

TRANSGENDER EQUALITY

Written evidence submitted by:

Centre for Law & Social Justice, University of Leeds, and Intersex UK.

The Centre for Law & Social Justice, School of Law, University of Leeds supports scholars, activists, organisations and practitioners who are interested in and engage with issues of equality, welfare, and social justice. Our work considers the extent to which law can address these inequalities and help ensure that resources are shared more equitably. One focus of the work of the Centre is vulnerability and embodied justice, including in respect of trans and intersex embodiment. This has motivated the submission of this evidence to the Women and Equalities Committee's inquiry into Transgender Equality.

Intersex UK is an international campaigning and educational organisation working to protect the bodily autonomy of intersex bodied children, teens, and adolescents through government lobbying and educational outreach.

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Executive summary

The Authors recommend the following

- a) An update of the Births and Deaths Registration Act 1953 s29 to specifically include intersex as a ground for *correction* – not as an alternative to male or female.
- b) Open up the possibility of allowing trans, intersex bodied, and other people to apply to have an 'X', 'O' or 'I' rather than and 'M' or 'F' in their passports. This is not recommended for birth certificates, nor should it be mandatory for passports.
- c) Extend the Equality Act 2010 to intersex bodied people and those who do not identify as male or female.
- d) An explicit inclusion of intersex bodied persons in current equality and anti-discrimination legislation.
- e) A guaranteed commitment to respecting the bodily integrity and autonomy of intersex bodied children including the prevention of irreversible normalising surgical and/or medical procedures.
- f) Remove the requirement for a Gender Recognition Panel and a diagnosis of gender dysphoria for trans and intersex people seeking gender recognition. Replace this with a model based upon the self-declaration of gender.
- g) Include within any new legislation a right to health care treatment.
- h) Remove the section 2(1)(b) Gender Recognition Act 2004 requirement that an applicant 'has lived in the acquired gender throughout the period of two years ending with the date on which the application is made'.

- i) Remove the section 2(1)(c) Gender Recognition Act 2004 requirement that an applicant 'intends to continue to live in the acquired gender until death'.
- j) Remove the section 19 Gender Recognition Act 2004 exemption which allows sporting bodies to exclude trans people from competitive sport. No intersex bodied person should face discriminatory or abusive treatment in competitive sport.
- k) Remove the schedule 4, section 5 Gender Recognition Act 2004 obligation to disclose a historical account of gender assignment and overturn *ST (formerly J) v J* [1998] 1 All ER 431.
- l) Remove the schedule 5 Marriage (Same Sex Couples) Act 2013 requirement that a married trans person to include 'a statutory declaration by the applicant's spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate' when applying for a gender recognition certificate.
- m) Adopt the recommendations of the Leveson inquiry in order to protect trans and intersex bodied people's right to privacy against media invasion.
- n) Overturn the case of *R v McNally* [2013] EWCA Crim 1051 in light of a commitment to equality. Deception as to gender should be removed from UK law.
- o) Review waiting times at NHS Gender Identity Clinics and ensure that intersex bodied people and their families are offered appropriate non-invasive and non-medicalised support and care.

The authors have focussed their response to the areas identified by the Committee.

1) Terminology and definitions, and the availability and reliability of data, relating to the trans community

- i) The authors are concerned by the lack of legal recognition of intersex bodied persons and intersex conditions under UK law. Though we recognise an important distinction between trans and intersex issues, we raise it at this juncture as an overhaul of this area is much needed. It is assumed by some that the Gender Recognition Act 2004 and current equality law is capable of including intersex issues. We would suggest that it is not and that further consultation and clarification is much needed in order to protect a vulnerable group in society. The Centre notes the growing international recognition of intersex issues (including in Germany, New Zealand, Malta, Argentina and Australia – discussed in more detail directly below).

