



House of Lords
House of Commons
Joint Committee on
Human Rights

Draft Gender Recognition Bill

Nineteenth Report of
Session 2002–03

Vol I: Report



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Report and formal minutes

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Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Thomas Elias (Lords Clerk), Professor David Feldman (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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Summary

The Committee has undertaken pre-legislative scrutiny of the Draft Gender Recognition Bill, Cm. 5875, July 2003. The Draft Bill is the Government's response to decisions of the European Court of Human Rights and the House of Lords holding that aspects of English legislation violate rights under ECHR Article 8 (respect for private life) and Article 12 (right to marry) so far as it refuses to give legal recognition to a transsexual person's reassigned gender.

This Report explains the background to the issues (paragraphs 5 to 8). It then outlines the previous law governing the treatment of transsexual people's identities in the United Kingdom (paragraph 9), the impact of developments which have already occurred in EC law (paragraph 10), the judicial decisions which revealed the incompatibilities between English law and Convention rights (paragraphs 11 to 16), and the Government's interim response (paragraphs 17 to 21).

The Report then evaluates the Draft Gender Recognition Bill in the light of the responses to the Committee's consultation exercise, paying particular attention to the Bill's adequacy as a measure to remove the incompatibilities identified in the litigation in Strasbourg and England, and particular problems to which the legislation itself may give rise. The Committee concludes that the Draft Bill is likely, with certain amendments, to succeed in removing the incompatibilities with Convention rights identified by the European Court of Human Rights and the House of Lords (paragraphs 23 to 29). However, the Committee draws attention to a number of additional issues which, in its view, require further attention, including:

- the retrospective effect of a change of gender in relation to previously invalid marriages (paragraphs 38 to 43);
- remedies for litigants whose cases led to the proposed changes in the law (paragraphs 44 to 48);
- the requirement to dissolve subsisting valid marriages prior to issue of a full gender recognition certificate (paragraphs 81 to 90);
- the interaction between the provisions of the Draft Bill and proposed legislation on civil partnerships (paragraph 91);
- the protection of transsexual persons against discrimination in the fields of education, housing and the provision of goods, facilities and services (paragraphs 92 to 103).

1 The Inquiry undertaken by the Joint Committee

1. The Draft Gender Recognition Bill was published in July 2003 by the Department for Constitutional Affairs. As part of the process of consultation on the Draft Bill, the Joint Committee on Human Rights was asked to undertake pre-legislative scrutiny of it. This was because its purpose is to respond to judgments of the European Court of Human Rights and the House of Lords holding that legislation in this country is incompatible with rights under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 in so far as it fails to give legal recognition to the acquired or reassigned sex or gender of a transsexual person.

2. In the course of our inquiry, we invited evidence from interested members of the public. We received a substantial number of submissions. They came from individuals with personal experience of the circumstances at which the Draft Bill is aimed, from organizations representing or working with them, and from professional people with expertise in the medical or legal consequences which are involved. This high-quality evidence has been immensely valuable in helping us to understand the problems and to assess the implications of the Draft Bill. We are very grateful to everyone who devoted so much time to providing us with information and views.

3. After our initial examination of the Draft Bill in the light of that evidence, we put a number of questions to the Department for Constitutional Affairs. The Department's responses were prompt and informative, and began an exchange of correspondence which continued for some time. We appreciate the efforts made by the Department, working under considerable pressure, to explain the Government's thinking on each issue which we raised, and to do it speedily and thoroughly.

4. Having considered all the evidence, we now report our views on the Draft Gender Recognition Bill.

2 Background to the Draft Bill

Sex, gender, and gender dysphoria.

5. English law has until now treated a person's sex as being fixed at birth by reference to physiological and chromosomal indications. Someone who is registered as a male or female at birth cannot have his or her birth certificate changed subsequently. In English law, a person's sex has determined a number of important matters, including capacity to marry particular people: the Matrimonial Causes Act 1973, section 11, provides (so far as relevant): 'A marriage shall be void on the following grounds only, that is to say ... (c) that the parties are not respectively male and female ...' The words 'male and female' have been interpreted as referring to sex, determined by reference to physical indications: chromosomal (males having XY chromosomes and females XX chromosomes), gonadal (the presence or absence of testes and ovaries), and genital (the presence or absence of internal or external sex organs).¹ Some commentators have suggested that the words 'male' and 'female' could be interpreted as referring not to sex but instead to gender, that is how one regards one's self and is regarded by others with whom one mixes socially.² However, this has not been accepted by courts.³ In addition, sex at birth determines a number of other questions, including the age at which one becomes eligible for a pension, some potential criminal liabilities, and (except in relation to cases affected by developments in EC law, considered below) whether one has suffered discrimination on the ground of one's sex.

6. Usually, a person's sex (determined by chromosomal, gonadal and genital indications) is clear, and coincides with his or her psychological sex (the person's view of himself or herself) and social behaviour (the social role sometimes being referred to as gender). Where these indicia coincide, the allocation of sex at birth is unproblematic. However, in two groups of cases it may give rise to difficulties.

Physical intersex cases

⁷ In some people the indicia of sex are inconsistent. External genitalia, the presence and arrangements of internal organs, and chromosomal identity, may not clearly define the person as either male or female. In these 'physical intersex' cases, the usual approach has been for medical advisers, in consultation with parents, to take a view as to where the best interests of the child lie. The child is then registered as male or female accordingly, and appropriate medical treatment (including surgery if necessary) is provided to ensure that the child's physical appearance is consistent with the allocated sex. It can lead to psychological problems later, particularly during and after puberty, but is currently thought to be preferable to leaving the child, and later the adolescent and the adult, in a social and legal limbo.⁴

1 Corbett v. Corbett (or se Ashley) [1971] P. 83

2 See e.g. S. M. Cretney and J. Masson, *Principles of Family Law*, 5th ed. (London: Sweet & Maxwell, 1990), pp. 46-48

3 See S.-T. (formerly J.) v. J. [1998] Fam. 103, CA; Bellinger v. Bellinger (Lord Chancellor intervening) [2003] 2 WLR 1174, HL

4 W. v. W. (Physical Inter-sex) [2001] Fam. 111

Gender dysphoria, or gender identity disorder

8. There may be a mismatch between a person's physical sex and his or her feelings, attitudes and desires about his or her real sexual identity and proper social role. This mismatch between physical appearance and psycho-social gender is a recognised medical condition, going under a variety of names, including gender dysphoria and gender identity disorder. It is a sense of being a woman in a man's body, or a man in a woman's body, and can lead to serious psychological and social problems. The causes are not clear, but a body of medical opinion regards it as resulting from a failure in the genetic process of sexual differentiation at an early stage in development. The normal treatment in the United Kingdom involves careful psychological assessment to ensure that the person is not in reality homosexual or transvestite rather than a gender dysphoria sufferer, followed by a period of living (and dressing) as a member of the other sex in order to confirm the diagnosis and establish whether the person would be able to function adequately with a reassigned gender. Alongside this goes hormone therapy to start the necessary bodily changes. These processes are at least partially reversible if necessary. If all goes well, the final stage is usually surgery to bring the appearance of external genitalia (and to a limited extent internal organs) into line with the reassigned gender as far as possible. This is often, for practical purposes, irreversible. At this stage, it is usual to speak of people as 'post-operative' transsexuals.

The traditional attitude to gender reassignment in English law

9. As noted in paragraph 5 above, English law has traditionally treated sex as defined, once and for all, at birth, by reference to physical indicators. It has refused to recognise that the sex of people with gender dysphoria is anything other than their physical appearance and chromosomal make-up would indicate, or that sex can be changed, or that people's sex (or gender) can be different for different purposes. When a person has been registered as male or female at birth, they have (in law) been stuck with that for life and for all purposes. Even post-operative transsexuals have been regarded in law as still having the sex with which they were registered.⁵ This has had some curious results. For example, a male-to-female transsexual remains, for legal purposes, a man, who can marry a woman but not a man; draws a pension at 65, not 60; and (except in relation to employment and vocational training, where Community law has intervened: see paragraph 10 below) cannot claim to have been unlawfully discriminated against on the ground of sex under the Sex Discrimination Act 1975 if people treat her less favourably than a man because she appears to be a woman. Official records may continue to record the person as being of his or her original gender, causing difficulties and embarrassment: for example, employers may discover a person's history when dealing with the Inland Revenue in respect of the person's national insurance records. This set of legal disabilities engages rights under ECHR Articles 8 (respect for private and family life, which includes in a number of respects a right to an identity), 12 (the right to marry), and 14 (the right to be free of discrimination in the enjoyment of other rights).

⁵ *Corbett v. Corbett (orse Ashley)* [1971] P. 83; *S.-T. (formerly J.) v. J.* [1998] Fam. 103, CA; *Bellinger v. Bellinger* (Lord Chancellor intervening) [2003] 2 WLR 1174, HL

Developments in EC law and the effect on national law in the UK

10. In 1996, the Court of Justice of the European Communities held, for the first time, that the protection against sex discrimination in employment and related fields under the EC Equal Treatment Directive encompassed discrimination on the ground of gender reassignment, which could not sensibly be separated from sex.⁶ This required legislative action, and the Government amended the law to bring it into line with the new understanding of the Equal Treatment Directive.⁷ However, the Directive applies only to employment and vocational training. The national law was amended by way of a statutory instrument made under section 2 of the European Communities Act 1972, and so was limited to giving effect to the enforceable Community rights. It could not deal with discrimination in contexts not covered by Community law.

