer as it does not define male or female or man or woman.

16. Does /should the Act refer to biological sex, legal sex, perceived sex, self-defined sex / gender? This is uncertain.
17. To take an example, if a trans woman applies for a job and is rejected for it despite being better qualified than all the other candidates, who are all male and not transgender, can she claim less favourable treatment on grounds of sex, the comparator being a man? Or is she treated as a man, and would therefore have to compare herself with a non-transgender person? Is that person a natal/cis man or a natal/cis woman or does it not matter?
18. If OPTION 1 is right, she is male for the purposes of EqA 2010 and so her comparator for the purposes of a claim of less favourable treatment on grounds of sex would normally be a woman, and in principle her claim would fail.
19. There is a further potential lacuna: if the potential employer does not realise that the transwoman is transgender and simply rejects her because they do not want to employ a woman, is it acceptable that she has to rely upon perceived discrimination, i.e. that she is perceived as being female (OPTION 3)? Again, who is the comparator in such a situation?
20. Now consider the position of a transgender person under OPTION 2 and compare the position of the above transgender woman (who falls within s7 EqA 2010 but who does not hold a GRC) with a transgender woman who does hold a GRC. The effect of holding a GRC is that, as a result of s9 GRA 2004, the transwoman is a woman 'for all purposes'. IF this affects rights under the EqA 2010 (OPTION 2), for the purposes of the EqA 2010 she is a woman and the

correct comparator is a man and the question of who is the correct comparator for sex discrimination purposes does not arise. However, this potentially means that a transgender woman who “passes” as a woman, who has lived potentially all of her adult life as a woman (potentially not even going through male puberty if she received puberty blockers as a child) may not be regarded as a woman for the purposes the EqA 2010 WHEREAS a person who transitioned later and possibly less successfully but who has obtained a GRC, is regarded as a woman for the purposes of the EqA 2010. Is it acceptable for the trans woman without a GRC to have to rely on the discriminator’s perception?

21. It might be suggested that one solution to the above would be to say that the transwoman should obtain a GRC. However, she may not wish to do so or she may not be able to do so, for example, if she does not (yet) meet the requirements for a GRC, albeit still falling within the protection of s7 EqA 2010, for example by being ‘caught’ by the spousal veto.
22. In another example, what about a teenager who is a transwoman/trans-girl applying for a “Saturday job”? If under 18, she will not be able to obtain a GRC, however successfully she has transitioned. Is she male or female for the purposes of the EqA? Why should she be potentially regarded as different under the EqA 2010 from an 18+ year-old whose circumstances are the same but who is simply a few months older?
23. There is a further complication in the above scenario. If the trans-teen with a GRC is not offered the job because she is transgender, who is the correct comparator? Is the comparator a male or female teenager or does it not matter?

24. There has been some, but very limited, guidance in this regard by the courts. It can be argued that, following the decision of the House of Lords in *Chief Constable of West Yorkshire Police v A (No2)* [2004] UKHL 21, [2005] 1 AC 51 (in which it was held that European Union law requires that those who have undergone hormonal treatment and surgery and lived successfully in the opposite gender be recognised in their reassigned gender for the purposes covered by the Equal Treatment Directive), it is difficult to see how a post-operative trans person who lives permanently in their acquired gender could be regarded as not being of their acquired gender for the purposes of the EqA 2010 and therefore for comparator purposes (OPTION 3 and OPTION 4 if they have gone sufficiently down the transition pathway). However, it is possible to argue that, short of receipt of a GRC, a transwoman remains a man as a matter of law, including for EqA 2010 purposes (OPTION 2).
25. Such legal uncertainty is unhelpful in employees and employers seeking to understand their rights and responsibilities under the EqA 2010 and unhelpful to professionals advising in the field.

Genuine Occupational Requirement / justification of indirect discrimination.

26. For these exceptions to be applied, the body relying on the exception has to show that it is operating a proportionate means of achieving a legitimate aim. There is some guidance in case law on these concepts – the least discriminatory means of achieving a legitimate aim, for example – but these concepts are far from easy in a tribunal, much less so in a workplace.