2) The relationship between the Government Equalities Office and other government departments in dealing with transgender equality issues and how the UK's performance compares internationally

- i) The Births and Deaths Registration Act 1953 has limited remedy for mistake under s29. It is suggested that this should be re-examined to specifically include all intersex bodied people. This would allow intersex bodied persons to correct their legal gender to match their lived identity without appealing to the Gender Recognition Act 2004. Maximising the

autonomy of intersex bodied children is more appropriate than a mandatory third gender (as has been brought in in Germany). The use of a third gender in Germany has been the focus for much criticism and we strongly recommend against the use of it for birth certificates.

- ii) That said, the authors would also recommend that the Committee consider following states such as Australia, Denmark, India, Nepal, New Zealand and Pakistan by opening up the possibility of allowing trans, intersex bodied and other people to apply to have an 'X' rather than and 'M' or 'F' in their passports; as proposed in the Early day motion 47 tabled in June 2014,¹ and permitted by the International Civil Aviation Organisation. We would also suggest going further than this and allow categories such as 'O', 'I' and 'M+F'.
- iii) The authors would also advise the Committee to consider including within the 'protected characteristic' of the Equality Act 2010 those trans and intersex bodied people who do not identify with the classifications of male or female.
- iv) It has been noted that the Government Equalities Office will come under mounting pressure to recognise intersex issues (Travis 2015). Germany's *Gesetz zur Änderung personenstandsrechtlicher Vorschriften (Personenstandsrechts-Änderungsgesetz—PStRÄndG)* (2013) recognises the possibility of children being born intersex. This will put pressure on European Anti-Discrimination Law to recognise intersex (including the European Courts, the UK Equality and Human Rights Commission and the European Institute for Gender Equality) (Travis 2015). Whilst, in the field of work it is likely that this will be included under existing EU Law it is felt that with further clarification, the UK could be at the forefront of developing anti-discrimination law in this area. The approach taken by Australia could be a possible model for consideration. This needs to be developed in conjunction with the continuing work of groups such as Intersex UK who are currently working with UK parliamentarians, the European Human Rights Commission, and a number of UN agencies including the UN Special Rapporteur on Torture.
- v) Health Care Law has become increasingly concerned with the question of bodily integrity (Priaulx 2009, Brazier 2009) and the issue of consent in non-therapeutic surgical interventions on the bodies of minors has gained increased attention over the last decade (Fox and Thomson 2006, 2008, 2009, 2012). In the context of intersex bodied children, advocates have been concerned to promote awareness of the multiple surgeries that have been undertaken on members of their community, often without consent. This has attracted attention from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Méndez 2013) who was also advised by Intersex UK (along with GATE, Swischengeschlecht, Oii Australia, and Dr Anne Tamar-Mattis (Advocates for Informed Choice)).² Similarly, the Parliamentary Assembly of the Council of Europe in its Resolution

¹ <http://www.parliament.uk/edm/2014-15/47>

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http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

1952 (2013) emphasises the right of children to bodily integrity and calls upon Member States to “ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, [and to] guarantee bodily integrity [...] to persons concerned.” Malta have recently become the first country to prohibit non-therapeutic surgery on the bodies of intersex children; through the Gender Identity, Gender Expression and Sex Characteristics Act 2015. Maltese politician Helena Dalli met with Intersex UK and their international colleagues at the International Intersex Forum sponsored by ILGA. The Minister was made aware of the history and scale of intersex abuses. In response, Malta introduced world leading legislation to protect intersex bodied children from non-therapeutic irreversible life changing procedures without consent, and to allow self-identification without second party consent. Given this growing international awareness it is suggested that this area of law is in need of further clarification in the UK. If this clarification is not provided it will lead to increasing tension between intersex bodied persons and the medical profession. As well as the significant harm caused to individuals this will also lead to greater legal costs for the NHS due to current practices including irreversible genital and other sex anatomy ‘normalising’ procedures (including sex assignment surgery of intersex bodied children’s genitals, correction of secondary sex anatomy, and gonadal sterilisations).