The impact of the ECHR

11. In a series of cases decided between 1986 and 1998,⁸ the European Court of Human Rights had held that the English law relating to transsexuals engaged the right to respect for private life under ECHR Article 8.1. However, applying the doctrine of the margin of appreciation, the Court (by a steadily narrowing majority) had felt unable to hold that it was an unnecessary, and so unjustifiable, interference with that right, because there was no European consensus as to the best way to approach the legal identity of people following gender reassignment. Nevertheless, the Court recognised that there was a steady movement towards recognising the person's post-operative reassigned gender, and repeatedly urged the United Kingdom to keep the matter under careful review, clearly implying that the Court might consider that the state had exceeded its margin of appreciation if it failed to take active steps to review the position in national law and amend the law accordingly.

12. In the same cases, the Court consistently decided that the right to marry under ECHR Article 12 was not infringed by the law in the United Kingdom, because—

- a) Article 12 gives the right to marry only 'according to the national laws governing the exercise of the right', thus apparently subjecting the right entirely to national law;
- b) limitations placed on the right by national law had to be such as not to deprive people of the very essence of the right; but
- c) the law in the United Kingdom did not prevent transsexual people from marrying, but only stopped them marrying people of the opposite sex to their reassigned gender, a restriction that the Court did not initially regard as depriving people of the very essence of the right to marry, although the Court's view was open to criticism on the ground that a right to marry is worthless if it permits marriage only to people of what one regards as one's own sex.

6 Case C-13/94, *P. v. S.* [1996] ICR 795

7 Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No. 1102; Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999, SR 1999 No. 31. These Regulations were made under s. 2 of the European Communities Act 1972.

8 *Rees v. United Kingdom* (1986) 9 EHRR 56; *Cossey v. United Kingdom* (1990) 13 EHRR 622; *Sheffield and Horsham v. United Kingdom* (1998) 27 EHRR 163

13. There was one area in which the Court was willing to find a violation. In countries where people are required to carry identity cards and to produce them to officials on request, or as a condition for obtaining access to public benefits, including information about the person's original gender on the card could cause great embarrassment. This was held to be a disproportionate interference with the right to respect for private life, violating ECHR Article 8.9 In the United Kingdom, the absence of a system of identity cards was thought to avoid this problem.

The recent decisions of the Strasbourg Court and the House of Lords, and their implications

14. In *Goodwin v. United Kingdom* and *I. v. United Kingdom*,¹⁰ decided in July 2002, the Strasbourg Court took the final step of holding, unanimously, that the United Kingdom's continuing refusal to take steps to recognise the reassigned gender of a post-operative transsexual person was not necessary in a democratic society for any legitimate aim under ECHR Article 8.2, and therefore violated the right to respect for private life.

15. In addition, the Court for the first time decided that refusing to allow transsexual people to be treated as being of the sex matching their reassigned genders for the purpose of marriage violated the right to marry under ECHR Article 12.

16. A few months after those decisions of the Strasbourg Court, the House of Lords decided an appeal in *Bellinger v. Bellinger (Lord Chancellor intervening)*.¹¹ Mrs. Bellinger (who gave evidence to us as part of our inquiry) is a male-to-female transsexual person who in 1981 went through a ceremony of marriage with Mr. Bellinger. They brought proceedings seeking a declaration that their marriage was valid. They failed at first instance, in the Court of Appeal and in the House of Lords. All the judges expressed sympathy, but all but one (Thorpe L.J., who dissented in the Court of Appeal) decided that only Parliament could change the well-settled law that a marriage is invalid under section 11(c) of the Matrimonial Causes Act 1973 if the parties are not respectively man and woman in the sense of having been recognized as being of male and female sex respectively from birth. However, the Bellingers also sought a declaration under section 4 of the Human Rights Act 1998 that the provisions of section 11(c) of the 1973 Act are incompatible with ECHR Articles 8 and 12. The Lord Chancellor, intervening, accepted that there was an incompatibility in the light of the recent decisions of the Strasbourg Court, but argued that the House should exercise its discretion against making a declaration of incompatibility because the Government was actively planning legislation to remedy the incompatibility. But the House of Lords decided that there was no reason to deny the Bellingers the satisfaction of a declaration of incompatibility.

The Government's position since *Goodwin and I.*

17. As a result of the Strasbourg decisions, the Government is obliged, under international law, to arrange for the law to be amended in the United Kingdom to bring it into line with

9 B. v. France, Eur. Ct. H.R., Series A, No. 232-C (1992)

10 (2002) 35 EHRR 447; *The Times*, 12 July 2002

11 [2003] 2 WLR 1174, H.L.

the requirements of the ECHR as interpreted in *Goodwin v. United Kingdom* and *I v. United Kingdom*. The declaration of incompatibility made in *Bellinger v. Bellinger (Lord Chancellor intervening)* does not oblige the Government to introduce remedial legislation as a matter of national law, but the Government has very properly decided that it ought to act.

18. After the Strasbourg judgments, the Government had to decide what should be done by registrars of marriages while it considered the form which legislation should take. In a letter of 25 November 2002 to our Chair, Rosie Winterton MP (the Minister then responsible for the review of the law) explained that, since July 2002, the Government had advised registrars of marriages to continue to apply section 11(c) of the Matrimonial Causes Act 1973 in the traditional way, allowing people to marry according to their birth genders but not their reassigned genders. As this might lead to a position where, for example, a male-to-female transsexual married a woman, the parties would have to be advised that subsequent legislation (for instance, recognising the reassigned gender so that the transsexual partner had to be treated as a woman rather than a man for the purpose of marriage) might invalidate the marriage. In the light of the decision of the House of Lords in *Bellinger v. Bellinger (Lord Chancellor intervening)* the approach recommended by the Government is clearly lawful.

19. Meanwhile the Government has actively developed its strategy to amend the law. The Draft Gender Recognition Bill embodies most of the Government's response. The Department has told us that some further provisions will be included before a Bill is introduced to Parliament in order to make the necessary consequential changes to the social security system.

What the legislation needs to do

20. In order to rectify the incompatibilities between English law and Convention rights identified in the judgments of the Strasbourg Court and the House of Lords, any legislation must as a minimum achieve the following:

- a) to comply with ECHR Article 12 (right to marry), either amend section 11 of the Matrimonial Proceedings Act 1973 or otherwise change the legal treatment of transsexual people so that once they have acquired a new sex or gender they are no longer disabled from entering into a valid marriage with a person of their birth sex;
- b) to comply with ECHR Article 8 (right to respect for private life), amend the law so that any failure to recognise a person's reassigned sex or gender is justifiable under Article 8.2 as being in accordance with the law and necessary in a democratic society (i.e. serving a pressing social need and being proportionate to it) in order to achieve one of the legitimate aims listed in that paragraph; and
- c) to avoid any incompatibility with ECHR Article 14 (right to be free of discrimination in the enjoyment of Convention rights) taken together with other Convention rights, ensure that arrangements which might lead to such discrimination are avoided.

21. Although those are the minimum requirements of international and domestic human rights law in this field, neither the Strasbourg Court nor the House of Lords could specify

the manner in which the law should be changed to meet those requirements. This is a matter for the legislature, which is free to adopt any means which seem to it to be appropriate. Nevertheless, the resulting changes to laws and practices will inevitably have far-reaching effects, with an impact on many areas of life and law, including criminal law, family law, entitlement to pensions, and sex discrimination (so far as it covers areas such as housing, education and the provision of goods and services not already dealt with under EC law). The legal status of transsexual people has an immense impact on their lives and the lives of their families and friends. The sensitivity of these issues cannot be exaggerated.

22. In the remainder of this Report, we examine the provisions of the Draft Bill in the light of those considerations.

3 The Draft Gender Recognition Bill

23. The Draft Bill is constructed on six main planks.

- a) The Draft Bill would establish a scheme for giving legal recognition to a transsexual person's 'acquired gender' (clauses 1, 2 and 5). It would not require that the person should have undergone reconstructive surgery before the acquired gender is recognised, although a person would be required to supply evidence relating to relevant medical treatment.
- b) The recognition of the acquired gender will apply for all purposes: clause 5(1); but will be prospective only: clause 5(2). The Government has set its face against retrospectively validating marriages which were invalid at the time when the parties went through a ceremony of marriage.
- c) The Government considers that there needs to be certainty as to the way in which a person's gender will be treated for legal purposes. To that end, there are to be legal conditions for recognition of a change of gender, set out in clauses 1, 2 and 4 of the Draft Bill. There would also be official 'gatekeepers', Gender Recognition Panels, to certify that the conditions have been complied with (clause 1 of and Schedule 1 to the Bill), interim and final certificates to mark the recognition officially (clause 3), and a Transsexual Persons Register to be kept by the Registrar General of Births, Marriages and Deaths for England and Wales (clause 6 and Schedule 2).
- d) Where a person contracted a valid marriage in his or her original gender and subsequently undergoes a change, the change will not be legally recognized as long as the person continues to be a party to the marriage. It will not be possible to give legal recognition to a change of gender if that would result in two people of the same gender being regarded as legally married: clause 3(3), (5) and (8), clause 7, and Schedule 3, paragraphs 5, 6 and 7.
- e) Anti-discrimination law is to be brought into line with the new legal regime, so it will be unlawful to discriminate against a person by reason of his or her reassigned gender in any of the fields covered by the Sex Discrimination Act 1975, so far as discrimination against a person originally of that gender would previously have been unlawful: clause 9.
- f) Provision would be made to protect the interests of all members of families and others where the change of gender could affect a person's status as a parent, or his or her succession to property or a peerage or honour, interests under trusts, or other property interest, or freedom of religion, could be affected by the change of gender: clauses 8, 10, 11, 12 and 13, and Schedule 3, paragraph 2.

24. Like most of the people who gave evidence to us, we welcome the Government's determination to deal with the very difficult problems faced by people in this field, and we respect the Government's good intentions as reflected in the Draft Bill. As one would expect in an area of such delicacy and complexity, each of these main planks has some

significance in terms of both the impact on sensitive interests of people affected by them and their human rights. We examine them separately, but some important common themes will emerge.