QUESTION 3

Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?

27. The EqA provides for conditions in which it is permissible to offer separate services for each sex, separate services differently for each sex, or services only to persons of one sex (subject to a proportionality requirement).
28. Schedule 9 allows employers to ring-fence certain jobs to individuals with one or more specified protected characteristics, where having regard to the nature or context of the work it is an occupational requirement to have that characteristic, and the application of the requirement is a proportionate means of achieving a legitimate aim.
29. The debate about proportionality in this area has become toxic and polarised.
30. Those who are the more extreme supporters of trans individuals often talk of a 'right' for trans people to use single sex services and conflate sex and gender.
31. Those who regard any use of single sex services or spaces by trans people as inherently bad, talk about the ability to exclude trans individuals but tend to ignore or minimise the proportionality test.
32. When I am in the Women's toilets in my local supermarket, I am there to pee. Would it be proportionate to exclude me? Would it be proportionate to insist that I, who transitioned 9 years ago use the male lavatories? Would it be proportionate to exclude me from those lavatories, male or female? Would it be proportionate to legislate to insist that every supermarket provide gender-neutral

facilities? Only gender neutral facilities? Answers / legislation / guidance must make sense on this intensely practical level.

33. I, for one, accept that there are (some, rare) circumstances in which trans people should be excluded from single sex spaces and services. But that requires engagement with difficult and perhaps highly personal questions of proportionality. There ARE legitimate parallels with questions of race or disability discrimination. There needs to be an open, honest debate about such issues approached with more goodwill than some of the present shouting and throwing of hand grenades allows.

QUESTION 4

Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed?

34. The various failures of clarity set out above form the single greatest issue.

QUESTION 5

What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services?

35. I have experienced no particular difficulty, personally. However, I have access to significant personal resources which most trans people do not have. For example, I paid for my facial and gender confirmation surgery privately.

36. Many trans people do not have such access to resources and wait unacceptable lengths of time to be assessed for and to enter the transition pathway.

37. This is a particular scandal in the case of trans children, who would be considerably assisted by avoiding puberty. I can only describe male puberty as an horrific experience from the perspective of someone who had understood their true nature by the age of 11 or 12 and had to experience it without any form of support.

QUESTION 6

Are legal reforms needed to better to better support the rights of gender-fluid and non-binary people? If so, how?

38. The panel will be aware that I was Counsel for the claimant in the case of Taylor v Jaguar Land Rover, Case No. 1304471/2018 in which the Birmingham ET found that non binary and genderfluid individuals are within the definition of gender reassignment as defined by the Equality Act. The tribunal's full reasons and to me published momentarily and I would be pleased to discuss the case with the panel. When they read the tribunal's decision, I believe the panel will be appalled that a major employer could be so far behind in Diversity and Inclusion almost 50 years since we began to enact discrimination legislation in the UK.

39. The panel will be aware that this decision is not being appealed and so it does not formally have precedent status. However, trans cases are still very rare in the tribunals, complex gender identity cases vanishingly so, and it is unlikely that the point will reach a higher court anytime soon.

40. Doubt and uncertainty is therefore likely to persist.

41. The world of work and society is still working through how to deal with binary trans individuals. More complex identities pose greater challenges. Other employees, for example, take some time to understand that trans 'John' will be Jane from next week – with a different name, pronouns, style of dress, toilet use and social norms.
42. How much more complex to understand that genderfluid John/Jane may vary in these characteristics on a daily basis, or non-binary 'J' requires the use of gender neutral pronouns, gender neutral toilet facilities (or some understanding that they may not easily fit a binary), unfamiliar pronoun use and the like.
43. It is unimpressive that government is not taking the lead by resisting a gender-neutral marker on passports (unlike other jurisdictions such as New Zealand, Australia and the Netherlands), a tax system that cannot cope with gender-neutral individuals and a Driving license which includes a gender marker in the driver number that has to be male or female.
44. Furthermore, the Gender Recognition Act makes no provision for complex gender identities.
45. If the UK is to regain its place at the forefront of advancing citizens' protection, these difficult issues need to be tackled.

November 2020