3) The operation of the Gender Recognition Act 2004 and whether it requires amending

- i) The authors feel that the Gender Recognition Act 2004 (GRA hereafter) is in need of amendment. Many of these issues revolve around gender dysphoria and are covered under section 7 of this report.
- ii) The GRA should be reformed to keep the UK in line with gender recognition laws in Europe and internationally. Legislation based on an alternative self-declaration model of gender recognition – which allows trans people to self-define their own gender identity upon application to the State – is already in operation in Argentina since 2012 and Denmark since 2014, and will soon be adopted in the Ireland. Similar inquiries to this one also indicate that Norway,³ and Sweden,⁴ may be added to this list in the near future. While respecting trans people’s self-defined gender identity (in accordance with the Right to Recognition Before the Law, Principle 3 in the Yogyakarta Principles), such reform removes the requirement of a diagnosis of gender dysphoria as a pre-condition of legal gender recognition, and would

³ (Summary in English on page 173)

https://www.regjeringen.no/contentassets/d3a092a312624f8e88e63120bf886e1a/rapport_juridisk_kjonn_100415.pdf

⁴ (Summary in English on page 25)

<http://www.regeringen.se/contentassets/cc83a2119dba4a3781966d2e3555062e/juridiskt-kon-och-medicinsk-konskorrigering-sou-201491>

also remove the necessity of convening a Gender Recognition Panel (and all related administration). This model could also be improved upon by allowing for multiple (or non-) gender options (such as 'X', 'O' or 'I') for those who do not identify with the male or female gender classifications.

- iii) In addition to adopting the self-declaration model of gender recognition, any further reform of the GRA might improve trans equality by including a right to health care, as seen in Article 11 of the Argentinean Gender Identity Law 2012.
- iv) The authors also consider the current requirement that an applicant for a gender recognition certificate 'has lived in the acquired gender throughout the period of two years ending with the date on which the application is made' (section 2(1)(b) of the GRA) overly restrictive; particularly when the 'real-life test', which trans people are expected to undergo before gaining access to medical treatment is only expected to last for half that time (Bockting 2008: 213). No such criterion would be required if the self-declaration model were to be adopted.
- v) The authors also consider the current requirement that an applicant for a gender recognition certificate 'intends to continue to live in the acquired gender until death' (s 2(1)(c) of the GRA) – the 'permanence provision' – both discriminatory and unnecessary (Grabham 2010).
- vi) The authors would advocate the removal of the 'sporting exemption', in section 19 of the GRA, which allows sporting bodies to exclude trans persons from competitive sports on the basis of having received a gender recognition certificate. It is felt that this provision is unnecessary and discriminatory and may contribute to ongoing discriminatory and other problematic attitudes that appear to be entrenched in some sporting sectors. Further, it should be removed so as to ensure that trans people are granted equal access to a healthy lifestyle (McArdle 2008). Similarly, people with hypergonadism should be protected under all laws to enable them to compete in sport without exclusion, gender testing or being enforced to undergo hormonal and or medical procedures to alter their natural or chosen bodily function. Some intersex bodied people need testosterone to function, which could wrongly be seen as doping. Others intersex bodied persons have high levels of testosterone and this should be accepted as their natural status (Mitra 2014).
- vii) Schedule 4, section 5 of the GRA should also be deleted so as to remove the obligation that a trans person disclose a historical account of gender assignment – with which they may not identify – before getting married. This obligation is both homo- and transphobic and perpetuates the view that trans people are a source of danger and deception (Sharpe 2012). These concerns have been aired in *ST (formerly J) v J* [1998] 1 All ER 431.

4) The aspect of the Marriage (Same Sex Couples) Act 2013 which is referred to as the 'spousal veto'

- i) The authors would advise the Committee to consider removing schedule 5 of the Marriage (Same Sex Couples) Act 2013, which requires a married trans person to include ‘a statutory declaration by the applicant’s spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate’ when applying for a gender recognition certificate. This ‘spousal veto’ discriminates against the married trans person in favour of their spouse – prioritising the right of the latter to delay the former’s gender recognition in order to maintain the heterosexual status of their marriage. That this runs against the whole spirit of the Marriage (Same Sex Couples) Act 2013 has been noted (Renz 2015).