Recognition of 'acquired gender'

25. The Draft Bill is couched in terms of gender, not sex. As noted above, gender is a matter of a person's psychology and social role, and depends on the person's view of himself or herself and his or her relationships with others, while sex is principally concerned with physical characteristics. The Draft Bill emphasises that it is not concerned with physical characteristics in a number of ways. A person may apply for a gender recognition certificate on the basis of living in the other gender (clause 1(1)(a)). There is no requirement for a person to have had, be having or be planning to have any treatment to change his or her physical appearance before applying for a certificate (clause 1(4)), although evidence of any such treatment would have to be given by a medical practitioner and would strengthen the case for recognition (clause 2(1), (3)).

26. This gives rise to two separate questions. First, is it appropriate to recognise a person's acquired gender before he or she has undergone specified therapies, including surgery, to reassign his or her sex? Secondly, would the Draft Bill's use of the language of gender rather than sex make it more difficult for the legislation to meet the minimum requirements set out in paragraph 20 above?

Should recognition be limited to post-operative transsexual people?

27. The Draft Bill's focus on gender rather than sex has given rise to contrasting reactions among those who gave evidence to us. Most of them welcomed the decision not to require transsexual people to undergo surgery to change their physical characteristics before applying for a gender recognition certificate. On the other hand, a few correspondents considered that legislation should be aimed at the really serious harm suffered by those transsexual people who, despite social, personal, medical and legal hurdles, had felt forced to change their sex, and had undergone surgery as part of that process. These correspondents considered that the Draft Bill, by extending beyond post-operative transsexuals and concentrating on gender rather than sex, comes perilously close to giving legal recognition to a lifestyle choice, and demeans the suffering of those people who are most severely affected by the present law.

28. In our view, the flexible approach adopted by the Government in not restricting recognition to people who have undergone surgical sex reassignment therapy is entirely appropriate, and we welcome it. Allowing people to apply for recognition before, or without, surgery or other specified therapies would avoid discriminating against people who for some medical reason unconnected with their gender are unsuitable for particular kinds of surgical, hormonal or other treatment. It would also allow people in the process of sex or gender reassignment to have their acquired gender recognised by law without waiting an uncertain period for particular types of treatment to become available through the National Health Service if the Gender Recognition Panel is satisfied that they have or have had gender dysphoria, have lived in the acquired gender for two years, and intend to live in that gender for life (clause 1(4)(a)-(c)). The evidence presented to us suggests that

the expert professional members of the Panels are unlikely to issue certificates to people who are making a mere lifestyle choice. Indeed, there were suggestions in the evidence that medical experts are sometimes unfairly sceptical about whether a person is suffering from gender dysphoria.

29. We conclude that the Draft Bill represents a sensitive and sensible compromise by allowing pre-operative transsexual people to have their acquired gender recognised, with the Gender Recognition Panel providing a safeguard against premature or frivolous applications. In our view, the absence of a requirement for people to undergo surgical or medical reshaping of their bodies before applying makes it sensible to speak of gender rather than sex in the Draft Bill.

Are any legal problems presented by the language of gender rather than sex?

30. While we accept that it is appropriate to speak of gender rather than sex in the Draft Bill, we consider that the language of gender might make it more difficult to be sure that the legislation will produce the required effects outlined in paragraph 20 above. Some of those who gave evidence to us expressed similar concerns.

31. In a nutshell, the potential problem is as follows. The legislation which has been held to be incompatible with Convention rights, and other legislation which adversely affects transsexual people, is either cast expressly in terms of a person's physical sex or has been interpreted by courts in this country as applying in that way. This is true of the Matrimonial Causes Act 1973, section 11(c), as noted in paragraph 5 above. It is also true of the Sex Discrimination Act 1975, which has been interpreted by courts as protecting people against discrimination on the ground of their physical sex at birth, not their gender or (except in relation to employment and vocational training, affected by Community law and to some extent operating retrospectively¹²) their status as transsexual people. Clause 5(1) of the Draft Bill provides, 'Where a full gender recognition certificate has been issued to a person, the person's *gender* becomes for all purposes the acquired *gender*.'¹³ The Draft Bill does not define 'gender', so presumably it would be interpreted by courts in accordance with the previous case-law which distinguished between sex (physical) and gender (psychological and social). If this is correct, it is far from clear that recognition of a person's acquired gender would be regarded as giving them a new sex for the sex discrimination legislation, or making them male rather than female (or vice versa) for the purpose of deciding the validity of a marriage under the Matrimonial Causes Act 1973, section 11(c).

32. It is possible that courts might interpret 'gender' as meaning 'sex' for those purposes, thus making the Draft Bill effective to achieve its purposes. The courts might be assisted by the presumption that Parliament, when legislating to give effect to the United Kingdom's international obligations, intends to implement international law effectively. They might also be influenced by their duty under section 3 of the Human Rights Act 1998 to read and

¹² See *Chief Constable of the West Yorkshire Police v. A.* (No. 2) [2002] EWCA Civ 1584, [2003] AC 161, [2003] 1 All ER 255, CA (but note that leave has been granted to appeal to the HL)

¹³ Italics added

give effect to the legislation in a manner compatible with Convention rights (including the rights under ECHR Articles 8, 12 and 14) so far as it is possible to do so.

33. However, we are not convinced that the desired result would necessarily be achieved. We think it is significant that the House of Lords in *Bellinger v. Bellinger* (Lord Chancellor intervening) refused to re-interpret section 11(c) of the Matrimonial Causes Act 1973 so as to be compatible with Convention rights as interpreted by them in that case and by the European Court of Human Rights in *Goodwin v. United Kingdom* and *I. v. United Kingdom*. Their Lordships considered that the complexity of the issues and the consequential effects of any change made it necessary to leave Parliament to make the necessary changes. It seems to us that the legislation should therefore be cast in the clearest terms possible, so as to leave no doubt about the effect which Parliament intends to achieve.

34. Accordingly, we recommend that a further paragraph should be added to clause 5 of the Draft Bill, making it clear that where under any legislation it is necessary to decide the sex of a person who has an acquired gender, or to say whether that person is a man or a woman or male or female, the question must be answered in accordance with the person's acquired gender, except to the extent that the Draft Bill or the legislation in question provides otherwise expressly or by necessary implication. Without such a provision, we fear that there is a significant risk of the Draft Bill failing to achieve some of its purposes.

The effect of a recognized change of gender

35. As noted above, clause 5(1) provides that a person's gender becomes for all purposes the acquired gender once a full gender recognition certificate is issued. However, the law would not recognize an acquired gender until a full gender recognition certificate has been issued, and would not retrospectively affect the legal status of any marriage or other transaction taking place before the certificate is issued: clause 5(2).

36. This has provoked a good deal of concern among respondents to the Committee's consultation exercise. In particular, the people who successfully challenged the compatibility of English law in Strasbourg and in *Bellinger v. Bellinger*, and some of those who challenged it unsuccessfully in earlier years or were in similar positions but did not take legal action, have submitted that retrospective recognition of marriages in particular is needed in order to provide them with an effective remedy for having suffered a violation of their rights.¹⁴ This is supported by many correspondents, some of whom also consider that it would be demeaning to them and their families, devalue their earlier marriage vows, and show a lack of respect for their long-standing and loving relationships, to require them to apply for a full gender recognition certificate after the legislation comes into force, then go through a further ceremony of marriage, before they could be legally regarded as husband and wife as they should have been before.

37. We have a good deal of sympathy with these points of view. They seem to us to give rise to two distinct issues.

¹⁴ See the evidence of Mrs Elizabeth Bellinger, Christine Goodwin, and Kristina Sheffield

The first issue: general retrospective effect in relation to marriages

38. The first issue relates to the general treatment of couples who are in the situation of Mr and Mrs Bellinger, with one party being a male-to-female transsexual and the other being a male for the purpose of section 11(c) of the Matrimonial Causes Act 1973, or where one party is a female-to-male transsexual and the other party is a female. Can it be right to refuse to recognise the validity of their marriages if, at the time they went through the wedding ceremony, the transsexual party was well settled in his or her reassigned gender and would have satisfied the requirements for recognition of the acquired gender had clause 1(4) of the Draft Bill been in force?

39. We have engaged in some correspondence with the Department of Constitutional Affairs on this issue. We would summarise the Department's position as follows.

- a) The European Court of Human Rights in *Goodwin v. United Kingdom* and *I. v. United Kingdom* made it clear that their judgment operated only prospectively. It had previously been held that English law did not violate Convention rights, and the judgment in the most recent cases did not cast doubt on the correctness of the earlier judgments at the time when they were given. The House of Lords in *Bellinger v. Bellinger (Lord Chancellor intervening)* held that a marriage between parties in the position of Mr. and Mrs. Bellinger was void in English law, although their Lordships declared that the relevant legislation was incompatible with Convention rights.¹⁵ The marriages were therefore void at the time they were entered into.
- b) The Government does not wish to change retrospectively the legal status of the parties to such marriages, because:
 - i) such a change could affect rights and obligations acquired over a long period (including pension and social security entitlements and tax liabilities) and require decisions on those matters to be reopened;
 - ii) it might be very difficult to establish now whether a person would have met the requirements of clause 1(4) of the Draft Bill many years ago; and
 - iii) retrospectively validating marriages which were originally void in these cases would create a position where people legally regarded as having been of the same sex are to be treated as legally married, whereas the Government does not consider that it would be appropriate to equate same-sex relationships to marriage.

