

TRANSGENDER LAW IN PRACTICE:

Highgate House Residential Weekend 2020

By Allan Briddock

In early 2020, when lockdown and social distancing were as yet unimaginable, The Inner Temple hosted its *Transgender Law in Practice* weekend.

Professor Alex Sharpe, Keele University and Garden Court Chambers, set the bar high with her keynote address on the Friday evening. Professor Sharpe was also a panelist on the Saturday morning, alongside Jay Stewart, Gendered Intelligence; Robin White, Old Square Chambers; and Leonie Hirst, Hirst Chambers. The panel was expertly chaired by Lord Justice Singh, who opened with a history of discrimination law as it relates to transgender persons. The panel discussion was thought-provoking, with much engagement from students and trainers alike.

The main topic of discussion at the weekend, and the subject of Professor Sharpe's keynote address, was gender recognition reform, in particular 'self-identification' (self-ID).

In 2017, the Conservative government unexpectedly announced it was looking into reforming the Gender Recognition Act 2004 (the GRA). In combination with transgender persons becoming more visible in society, the proposed reforms ignited an often-toxic debate.

One proposed reform is to legislate to allow some form of gender self-ID. It is not proposed that self-ID would mean a person is able to simply say 'I am a woman/man', and then be automatically legally recognised in all contexts as that gender. It is instead envisaged that the person would have to make a form of statutory declaration in order to be legally recognised as a woman or man, and making a false declaration would be a criminal offence.

Nevertheless, I have no doubt there are many people who hold residual, genuine concerns about this issue and the impact it may have on women-only spaces. I am confident that if people who have genuine concerns look at the evidence on this issue, their concerns would be much lessened.

The UK currently provides a mechanism via the GRA for transgender persons to legally change their gender, following the European Court of Human Rights decision in *Goodwin v UK* [2002]. 'Gender reassignment' has been a protected characteristic since the introduction of the Equality Act 2010. Those rights and protections have existed, without controversy, until recently.

Although a breakthrough at the time, the GRA is problematic in ways that lead to a very low uptake in the transgender community. Problems include secret panels, a spousal veto, and the requirement for a medical diagnosis of gender dysphoria, to name but a few.

Those problems have led many to argue that a change in law is long overdue, to allow transpersons' self-identified gender to be legally recognised without the trauma and bureaucracy the current GRA process precipitates.

Transgender women have been portrayed by detractors of self-ID as predators from whom cisgender women need to be protected – a chilling echo of the way that gay men were portrayed as a danger to children and young people in not so distant times. The argument inverts the victim/perpetrator distinction against a tiny vulnerable minority.

When the argument against self-ID is put in this way – 'this change in law will allow men to access women-only spaces – then any right-minded person would be concerned. There is no doubt whatsoever that women-only spaces should be protected. However, transgender women are not a threat to them.

“ Those problems have led many to argue that a change in law is long overdue, to allow transpersons' self-identified gender to be legally recognised.

In *J v B (Ultra-Orthodox Judaism: Transgender)* [2017], Mr Justice Peter Jackson noted that “*gender dysphoria will doubtless have existed throughout the 120,000 years that Homo sapiens have been on earth*”. Transgender women have a long history of accessing women-only spaces with little or no evidence that they have caused harm. Indeed, transgender women, with or without a Gender Recognition Certificate, have been legally able to access women-only spaces since the Equality Act 2010. Gender self-ID would not change that. Although sex-based exceptions exist, and can be used in exceptional cases to exclude transgender women from women-only spaces, the very existence of these exceptions serves to emphasise that the default position is a right for transgender women to be in these spaces.

Professor Sharpe notes in her article, *Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?* (2020) 83(3) MLR 539–557:

“A recent report commissioned by Stonewall, which interviewed representatives of 15 of the largest national and regional women's organisations in the UK (including IDAS, LAWA, Oasis, RISE, Women's Aid, and Rape Crisis Scotland) found no evidence of problems associated with providing access to and catering for transwomen. The study found that such bodies have been supporting transwomen for a long time and that no real problems on the ground have been experienced.”

Despite concerns that self-ID will endanger women in women-only spaces, there is in fact no study suggesting self-ID poses a significant threat. Studies in the USA have consistently found that allowing transwomen to access women-only spaces has not led to harms. Some form of self-ID is now in place in at least 10 countries and the fears expressed in the UK have not materialised in those countries.

Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms is an American empirical piece that drew on police and other institutional statistics. It concluded:

“This is the first study to collect public records and analytically compare the safety of public restrooms, locker rooms, and changing rooms in localities that have gender identity inclusive non-discrimination laws that apply to public restrooms and matched localities that do not have such laws. The results show that the passage of such nondiscrimination laws is not related to the number or frequency of criminal incidents in such public spaces.”

Most people would agree that excluding an entire class of persons due to a perceived risk of harm to another class of persons should be based on evidence and not just fear. The fact is that fear of transgender women is not based on evidence. On the contrary, the evidence that does exist points in the other direction.

The concern that men will pretend to be transgender women in order to access women-only spaces is equally not based on evidence. The argument is that this would become frequent if self-ID is introduced. Baroness Nicholson is a Conservative peer who had been campaigning to exclude transgender persons from single-sex spaces, including hospital wards and changing rooms. She recently said her concern is *“about the risk that a small minority of people with malign intentions may seek to use the trans community as a cover to harm and prey on women and children”*. This argument suggests that an already vulnerable class of persons, transgender men and women, should be excluded from the Equality Act protections and in reality everyday public life because of the risk that

persons *not in that class* – that is, cisgender men – may have malign intentions. On a basic level, the argument is that a transgender man should be placed on a female hospital ward, or a transgender woman should be exposed to risk in all-male environments, on the basis that someone somewhere might pretend to be transgender to access those single-sex spaces.

“Excluding an entire class of persons due to a perceived risk of harm to another class of persons should be based on evidence and not just fear.”

In any event, the vast majority of transgender women do not have a Gender Recognition Certificate but nevertheless have been accessing women-only spaces from time immemorial and have a legal right to do so under the Equality Act. It is irrational to assume that a man who is prepared to pretend to be a transwoman to sexually assault a person in, say, a public toilet, would simply not commit that crime because the law prevents him from entering that toilet. Allowing an easier form of gender recognition will not change that or create more risk of harm.

There is a huge misunderstanding therefore about self-ID and the perceived threat to women. As Mr Justice Peter Jackson noted, transgender people have always been with us. They are part of the rich fabric of life. Transgender people are one of the most marginalised groups in the UK. To be able to change their gender without having to be medicalised and judged by a secret panel would have a massive positive impact on their lives, and would, in reality, change little to nothing for those of us who are not transgender.

If we are not careful, further generations might look back at the treatment of transgender persons in the 2020s in the same way that we look back in shame at the way we treated gay men and lesbians in previous decades.

Allan Briddock
One Pump Court
Residential Weekend Organiser