5) Transphobia in the media and hate crime

- i) The authors are of the opinion that strong regulation of the press might be necessary if ordinary trans people are not to be harassed and exoticised in the print media. Wragg (2013) suggests that protection of the right to privacy may have to be extended even in excess of the recommendations of the Leveson inquiry if invasions of privacy such as those in the tragic case of Lucy Meadows are to be avoided in the future.
- ii) It has been noted that hate crime legislation has been fairly responsive to LGBT activism. However, whilst important this should not detract from governmental responsibilities to address other problems facing trans people, for example within the criminal justice system (see section 6) and other forms of discrimination produced by the State (Conrad 2012, Lambie 2013).

6) Issues affecting trans people in the criminal justice system

- i) The authors are very concerned by the Court of Appeal’s decision in *R v McNally* [2013] EWCA Crim 1051. In this case Justine McNally was prosecuted under section 2 of the Sexual Offences Act 2003. The case hinged upon whether consent could be vitiated where there had been deception as to gender.
- ii) The Court of Appeal held that gender was a criterion capable of vitiating consent. We would begin by highlighting the potential for inequality generated by this decision. Whilst trans people with a full gender recognition certificate would not be caught by the ambit of this decision many groups will be affected by this. Particularly vulnerable groups include intersex bodied people and trans children under 18 (who do not have access to a Gender Recognition Certificate), trans people who have not lived in the acquired gender for two years, and trans people who do not feel obliged to legally change their gender. All of these groups would have an obligation, under *McNally*, to disclose their gender history highlighting their lack of equality with other groups. By way of comparison, characteristics of race and disability would not be capable of vitiating consent, even where they had not been

immediately apparent (Sharpe 2014). As a result, this decision appears transphobic and homophobic and needs legislative clarification in order to ensure full equality for trans and intersex bodied persons.

7) Issues concerning the diagnosis of gender dysphoria, including the operation of NHS Gender Identity Clinics

- i) The authors question the veracity of situating trans embodiment within what a member of the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) Workgroup on Sexual and Gender Identity Disorders describes as a 'narrative of pathology' (Drescher 2014: 12). While any classification of trans embodiment will inevitably be problematic, it is worth noting in this instance that in the latest draft of the World Health Organization's forthcoming International Statistical Classification of Diseases and Related Health Problems (ICD-11), trans embodiment is re-conceptualised as 'Gender incongruence', and reclassified from the chapter detailing 'Mental and behavioural disorders' and 'Disorders of adult personality and behaviour' to one comprising 'Conditions related to sexual health'.⁵
- ii) The authors are also concerned about the amorphous qualities of the term 'gender dysphoria'. At the time that the Gender Recognition Act was enacted leading clinical psychological texts explicitly excluded intersexuality from the remit of gender dysphoria (DSM-IV TR). The most recent edition, however, of the DSM-V has explicitly included intersexuality, it also recognises that gender and sex exist on a spectrum. The British Psychological Society criticised these changes for pathologizing congenital conditions. At present, as a consequence, it is unclear whether intersex bodied individuals are able to fulfil the requirements under section 3 of the Gender Recognition Act 2004. The GRA currently only recognises the existence of two genders which works in tandem with the 'wrong body' narrative, evidencing the desire for congruence between mind and body and does not permit for a third sex or for those who do not see themselves as neither one or the other gender.
- iii) Section 3(3) (a) of the GRA means that a list of treatments, both planned and undergone, must be provided in an application for a Gender Recognition Certificate. This was challenged as being discriminatory against those having undergone surgery on the basis of it being a higher evidential burden than that of people who use the gender dysphoria ground alone in *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (QB). This argument was rejected and it was acknowledged that those not undergoing surgery would experience equal, if not greater, levels of intrusion, as they have to explain that