40. We accept the correctness of point a) as a matter of law. We also accept that the problems referred to in b) i) might arise, unless the legislation makes it clear that the change in status is not to have any such consequences. On the other hand, we do not consider that considerations b) ii) and iii) have much weight. In relation to b) ii), a person seeking to establish that he or she would have met the requirements of clause 1(4) of the Draft Bill ten or twenty years ago would have to provide medical evidence, as required by clause 2. If his or her medical advisers at that time kept adequate medical notes, and the notes are still available, it should now be possible to make a satisfactory assessment of the

¹⁵ See *Goodwin v. United Kingdom* (2002) 35 EHRR 447 at para. 120, Eur. Ct. HR, and *Bellinger v. Bellinger* [2003] 2 WLR 1147 at para [24] per Lord Nicholls of Birkenhead

person's condition at that time. Of course the notes might no longer be available, or might be insufficiently detailed for the purpose, but we do not consider that people who can establish their condition at a particular time in the past should be prevented from having their marriages recognised merely because other people might not be able to provide similar evidence.

41. In relation to b) iii), we do agree that recognising those marriages would have the effect of giving the legal status of marriage to same-sex relationships. If the law recognises a transsexual person's acquired gender retrospectively, either generally or for the purpose of marriage only, it follows that the marriage in question will have to be regarded as having been a mixed-sex marriage in law. For example, if the law recognises that Mrs. Bellinger, a male-to-female transsexual person, was female in 1981 when she married Mr. Bellinger (at least for the purpose of the Matrimonial Causes Act 1973, s. 11(c)), the marriage must logically be regarded as having been between a man and a woman.

42. On balance, we are not convinced that the difficulties which influence the Government's approach are insuperable, or that the suggestion that some retrospective effect for recognition of acquired gender would lead to same-sex marriage being legally recognised is correct. We recommend that the Government should give further thought to the possibility of giving retrospective recognition to a person's acquired gender from the date at which the person can show that he or she would have satisfied the requirements of clause 1(4) of the Bill had it been in force, at least for the purpose of deciding whether a marriage was void when entered into after that date.

43. We consider that this applies even more strongly to anyone who has entered into a ceremony of marriage since 11 July 2002 when the European Court of Human Rights gave judgment in *Goodwin v. United Kingdom* and *I. v. United Kingdom*. Since then, it has been well established that the UK has been in breach of international law by refusing to recognise the acquired gender for the purpose of marriage. There seems to us to be a particularly strong case for providing in the legislation for retrospective recognition of the acquired gender of a transsexual party to these marriages, and thus for the validity of the marriages themselves. We recommend that the legislation should include such provision.

The second issue: providing a remedy for the successful litigants and others whose cases were pending

44. The second issue concerning the validity of marriages entered into before the legislation comes into force relates to the position of the litigants before the European Court of Human Rights and the House of Lords who successfully persuaded the judges that they had suffered a violation of their Convention rights, and other litigants in a similar position whose cases were pending at the time of the judgments in *Goodwin v. United Kingdom* and *I. v. United Kingdom* in July 2002. As it stands, the Draft Bill would offer those litigants nothing by way of just satisfaction for the violation of their rights. It would merely allow them to go through another ceremony of marriage, which would be prospectively recognised by law, once the transsexual partner has applied for and obtained a full gender recognition certificate. This is far from being a completely satisfactory remedy

for a violation of the right to have their acquired gender recognised in the past for the purpose of deciding whether their marriages are valid.

45. We accept that the marriages were invalid in English law when they were entered into, and that the invalidity did not then violate Convention rights. However, we consider that there should be scope to give some benefit to people who have successfully followed the hard road of litigation in this country and in Strasbourg in order to establish the existence of a right to recognition of reassigned gender and of the right to marry for their own benefit but also for the benefit of others. In the European Court of Justice and the Supreme Court of the USA, judgments are sometimes given with prospective effect, but in such cases the courts order that the litigants who brought the matter before the court and others in a similar position whose cases are pending at that time are to be given the benefit of the judgment. In this way legal certainty is reconciled with the need to provide an effective remedy for successful litigants.

46. When we raised this point with the Department of Constitutional Affairs, the response was negative. The Department pointed to the factors influencing their approach to the general question of retrospective effect for the Draft Bill (see paragraph 39 above), and also pointed out that it would be invidious to create different classes of people, only some of whom would be entitled to the retrospective application of the legislation. We are even less impressed by the factors outlined in paragraph 39 in this context than we were in the context of general retrospective effect, because the acknowledged difficulty of unravelling previous transactions, rights and liabilities would be more far more limited if retrospective effect were allowed only in the case of successful litigants and those whose litigation was pending at the time of the judgments in July 2002.

47. We agree that treating differently people whose objective situation is similar gives rise to a risk of unjustified discrimination, a point which was made by a number of people who gave evidence to us on this subject. However, different treatment does not amount to improper discrimination if there is a rational and objective justification for it. In our view, there is a relevant distinction which provides a rational and objective justification in this case. The successful litigants, and others in the same position who had already initiated their litigation at the time of the crucial judgments of the European Court of Human Rights, were prepared to embark on the demanding, time-consuming and expensive process of litigation with no certainty of success. By doing so they provided a public benefit by allowing the requirements of the ECHR to be further elucidated and prompting the current legislative proposals. This seems to us (as it does to the European Court of Justice and the Supreme Court of the USA) to justify treating them more favourably than others. We note that a large number of correspondents favoured making special provision for the benefit of Mr and Mrs Bellinger, and we would extend that treatment to the successful litigants in the European Court of Human Rights and others whose litigation had been initiated before the date of the relevant Strasbourg judgments in July 2002.

48. We recommend that the legislation should provide for the successful litigants in Strasbourg and in the House of Lords, and others who had commenced similar proceedings by 11 July 2002 when the Strasbourg judgments were delivered, to have their acquired genders recognised by law from the earliest time at which they can show that they met the criteria for recognition set out in the legislation. Where they entered

into marriages after that time, the legislation should provide for the validity of those marriages notwithstanding section 11(c) of the Matrimonial Causes Act 1973.

The demands of certainty and procedures for recognising an acquired gender

49. It is reasonable for the Government to take the view that there needs to be a degree of certainty about people's genders. Gender will affect legal status and a variety of other rights and obligations. Certainty is also needed to protect the interests and rights of people who have dealings, either administratively or in the course of personal relationships, with the person whose acquired gender is to be recognized.

50. While the Government's preference for official certainty seems reasonable, it is not the only possible view. For example, in Australia and New Zealand the courts rather than legislatures have often taken the lead in recognizing the capacity of transsexual people to marry in their acquired genders. In New Zealand, a clear line has been drawn: an acquired gender will be recognized when a person has acquired the physical conformation of a specified sex through surgical and medical procedures.¹⁶ In Australia, post-operative transsexual people are normally to be regarded as members of their acquired sex, and this has been provided for by the legislature in South Australia;¹⁷ but it is possible that pre-operative transsexual people may also be recognized as members of the acquired sex in the light of their life experiences and self-perception and other factors.¹⁸ This leaves open a considerable area of uncertainty.

51. How does the Draft Bill pursue certainty? There are two elements: first, the need for certification by an official body, a Gender Recognition Panel; secondly, the application by the Panel of statutory criteria which, if met, would entitle a person to a certificate, and, if not met, would necessarily lead to refusal of a certificate. The Panel would have to assess the evidence, but would have no discretion.

The need to apply to a Gender Recognition Panel, and the procedural and registration requirements

52. The requirement to apply to a Panel for a gender recognition certificate, the set procedures to be followed, and the registration of acquired gender are essential elements in the scheme. They advance the aims of certainty and help to ensure that the Government's flexible approach to the stage at which an acquired gender should be recognized will not degenerate into giving legal recognition to lifestyle changes (see paragraphs 27-29 above). The system of registration is needed in order to ensure that it is possible to track a person's current identity back to their birth identity if necessary, for example in the course of a criminal investigation or in order to protect the health and rights of a person's children.

16 Attorney General v. Otahuhu Family Court [1995] 1 NZLR 603

17 See Sexual Reassignment Act 1988 (South Australia), authorizing the issue of a sexual reassignment certificate after which the person's reassigned sex is recognized by law

18 In re Kevin (Validity of Marriage of Transsexual) [2001] Fam CA 1074, affirmed on narrower grounds by the Federal Family Court, Appeal No. EA/97/2001, judgment of 21 February 2003

53. None the less, some of the people who submitted evidence to us have criticised the requirements and procedures on a number of grounds. We will consider, in turn:

- a) the requirement for a person to apply to the panel for recognition of an acquired gender;
- b) the procedural requirements relating to the application; and
- c) the proposed arrangements for registering the acquired gender.

Requirement to apply to a gender recognition panel

54. Some evidence has suggested that it is demeaning to have to apply to a Panel for recognition of an acquired gender with which one has been living for all purposes for years, sometimes in close personal relationships with other people who have accepted one as being of the acquired gender.

55. We understand people feeling that they would be required to open to public scrutiny their person history and identity which they may have tried to leave behind them as they have worked to integrate into society with a new identity linked to their acquired gender. Both personal identity and sexual identity are aspects of a person's private life, protected by the right to respect to private life under ECHR Article 8, as the European Court of Human Rights has repeatedly said. Nevertheless, it seems to us that there are occasions on which it is appropriate for the state to regulate the acquisition of a new identity, whether sexual or personal. We consider it to be reasonable to require some official act of recognition of a step which has legal consequences and affects a person's status. This is justified in order to protect the rights of others, including the family of the person whose status is changing and those who will have dealings with the person in the future. This is one of the reasons why the state regulates marriage and the adoption of children, and requires births and deaths to be registered. A person's sex or gender has important legal and social consequences, including implications for legal status. The state therefore has a legitimate interest in ensuring that people who take on a new legal status can establish to the satisfaction of an official that they meet certain criteria.