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<http://apps.who.int/classifications/icd11/browse/f/en#/http%3a%2f%2fid.who.int%2fcd%2fentity%2f411470068>

- decision. The Court seemed to be of the view that those not choosing surgery will have more to prove.
- iv) The authors would advocate a review of waiting times at NHS Gender Identity Clinics (GICs), in light of one recent survey (Ellis, Bailey and McNeil 2015) which found that 32% of the 202 respondents who had used GICs had waited between one and three years, with almost 10% waiting for more than three years to be treated.

Bibliography

Bockting, WO. 2008. Psychotherapy and the real-life experience: From gender dichotomy to gender diversity. *Sexologies*. 17: 211-224.

Brazier, Margot. 2009. Introduction – Being Human: Of Liberty and Privilege. In Smith, Stephen W and Deazley, Ronan (eds) *The Legal, Medical and Cultural Regulation of the Body*. Farnham: Ashgate.

Conrad, Ryan (ed). 2012. *Against Equality: Prisons Will Not Protect You*. AE Press.

Drescher, Jack. 2014. Controversies in Gender Diagnoses. *LGBT Health*. 1(1): 10-15.

Ellis, Sonja J, Bailey, Louis and McNeil, Jay. 2015. Trans People's Experiences of Mental Health and Gender Identity Services: A UK Study. *Journal of Gay & Lesbian Mental Health*. 19: 4-20.

Fox, Marie and Thomson, Michael. 2006. Cutting it: Surgical interventions and the sexing of children. *Cardozo Journal of Law and Gender* 13: 101-117.

Fox, Marie and Thomson, Michael. 2008. Older minors and circumcision: Questioning the limits of religious actions. *Medical Law International* 9: 283-311.

Fox, Marie and Thomson, Michael. 2009. Foreskin is a feminist issue *Australian Feminist Studies* 24: 195-210.

Fox, Marie and Thomson, Michael. 2012. The new politics of male circumcision: HIV/AIDS, health law and social justice. *Legal Studies*. 32: 255–281.

Grabham, Emily. 2010. Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act. *Social & Legal Studies* 19(1): 107-126.

Lamble, Sarah. 2013. Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment. *Law and Critique*. 24(3): 229-253.

Méndez, Juan E. 2013. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Human Rights Council. 22nd Session. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.2.2.53_English.pdf (Last Accessed 5/8/2015)

McArdle, David. 2008. Swallows and Amazons, or the Sporting Exception to the Gender Recognition Act. *Social & Legal Studies*. 17(1): 39-57.

Mitra, Payoshni. 2014. Male/Female or Other; The Untold Stories of Female Athletes with Intersex Variations in India. In Hargreaves, Jennifer and Anderson, Eric. *Routledge Handbook of Sport, Gender and Sexuality*. Oxon: Routledge.

Priault, Nicolette. 2008. Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters. *Medical Law Review*. 16 (2): 169-200.

Renz, Flora. 2015. Consenting to gender? Trans spouses after same-sex marriage. In Barker, Nicola and Monk, Daniel (eds) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections*. Oxon: Routledge.

Sharpe, Alex. 2012. Transgender marriage and the Legal Obligation to Disclose Gender History. *Modern Law Review*. 75(1): 33-53.

Sharpe, Alex. 2014. Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent. *Criminal Law Review* 3: 207-223.

Travis, Mitchell. 2015. Accommodating Intersexuality in European Union Anti-Discrimination Law. *European Law Journal*. 21: 180-199.

Wragg, Paul. 2013. Leveson's regulator and the goal of protecting 'real harm caused to real people': A likely story? The International Forum for Responsible Media Blog. <https://inform.wordpress.com/2013/04/19/levesons-regulator-and-the-goal-of-protecting-real-harm-caused-to-real-people-a-likely-story-paul-wragg/>