56. The proposed system interferes to some extent with people's freedom to be whom they choose, and so may engage the right to respect for private life under ECHR Article 8.1. Nevertheless, it seems to us to be justifiable under ECHR Article 8.2 in order to protect the rights and freedoms of others. The interference with respect for private life is limited. People can choose whether or not to apply. If the panel is satisfied that the criteria for recognition of the acquired gender have been met, a certificate must be issued. The confidentiality of the process is guaranteed by the ordinary principles of breach of confidence at common law and by clause 14 of the Draft Bill, which would make it a criminal offence for any member or staff of the Panel, or anyone concerned with the Register, or an employer or prospective employer, or anyone conducting business or supplying professional services, to disclose 'protected information', that is, information relating to an applicant which concerns either the application or the applicant's gender before a full gender recognition certificate was issued. Subject to one reservation which is mentioned below, the exceptions to the duty of secrecy seem to us to be reasonable and to

be justifiable interferences with the right to respect for private life by reference to the test in ECHR Article 8.2.

57. By the same token, we do not consider that the need to apply is likely to inflict on potential applicants a degree of suffering which would amount to degrading treatment in violation of ECHR Article 3.

The procedural and evidential requirements

58. Clause 2 of the Draft Bill sets out the statements which an applicant must make and the evidence which he or she must produce in support of an application for a gender recognition certificate. If the application is made on the basis that the applicant is living in the acquired gender, these are:

- a) either a report by two registered medical practitioners, at least one of whom must practise in the field of gender dysphoria, or a report by a chartered psychologist practising in that field and one by a registered medical practitioner (clause 2(1));
- b) the report of the practitioner or psychologist practising in the field of gender dysphoria must include details of the diagnosis of the applicant's gender dysphoria, and, if the applicant has undergone or is undergoing treatment to modify sexual characteristics, or has had such treatment prescribed or planned, the report must also include details of it (clause 2(2), (3));
- c) a statutory declaration by the applicant that that applicant has lived in the acquired gender for at least two years at the date of the application and intends to continue to live in the acquired gender until death (clause 2(4)(a));
- d) a statutory declaration by the applicant as to whether he or she is married (clause 2(4)(b));
- e) the applicant's birth certificate (which would include, where applicable, a copy of any relevant entry in the Adopted Children Register or the proposed Transsexual Persons Register) (clause 2(6)(a), (7) and (8));
- f) evidence concerning any changes in the name by which the applicant has been known at any time during his or her life (clause 2(6)(b));
- g) any other evidence required by the Gender Recognition Panel (clause 2(9)(a)); and
- h) such further evidence as the applicant wishes (clause 2(9)(b)).

59. If the application is made on the basis that the applicant has been recognised under the law of a country or territory outside the United Kingdom as having changed gender, the applicant must arrange to provide:

- a) if the applicant is not married, a statutory declaration to that effect (clause 2(5)(a));
- b) if the applicant is married, either a copy of an entry in a register containing a record of the marriage or other evidence as to the date of the marriage and the genders of the parties to it (clause 2(5)(b));

- c) evidence that the applicant is recognised under the law of an approved country or territory as having changed gender (clause 2(5));
- d) the applicant's birth certificate (which would include, where applicable, a copy of any relevant entry in the Adopted Children Register or the proposed Transsexual Persons Register) (clause 2(6)(a), (7) and (8));
- e) evidence concerning any changes in the name by which the applicant has been known at any time during his or her life (clause 2(6)(b));
- f) any other evidence required by the Gender Recognition Panel (clause 2(9)(a)); and
- g) such further evidence as the applicant wishes (clause 2(9)(b)).

60. Generally the required statements and evidence are limited to what is necessary to establish that an applicant meets the criteria for recognition under clause 1(4) of the Draft Bill and to protect the other party to any subsisting marriage. Nevertheless, the information is highly personal, and requiring it to be disclosed engages the right to respect for private and family life under ECHR Article 8.1. Such a requirement must be justified under Article 8.2 as being in accordance with the law and necessary in a democratic society (i.e. a response to a pressing social need, and proportionate to it) for one of the legitimate aims listed in Article 8.2.

61. The Draft Bill would constitute a sufficiently clear and accessible legal basis for the requirement to make it 'in accordance with the law'. The purposes served by disclosure are to protect the rights of other members of the applicant's family and to uphold morality. Once it is decided to put in place a scheme for recognising an acquired gender by law, it is necessary to have some criteria by which to decide whether a person's gender has changed, and to have evidence relating to the change and its social implications, not least as it affects other people. In relation to proportionality, there are safeguards for the security of personal information: as noted above, the principles of the law of breach of confidence would apply; so would the data protection principles of the Data Protection Act 1998; and clause 14 of the Draft Bill would make it a criminal offence for any member or staff of the Panel, or anyone concerned with the Register, or an employer or prospective employer, or anyone conducting business or supplying professional services, to disclose information relating to an applicant which concerns either the application or the applicant's gender before a full gender recognition certificate was issued. There are exceptions, and in one respect those included in the Draft Bill are rather too wide. (This matter is mentioned below, paragraph 67) But in principle we consider that the evidential requirements proposed in the Draft Bill are justifiable by reference to the criteria contained in ECHR Article 8.2.

62. It follows, in our view, that applicants are very unlikely to be subjected, through the need to provide evidence to the Panel, to a violation of their right to respect for private and family life under ECHR Article 8.

63. When we initially examined the Draft Bill we thought that the evidence required to support an application on the ground that the applicant was living in the acquired gender might, in one respect, interfere more than necessary with the right to respect for private life. The requirement to include in a medical report details of past, current or planned treatment to modify sexual characteristics seemed to us to go beyond what is necessary to

show that the criteria for recognition have been met, since clause 1 of the Draft Bill does not require a person to undergo such treatment as a condition of obtaining a gender recognition certificate. Nor does the requirement appear to protect the interests of the other party to a subsisting marriage. Since the European Court of Human Rights treats medical information as particularly private and sensitive, requiring a high level of protection, we asked the Department why it thought that the disclosure of such details should be mandatory, and what was meant by ‘treatment’.

64. The Department replied that treatment means more than diagnosis and advice. It might include counselling, and certainly includes medicinal or surgical treatment. A willingness to receive treatment is very important as evidence that the applicant is suffering from gender dysphoria and is determined to live his or her life in the acquired gender. There are good reasons for not including treatment among the list of conditions for the issue of a gender recognition certificate in clause 1(4). For example, a person might be unable for some reason to undergo medical or surgical therapy. However, in that event other evidence would have to be presented.

65. We see the force of this argument, and **on balance we accept that it is appropriate to ask for details of treatment to modify sexual characteristics where such treatment has been or is being received or is planned.**

66. As we pointed out above, we consider the safeguards against improper disclosure of information about applicants and their applications to be important in securing the confidence of applicants in the system and in ensuring that it complies with the state’s duties under ECHR Article 8 to respect private and family life. The type of information in question is particularly sensitive and personal, as the Strasbourg Court accepted in *B. v. France*,¹⁹ and therefore requires stringent protection against disclosure without the consent of the data subject. We agree with the Government²⁰ that it is appropriate to make it a criminal offence under clause 14 to disclose the information improperly, in order to give adequate protection to the right to respect for private life under ECHR Article 8.1. The consequences of disclosing that a person has applied or is applying for a gender recognition certificate, or of disclosing information about the applicant’s marital history or medical condition, could be devastating for the applicant, his or her family, employers, fellow workers, friends, and others.

67. On our initial examination of the Draft Bill, we had reservations about one of the exceptions to the duty not to disclose protected information: it would not be an offence to disclose protected information if ‘the disclosure is in the course of official duties’.²¹ This is a very vague expression, perhaps capable of including unlawful official action, and certainly capable of including action which is not required (or even expressly authorized) by statute. We thought that it is not sufficiently certain to meet the requirement in Article 8.2 that an interference with the right must be ‘in accordance with the law’, and it is too wide in scope to ensure that a disclosure would have to be proportionate to a legitimate aim in order to avoid criminal liability. We were therefore pleased to learn from the Department of

19 Eur. Ct. HR, judgment of 25 March 1992, Series A, No. 232-C

20 Commentary on Clauses, para. 51

21 Cl. 14(4)(d)

Constitutional Affairs that it had reached the same view, and that the exception would be omitted from the Bill to be presented to Parliament.

68. In other respects, we consider that the safeguards for the confidentiality of information are adequate to meet the requirements of ECHR Article 8.

The register of transsexual persons

69. Clause 6 of and Schedule 2 to the Draft Bill make provision for a Register, to be maintained in the General Register Office by the Registrar General, wherein would be kept records for each person who receives a full gender recognition certificate. For each successful applicant, the Register would contain an entry relating to the applicant's birth, and a copy of the certificate. In addition, the Registrar must arrange for the person's entry in the register of births to be marked in a prescribed manner, and arrange for the connection between the entries in the two registers to be traceable.

70. The maintenance of a separate register for gender recognition certificates is made necessary by the refusal to contemplate alterations to a person's entry in the register of births. We accept that there are good reasons for keeping a record of the historical fact that the transsexual person was originally registered at birth as being of a different sex from the gender in which he or she now lives. We also accept that connection between the entries in the two registers is important in order to allow essential tracking for the purpose of criminal investigations and the protection of the rights of a person's blood relations. However, this makes it very important for access to the knowledge that there is an entry in each register relating to a person to be tightly controlled, as the information that a person has changed his or her sex or gender is highly sensitive. The maintenance of a register of recognition of reassigned gender is essential to protect transsexual people against disclosure of their sex at birth to anyone entitled to examine the register of births, if it is accepted that it would be inappropriate to alter the birth register and issue an amended birth certificate.

71. A number of people gave evidence to us about a range of concerns in relation to the registers. At the most fundamental level, some people objected to being made to register at all. In one or two cases they thought that a requirement to register was demeaning in itself. However, it seems to us that registration is essential in order to allow people to prove that they are of the acquired gender as a matter of law: a copy of the entry in the register would be evidence of that fact (Schedule 9, paragraph 9). Several people thought that the title of the register, 'Transsexual Persons Register', was demeaning, calling to mind the Sex Offenders Register. We are sure that a different name could be found, such as the Gender Recognition Register. Although a few people thought that the existence of the register would allow some future government to trace all registered transsexual people to pursue a policy of eugenics, and compared the register with the policy of the Nazis in Germany during the 1930s and early 1940s in first requiring Jews to register so that they could then be rounded up and dispatched to concentration camps, we are not convinced that the risk is sufficiently significant to make it necessary to dispense with the system for registering the issue of a gender recognition certificate.

72. In order to protect the confidentiality of the history of people's sexual identity, it is essential to ensure the security of the registers and to make it impossible for anyone

without a pressing need which satisfies the requirements of ECHR Article 8.2 to trace the connection between a transsexual person's old and new identities. The Draft Bill contains some provisions which would help to achieve this. The Transsexual Persons Register would not be open to public inspection or search (Schedule 2, paragraph 1(3)). Certified copies of entries in the Transsexual Persons Register would not be permitted to disclose the fact that the entry is contained in that register, and short certificates of birth could be compiled from the Transsexual Persons Register rather than the births register but would not be permitted to disclose that fact (*ibid.*, paragraphs 4(2) and 5), and if compiled from the birth register would not be allowed to include anything marked in order to show that there was a connected entry in the Transsexual Persons Register (*ibid.*, paragraph 2(4)). Information kept by the Registrar General to make traceable the connection between the entry in the birth register and that in the Transsexual Persons Register would not be open to public inspection or search (*ibid.*, paragraph 2(5)). The index of entries in the registers maintained by the Registrar General, which is open to public inspection, would not be allowed to disclose the fact that any entry was contained in the Transsexual Persons Register (*ibid.*, paragraph 3(2)). Unauthorised disclosure of information would be a criminal offence (clause 14).

73. Despite these safeguards, some of our correspondents were concerned that it would still be too easy for a third party to discover that a person had acquired a new gender. We do not agree. In our view, the safeguards are as secure as those applying to the Adopted Children Register. **When the whole set of safeguards is taken into consideration, we consider that the interest of transsexual people in confidentiality and their right to respect for private life under ECHR Article 8.2 would be properly safeguarded by the measures contained in the Draft Bill.** We say this on the assumption, which we confidently make, that the methods of making the entry in the Transsexual Persons Register and marking the connected entry in the birth register to be prescribed by the Registrar General with the approval of the Chancellor of the Exchequer would ensure effective protection for confidentiality and privacy.

The criteria for granting a gender recognition certificate

74. A person would be able to apply for a gender recognition certificate on the basis of either (i) living in the other gender or (ii) being recognised under the law of another country as having changed gender.²² The Gender Recognition Panel would have to grant a certificate under (i) if satisfied that the applicant:

- a) has or has had gender dysphoria;
- b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made (a requirement which is at present usually a precondition for surgical treatment in the NHS);
- c) intends to continue to live in the acquired gender until death; and

²² Clause 1(1).

d) complies with the evidential requirements imposed by or under clause 2 of the Draft Bill.²³

The Panel would have to grant a certificate under (ii) if satisfied that the country is approved by order made by the Secretary of State, and that the applicant has provided the required evidence.²⁴ Otherwise the Panel must reject the application.²⁵

75. For reasons explained above, in paragraphs 27–29, we consider that the Government’s flexible approach to the criteria, and particularly their decision not to limit recognition to post-operative transsexual people, is a proper one.

76. The criteria for granting a certificate under (i) seem to us to meet human rights requirements. They would allow the United Kingdom to comply with its international obligations as disclosed in the recent decisions of the European Court of Human Rights and the House of Lords in relation to the right to respect for private life under ECHR Article 8.1 and the right to marry under Article 12. So far as the criteria restrict recognition of the acquired gender, the restriction must be justifiable under Article 8.2 and Article 12.

77. To be justifiable under Article 8.2, restrictions must be in accordance with the law, and pursue a legitimate aim identified in that paragraph, and be necessary in a democratic society for that purpose. In our view, the criteria for recognition in clause 1 would satisfy the ‘in accordance with the law’ requirement. It would lay down in municipal law a set of rules which would be sufficiently clear and accessible to allow people to understand their legal positions. They pursue a legitimate aim, namely the protection of the rights and freedoms of others, particularly those who have dealings or enter into relationships with the applicant. They are likely to be regarded as necessary in a democratic society, within the meaning of Article 8.2: there is a pressing social need for legislation, not least because of the need to respond to the judgments of the Strasbourg Court and the House of Lords, and the criteria seem to us to represent a fair and proportionate balance between the competing interests of those involved. Some people might say that the choice of a gender should be unconstrained and reversible, but that seems to us to give insufficient weight to the interests of others in knowing the legal status of those with whom they have to deal.

78. The criteria also seem to us to be compatible with Article 12, which recognises the right of men and women of marriageable age to marry and to found a family according to national laws governing the exercise of this right. The state’s discretion in setting those laws is limited. In particular, the laws must not effectively deprive anyone of the very essence of the right to marry, as the recent decisions of the Strasbourg Court and the House of Lords demonstrate. The proposed criteria are a great improvement on the previous blanket refusal to recognise a person’s reassigned gender. They are sensitive to the social as well as the sexual and medical aspects of gender and gender dysphoria. They impose conditions which must be met, but these serve legitimate state aims (including administrative and fiscal efficiency and the protection of the rights and freedoms of others) and they do not seem to us to impose an unreasonable or disproportionate burden on people in pursuing those aims.

23 Cl. 1(4)

24 Cl. 1(5), (6)

25 Cl. 1(4), (5)

79. The criterion under (ii), recognition of change of gender in an approved foreign country or territory, appears to us to make sense in policy terms. It would be awkward and unfair to treat a person as being of a different gender in this country from that which he or she has under the law of another country, as long as that other country applies criteria for recognising a change of gender which seem acceptable. Nevertheless, there is no explanation in the Draft Bill or the annexed Commentary on Clauses of the criteria which the Secretary of State will apply when deciding whether to prescribe a country or territory as an approved country or territory by an order made under clause 1(6). Orders would be subject to the negative resolution procedure only.²⁶ We therefore asked the Department of Constitutional Affairs what criteria are likely to be applied when deciding whether to prescribe a country or territory as an approved one.

80. The Department's reply satisfies us that the power to prescribe approved countries and territories would be used to ensure that a person's foreign recognition of change of gender would be accepted here only if the criteria for recognition in the foreign country or territory are at least as demanding as those under the Draft Bill. If they are not, the person would still be able to apply on ground (i), but would have to provide much fuller supporting evidence and documentation than would be necessary if the application under (ii) were acceptable (see paragraph 59 above).

Parties to marriages who acquire a new gender after marriage

81. The Draft Bill also has important implications for the parties to marriages who were respectively male and female at the time of the wedding but one of whom subsequently seeks to change his or her sex or gender as a result of gender dysphoria.

82. A person who is validly married in his or her birth gender would be unable to obtain a final gender recognition certificate unless the marriage is first annulled or dissolved. During the continuance of the marriage, the person would be able to apply to a Gender Recognition Panel, but even if he or she satisfied the Panel that the criteria for recognition of the acquired gender in clause 1(4) have been met, the Panel would be allowed to grant only an interim gender recognition certificate. This would state that the application for recognition has been granted (because the criteria for recognition have been met) but that, because of the applicant's marriage, a full gender recognition certificate has not been granted.²⁷

83. An interim certificate would not have any effect on the applicant's legal status or on the validity of the marriage, but would entitle him or her to apply for a full gender recognition certificate within six months of the marriage being annulled or dissolved or the other party to the marriage dying (unless the applicant has remarried). If satisfied, the Panel would then have to grant a full certificate.²⁸

84. To make it easier to end the marriage, the Draft Bill would amend the Matrimonial Causes Act 1973 to provide that a marriage is voidable if either party to it has after the time of the marriage been granted an interim gender recognition certificate, in which case the

26 Cl. 15(2)

27 Cl. 3(3)

28 Cl. 3(5)-(9)

usual bars to relief by way of a decree of nullity on the ground that the marriage was voidable²⁹ would not apply.³⁰

85. When we initially examined the Draft Bill we were deeply concerned about the way that people in stable marriages, perhaps with dependent children and strong family ties, would be pushed into ending the marriage if one of the parties suffers from gender dysphoria and wants legal recognition of his or her acquired gender. A number of the people who sent us written evidence provided eloquent testimony to the heartache and hardship which this might cause. As well as the emotional costs, the ending of a marriage could affect people financially, by depriving a surviving partner of widow's benefits or of the benefit of a pension, or of a right to damages under the Fatal Accidents Acts. It was also pointed out that the approach gives relatively little weight to the value of maintaining family life and the sacredness of marriage vows.

86. The Department for Constitutional Affairs accepts that other approaches to subsisting marriages may be justifiable, and that the approach taken has an impact on the right to respect for private and family life of individual applicants and their families. But it takes the view that it is justifiable under Article 8.2 and Article 12 to require transsexual people 'to accept the ending of a male-female marriage as a condition for registration in the new gender'.³¹ This is mainly because the Government does not wish to sanction the idea that there can be a valid marriage between two people of the same sex or gender. It may be reasonable to expect people contemplating gender reassignment to accept that a willingness to accept that a marriage between two people of the same sex is not legally acceptable. The Government points to its plans to introduce a Bill to Parliament to institute a system of civil partnerships for same-sex couples, with legal consequences broadly similar to those entailed by marriage. It says that the parties to a marriage annulled in order to allow one of them to obtain a full gender recognition certificate would be able to enter into a civil partnership within a matter of days. It is estimated that only a small number of marriages—perhaps between two and three dozen in all—would be affected.

87. The requirement for a marriage to be ended before a party to it can obtain a full gender recognition certificate undoubtedly engages ECHR Article 8, as the Government accepts (and it might also discriminate on the ground of marital status contrary to ECHR Article 14 taken together with Article 8). It would be in accordance with the law for the purpose of a justification under Article 8.2, and could be said to pursue a legitimate aim, the protection of morality (in the sense of wanting to preserve the special significance of marriage as a union between a man and a woman) and the rights and freedoms of others. We accept that the state is entitled to give special status to marriage as a union of people of different genders. However, we remain to be satisfied that it would be proportionate to a pressing social need so as to be 'necessary in a democratic society'. We are troubled by the submissions which draw attention to the distress caused to parties to a marriage and their children, who still form part of a close and loving family group, by the idea that the

29 These bars are: that the petitioner had prior knowledge that it was open to him or her to have the marriage avoided, but so conducted himself or herself as to lead the respondent reasonably to believe that he or she would not do so; injustice to the respondent in granting a decree; or delay beyond three years from the date of the marriage: Matrimonial Causes Act 1973, s. 13(1), (2)

30 Cl. 7 and Sch. 3, paras. 4-7

31 Commentary on Clauses, para. 50

marriage would have to be annulled or dissolved before the applicant's change of gender could be legally recognised.

88. After the end of the marriage, the family unit could continue to operate as before if its members wanted that to happen. But even if the parties immediately enter into a civil partnership, there might be financial consequences. For example, if one of the parties has retired and is receiving an occupational pension and subsequently dies, the survivor might not be entitled to continue to receive a pension if the civil partnership was entered into after the deceased person's retirement. Even the availability of a civil partnership with legal effects is not certain. Although there have been suggestions that a Civil Partnership Bill might be introduced to Parliament in the 2003-04 session, there is no guarantee that it would be passed, and the Government was understandably unable to offer us any assurance that it would come into force at the same time as the legislation on gender recognition.

89. We therefore recommend that the Government should reconsider the requirement for a party to a subsisting marriage to end the marriage before obtaining a full gender recognition certificate (clause 3(3) and (5)).

90. If the Government decides as a matter of principle that the requirement should remain part of the legislation, we recommend that transitional provision should be made to ensure that the requirement will not apply to applications made to Gender Recognition Panels until such time as the relevant provisions of the proposed civil partnership legislation are in force to allow the parties to the marriage to enter into such a partnership with legal consequences.

91. We recommend that the gender recognition legislation should relieve the parties to the marriage of any adverse financial and fiscal consequences of the ending of the marriage by reason of the provisions of the legislation, as long as the parties enter into a civil partnership within a reasonable time if and when the civil partnership legislation is in force.

Anti-discrimination law

92. Two issues call for consideration in relation to the effect of the Draft Bill on a transsexual person's rights under the Sex Discrimination Act 1975 and related legislation. First, would a male-to-female transsexual person be protected against discrimination on the ground that she is a woman (and vice versa)? Secondly, would a transsexual person be protected against discrimination on the ground that he or she has acquired a new gender?

Sex discrimination on the ground of the person's acquired gender

93. Because a person whose acquired gender is recognized under the Draft Bill would be regarded for all purposes as being of that gender, the Government considers that he or she would be treated as a victim of unlawful sex discrimination for all the purposes of the Sex Discrimination Act 1975 if he or she suffers discrimination on the ground that he or she is a person of his or her acquired gender.

94. We hope that the Government is correct, but we are not completely confident. As we pointed out above, in paragraphs 31 to 34, the Draft Bill uses the language of gender rather than sex, while the Sex Discrimination Act 1975 generally makes it unlawful to discriminate on the ground of sex, not gender. **To make absolutely sure that the legislation would achieve its intended effect, we recommend that it should expressly state that ‘sex’ in the 1975 Act is to be interpreted as including the acquired gender of a person who has obtained a full gender recognition certificate.**

95. We welcome clause 9 of the Draft Bill, which would amend the 1975 Act so that it would no longer be possible to justify discriminating against a person in employment, vocation or partnership appointments by reason of his or her acquired gender on the ground that being of one sex rather than the other is a ‘genuine occupational qualification’ once his or her acquired gender has been recognised.

Discrimination on the ground that the victim is a transsexual person

96. When we initially examined the Draft Bill, we devoted a good deal of attention to trying to decide whether, and if so when, the Draft Bill would make it unlawful to discriminate against a person on the ground that he or she is a transsexual person. The position under the present law is as follows. The European Court of Justice in *P. v. S.*³² decided that the EC Equal Treatment Directive should be interpreted as protecting people against discrimination on the ground that they are transsexual, because that was so closely connected to a person’s sex that transsexual people could not properly be excluded from the general protection against sex discrimination. However, the Directive applies only to employment and vocational training, so when the Sex Discrimination Act 1975 and the equivalent Northern Ireland legislation were amended by statutory instruments, made under section 2 of the European Communities Act 1972, to bring them into line with the requirements of the Directive, the amendment applied only in the fields of employment and vocational training.³³ The legislation as amended makes it unlawful to discriminate in those fields against a person on the ground that he or she has undergone, is undergoing or plans to undergo sex reassignment therapy.³⁴

97. It remains lawful at present to discriminate against a person on that ground in the other fields covered by the Sex Discrimination Act 1975, namely education, housing and the supply of goods and services.

98. It seemed to us that it would be strange to make such discrimination unlawful in one field covered by the 1975 Act but to continue to permit it in other fields covered by the same Act. This prompted us to consider whether discrimination against people on the ground that they have undergone, are undergoing or plan to undergo sex reassignment therapy would constitute unlawful discrimination on the ground of sex in the fields of education, housing and the supply of goods and services. It is possible that such discrimination might be regarded as discrimination on the ground of sex, because (adopting rather similar reasoning to that used by the European Court of Justice in *P. v. S.*)

32 Case C-13/94, [1996] ICR 795

33 See Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No. 1102; Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999, SR 1999 No. 31

34 See e.g. Sex Discrimination Act 1975, s. 2A

it would discriminate on the ground that the person was of one sex and wanted to be, or had been, of the other. In establishing whether the person had been treated less favourably than others on the ground of sex, it would not be possible to compare his or her treatment with that of a person of the other sex, but in *P. v. S.* the European Court of Justice accepted that it would not be appropriate to seek a comparator in such cases. We thought that courts in this country might be encouraged to take a similar view in the light of the duty under section 3 of the Human Rights Act 1998 to read and give effect to legislation so far as possible in a manner compatible with Convention rights, including the right to respect for private life and for the home (ECHR Article 8) and the right to education (Article 2 of Protocol No. 1 to the ECHR) taken together with the right to be free of discrimination on the ground of status in the enjoyment of the other Convention rights (ECHR Article 14).

99. However, in the end we did not feel sufficiently confident that this would achieve the desired result, so we asked the Government for its view of the desirability of extending the legal protection against such discrimination under the 1975 Act from employment and vocational training to education, housing and the supply of goods and services.

100. The Government replied that it did not consider it to be a priority to extend the protection in that way at present. It took the view that the most pressing need had been to amend the law in relation to employment and vocational training in order to comply with Community law. It did not consider that there was any evidence of a pressing need to protect transsexual people against discrimination in other fields. The Government pointed out that people who have dealings with transsexual people but who do not know them well, particularly in the fields of housing (for example in hostels) and the supply of goods and services, might find it very difficult to know whether a person is transsexual or transvestite, and there might be no way of finding out.

101. We do not accept the Government's approach. The evidence provided by our correspondents shows that there is a significant amount of discrimination against transsexual people in the supply of goods and services, particularly pubs and clubs, and in housing, where homeless people may be left without access to a hostel because the people in charge of hostels for men and women respectively refuse to take in people on account of their status as transsexuals. This is borne out by other anecdotal evidence. We consider that there is a pressing need to protect transsexual people against discrimination in fields other than employment and vocational training. We note that the difficulty of deciding whether a person falls into the category of transsexual person would be no greater than that involved in deciding whether transsexual people, or transvestites, are men or women, but that is not considered to justify refusing protection to men and women against discrimination on the ground of sex.

102. In our view, there is a risk that the legislation in its present form might give rise to a violation of the right to be free of discrimination on the ground of status in the enjoyment of Convention rights, under ECHR Article 14. Gender reassignment affects a person's status, and the relationship with status will be still clearer when a person can obtain a gender recognition certificate with legal effects. As noted above (paragraph 98), the supply of goods and services, housing and education fall within the ambit of the rights under ECHR Article 8 and Article 2 of Protocol No. 1. Discrimination in those fields on the ground of gender reassignment may therefore engage the right to be free of discrimination

under Article 14, taken together with those rights. We consider that the Government should take this opportunity to attend to this potential incompatibility in the proposed primary legislation.

103. We therefore recommend that the legislation should include provisions amending the sex discrimination legislation to make it unlawful to discriminate against people in the fields of education, housing and the provision of goods, facilities and services on the ground that they have undergone, are undergoing or plan to undergo sex reassignment.

Rights of third parties

104. Third parties are inevitably affected by a person's decision to acquire a different gender. This section of the Report considers three respects in which the Draft Bill affects the rights of third parties: the parental responsibilities of the person concerned; the effect on property rights; and the rights of third parties whose religious convictions may be affected.

Parental responsibilities and rights

105. Clause 8 of the Draft Bill protects the status of a father or mother of a child after the acquired gender has been legally recognised. ECHR Article 8.1 protects respect for private and de facto family life rather than marriage as a legal status, so the proposals in the Draft Bill would not deprive anyone of the very essence of the right guaranteed by Article 8.

Succession to property, etc

106. A change of gender could affect rights of succession to property, to peerages, dignities and other titles of honour, and to interests under trusts.

107. In relation to property interests, this could affect the right to peaceful enjoyment of one's possessions under Article 1 of Protocol No. 1 to the ECHR. The Draft Bill makes provision for this. First, the interests of testators, settlors and donors of property are protected by providing that recognition of acquired gender would not affect the disposal or devolution of property if an intention that it should not do so is expressed in the will or other instrument by which the property is disposed of or devolves.³⁵ In the absence of such an expressed intention, the general rule in clause 5(1) would apply: the beneficiary would fall to be treated as having his or her acquired gender, so that (for example) a settlement in favour of 'my sons' would not benefit a son who had obtained a final gender recognition certificate as a male-to-female transsexual.

108. One can imagine circumstances in which this might cause injustice. For example, a bequest by a father with three sons and no daughters to 'each of my sons' could equally well mean 'each of my children', but expresses no intention that a son who acquires a female gender is still to benefit. The Bill caters for this sort of problem, which may arise in unpredictable ways, by allowing a person to apply to the High Court on the ground that he or she is adversely affected by the different disposition or devolution of the property. The

High Court would then be allowed to make such order as it considers appropriate if satisfied that it is just to do so.³⁶

109. In relation to peerages, dignities and other titles of honour, the Draft Bill provides that their devolution is not to be affected by anybody's change of gender (clause 11). This gives rise to the surprising possibility that one could have a Duke who is to be regarded as female for all legal purposes. But the Department for Constitutional Affairs explained that the purpose was to avoid the possibility that people might decide to change their sex in order to acquire a title. Clause 11 should achieve that aim.

Members of religious groups

110. Members of religious groups may consider that a person remains a man in the eyes of God even after being recognized as being a woman in the eyes of the state (or vice versa). To preserve the religious freedom to refuse to marry a person in his or her acquired gender, the Draft Bill provides that no clergyman is obliged to solemnize the marriage of a person whose gender has become the acquired gender under the Draft Bill, and that no clerk in Holy Orders in the Church of Wales is obliged to permit the marriage of such a person to be solemnized in the church or chapel of which he is the minister.³⁷

36 Cl. 13

37 Cl. 7 and Sch. 3, para. 3, inserting a new section 5B in the Marriage Act 1949

4 Conclusion and summary of recommendations

Conclusion

111. Generally, we welcome the efforts of the Government to legislate in a principled way on this difficult and complex topic. We consider that the structure of the Draft Bill is capable of remedying the incompatibilities identified in recent decisions of the European Court of Human Rights and the House of Lords between domestic law and the Convention rights in relation to the legal treatment of people with gender dysphoria.

112. However, in a number of respects we consider that the provisions of the Draft Bill require further consideration to ensure that they will succeed in removing the incompatibilities while also avoiding further human rights difficulties. We draw attention in particular to the following recommendations.

Summary of Recommendations

Recognition of ‘acquired gender’

1. We conclude that the Draft Bill represents a sensitive and sensible compromise by allowing pre-operative transsexual people to have their acquired gender recognised, with the Gender Recognition Panel providing a safeguard against premature or frivolous applications. In our view, the absence of a requirement for people to undergo surgical or medical reshaping of their bodies before applying makes it sensible to speak of gender rather than sex in the Draft Bill. (Paragraph 29)
2. We recommend that a further paragraph should be added to clause 5 of the Draft Bill, making it clear that where under any legislation it is necessary to decide the sex of a person who has an acquired gender, or to say whether that person is a man or a woman or male or female, the question must be answered in accordance with the person’s acquired gender, except to the extent that the Draft Bill or the legislation in question provides otherwise expressly or by necessary implication. Without such a provision, we fear that there is a significant risk of the Draft Bill failing to achieve some of its purposes. (Paragraph 34)

The effect of a recognised change of gender

3. On balance, we are not convinced that the difficulties which influence the Government’s approach to recognition of previously invalid marriages are insuperable, or that the suggestion that some retrospective effect for recognition of acquired gender would lead to same-sex marriage being legally recognised is correct. We recommend that the Government should give further thought to the possibility of giving retrospective recognition to a person’s acquired gender from the date at which the person can show that he or she would have satisfied the requirements of

clause 2 of the Bill had it been in force, at least for the purpose of deciding whether a marriage was void when entered into after that date. (Paragraph 42)

4. We consider that such considerations apply even more strongly to anyone who has entered into a ceremony of marriage since 11 July 2002 when the European Court of Human Rights gave judgment in *Goodwin v. United Kingdom* and *I. v. United Kingdom*. Since then, it has been well established that the UK has been in breach of international law by refusing to recognise the acquired gender for the purpose of marriage. There seems to us to be a particularly strong case for providing in the legislation for retrospective recognition of the acquired gender of a transsexual party to these marriages, and thus for the validity of the marriages themselves. We recommend that the legislation should include such provision. (Paragraph 43)
5. We recommend that the legislation should provide for the successful litigants in Strasbourg and in the House of Lords, and others who had commenced similar proceedings by 11 July 2002 when the Strasbourg judgments were delivered, to have their acquired genders recognised by law from the earliest time at which they can show that they met the criteria for recognition set out in the legislation. Where they entered into marriages after that time, the legislation should provide for the validity of those marriages notwithstanding section 11(c) of the Matrimonial Causes Act 1973. (Paragraph 48)

The demands of certainty and procedures for recognising an acquired gender

6. On balance we accept that it is appropriate to ask for details of treatment to modify sexual characteristics where such treatment has been or is being received or is planned. (Paragraph 65)
7. When the whole set of safeguards is taken into consideration, we consider that the interest of transsexual people in confidentiality and their right to respect for private life under ECHR Article 8.2 would be properly safeguarded by the measures contained in the Draft Bill. (Paragraph 73)

Parties to marriages who acquire a new gender after marriage

8. We recommend that the Government should reconsider the requirement for a party to a subsisting marriage to end the marriage before obtaining a full gender recognition certificate. (Paragraph 89)
9. If the Government decides as a matter of principle that the requirement should remain part of the legislation, we recommend that transitional provision should be made to ensure that the requirement will not apply to applications made to Gender Recognition Panels until such time as the relevant provisions of the proposed civil partnership legislation are in force to allow the parties to the marriage to enter into such a partnership with legal consequences. (Paragraph 90)

10. We recommend that the gender recognition legislation should relieve the parties to the marriage of any adverse financial and fiscal consequences of the ending of the marriage by reason of the provisions of the legislation, as long as the parties enter into a civil partnership within a reasonable time if and when the civil partnership legislation is in force. (Paragraph 91)

Anti-discrimination law

11. To make absolutely sure that the legislation would achieve its intended effect, we recommend that it should expressly state that 'sex' in the Sex Discrimination Act 1975 is to be interpreted as including the acquired gender of a person who has obtained a full gender recognition certificate. (Paragraph 94)
12. We recommend that the legislation should include provisions amending the sex discrimination legislation to make it unlawful to discriminate against people in the fields of education, housing and the provision of goods, facilities and services on the ground that they have undergone, are undergoing or plan to undergo sex reassignment. The government should consider whether it would be appropriate to limit protection to people who have obtained a full gender recognition certificate, bearing in mind that there is no such limitation in the provisions of section 2A of the Sex Discrimination Act 1975 which applies to employment and vocational training. (Paragraph 103)

Formal Minutes

Monday 17 November 2003

Members Present:

Jean Corston MP, in the Chair

Lord Bowness

Lord Lester of Herne Hill

Baroness Prashar

Baroness Whitaker

Mr David Chidgey MP

Mr Richard Shepherd MP

Mr Paul Stinchcombe MP

The Committee deliberated.

Draft Report [Draft Gender Recognition Bill], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 112 read and agreed to.

Resolved, That the Report be the Nineteenth Report of the Committee to each House.

Summary agreed to.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Monday 8 December at half past Four o'clock.]

List of Written Evidence published in Volume II

Department for Constitutional Affairs

1. Letter to Department and Reply

Organisations

2. Beaumont Trust
3. Christian Spirituality Group for the Transgendered (The Sibyls)
4. Croydon Area Gay Society
5. Discrimination Law Association
6. Equal Opportunities Commission
7. Evangelical Alliance
8. Gender Identity Research and Education Society (GIREs)
9. Gender Trust
10. Liberty
11. Lima House Group
12. Metropolitan Community Church of Manchester
13. Northern Ireland Human Rights Commission
14. Post-Op Women UK Group
15. Press for Change
16. SAGE Australia
17. Scottish Human Rights Centre

Individuals

18. Yogi Amin, Solicitor
19. A & B
20. Ashley Bayston, Barrister at Law
21. Elizabeth A Bellinger
22. G D and S L Brooks
23. C & D
24. Jenny Day and Alison Bennett
25. Mrs C
26. Melanie and Sue Cherriman
27. E

28. Christine Goodwin
29. Reverend David Horton
30. F
31. Deborah Lake
32. Gina Large
33. G
34. Kay Nicholson
35. Miss Roslyn Owens
36. Reverend Wena D Parry
37. Ann and Kathleen
38. Mrs T D Roberts
39. Tam Sanger
40. Fiona Scott
41. Captain Kristina Sheffield
42. Brenda Lana Smith
43. Submission removed at request of witness
44. Allena Tyrell
45. Jay Walmsley
46. Mrs W
47. Janet and Sarah Wood

Reports from the Joint Committee on Human Rights since 2001

The following reports have been produced

Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children’s Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766
Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272

Session 2001–02

First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405

Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674
Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102
Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141
Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294

