

GENDER REASSIGNMENT

LEGAL ISSUES

I have been asked by the Board of General Purposes to identify legal issues arising from gender reassignment which require consideration; and to advise in relation to those issues.

What is gender reassignment?

1. The law of England and Wales recognises two - and only two - sexes: the male sex and the female sex. Sex is assigned at birth - usually by reference to a relatively superficial examination of physical characteristics (genitalia) - and entered on the child's birth certificate. Thereafter - prior to the enactment of the Gender Recognition Act 2004 - it was immutable in the absence of proof, following more sophisticated tests of a biological nature (the chromosomal, gonadal and genital tests), that a mistake had been made¹.
2. Although, subject to the provisions of the 2004 Act, sex is determined by tests of a biological nature, it is generally recognised that determination of gender includes other factors: including societal factors (the way in which the individual is treated in society) and psychological factors (the gender in which the individual perceives him/herself). For most purposes it is unnecessary to distinguish between sex and gender: most individuals live (and are content to live) in the gender - male or female - which corresponds to their sex. But some are not so content: although born with the anatomy of a person of one sex they have an unshakeable belief or feeling that they are persons of the opposite gender. They are commonly described as "transsexuals"²; or, in the language of the 2004 Act³, as "people suffering from gender dysphoria".
3. The object of the 2004 Act was to enable a person of either gender who is aged at least 18 years to make an application for a Gender Recognition Certificate on the basis of (a) living in the other gender or (b) having changed gender under the law of a country or territory outside the United Kingdom. If a Gender Recognition Panel⁴ is satisfied that the statutory requirements⁵ are met, it must grant the application and issue a Gender Recognition Certificate to the applicant: if it is not so satisfied, the Panel must refuse the application.

¹ For a detailed analysis of the position prior to GRA 2004, see the seminal judgment of Mr Justice Ormrod in *Corbett v Corbett (otherwise Ashley)* [1971] P 83, approved by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21.

² Transsexual people are to be distinguished from "intersexual" people; as explained by Lord Nicholls of Birkenhead in *Bellinger* (at paragraphs 6 and 7 of his judgment).

³ GRA 2004, section 25: "'gender dysphoria' means the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism".

⁴ Established under GRA 2004, Schedule 1: such a Panel must include at least one legal and one medical member.

⁵ It is necessary for an applicant within the first category - living in the other (or "acquired") gender - to satisfy the Panel, by evidence in the prescribed form, that he or she (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, and (c) intends to continue to live in the acquired gender until death.

4. The statutory requirements under the 2004 Act (as enacted) are restrictive. The Government has announced an intention to review those requirements - in particular, the requirement for a diagnosis of gender dysphoria by two qualified professionals and the need to provide evidence for scrutiny by a Panel - and to move towards self-identification. That proposal has run into some opposition; and the intended review appears to have stalled. Nevertheless, it would be sensible to assume that, in due course, the requirements will be relaxed. If so, it can be expected that the number of those who seek and obtain Gender Reassignment Certificates⁶ will increase.
5. The effect of a full Gender Recognition Certificate is that the gender of the person to whom it is issued becomes for all purposes the acquired gender; so that, if the acquired gender (in which the successful applicant is living) is female, the person's sex becomes that of a woman; and if the acquired gender is male, the person's sex becomes that of a man⁷. Gender reassignment effects a change of sex as well as a change of gender.

The effect of gender reassignment on existing membership of the Craft

6. The change of sex, following the issue of a full Gender Recognition Certificate, to a mason who (as a male) has been initiated into freemasonry under the UGLE Constitution will not affect the validity of that initiation⁸. It follows that, unless there were some provision in the Book of Constitutions which (lawfully) required that those who have become masons shall cease to be masons if they cease to be of the male sex, the mason who has become female following gender reassignment and change of sex will remain a mason.
7. There is no express provision in the Book of Constitutions which has the effect that a member of the Craft who has been validly initiated into freemasonry as a male ceases to be a mason when he (she) changes sex and becomes a female. That is unsurprising: at the time when the General Laws and Regulations were first adopted (and, thereafter, prior to the enactment of the 2004 Act) a change of sex would not have been regarded as possible. If there were, it would be unlawful under the Equality Act 2010. Gender reassignment is a protected characteristic⁹: UGLE is an association for the purposes of the Act¹⁰: an association must not discriminate against a member by depriving him (or her) of membership because of a protected characteristic¹¹. Further, given that an express provision for termination of membership on change of sex would be unlawful, there is no ground for the implication of such a provision (even if such an implication would otherwise be permissible under the general law). Nor would it be lawful to seek to amend the Book of Constitutions by introducing such a provision¹².

⁶ If, indeed, a formal certificate effecting a change of gender were still required.

⁷ GRA 2004, section 9(1).

⁸ GRA 2004, section 9(2).

⁹ EA 2010, sections 4 and 7.

¹⁰ EA 2010, section 107(2).

¹¹ EA 2010, sections 13(1) and 101(2)(b).

¹² EA 2010, sections 13(1) and 101(2)(c).

8. It would be plainly be discriminatory, and so unlawful, for UGLE to seek to expel from the Craft a mason on the ground that she had become female following gender reassignment and change of sex: that, alone, could not constitute engaging in conduct which may bring freemasonry into disrepute¹³. And for UGLE to attempt to put any pressure on a mason who has changed sex to resign from the Craft would risk a complaint of unlawful harassment¹⁴.
9. The effect is that, if a mason who has become female following gender reassignment and change of sex does not choose to resign from the Craft, she will remain a mason. In my view, it must be accepted that, in due course, UGLE may have members who are female.

Admission to membership of the Craft

10. Admission to membership of the Craft is by initiation into a private lodge. Initiation is restricted to male candidates¹⁵: a female candidate could not be initiated¹⁶. But for an exemption in the 2010 Act¹⁷ on which UGLE has hitherto relied, the restriction would constitute unlawful discrimination. I have considered whether, in the circumstances that UGLE did (or could) have members who are female, the exemption will continue to be available. The better view, I think, is that that exemption would not be lost¹⁸. Although, as I have explained, UGLE may have members who (following gender reassignment and change of sex) are female, it will continue to be lawful for UGLE to restrict admission to male candidates.
11. The change of sex following the issue of a full Gender Recognition Certificate to a person born female whose acquired gender is male will have the effect that there is nothing in the Book of Constitutions which would prevent that person from being admitted into masonry by initiation; and that it would be unlawful, because discriminatory, for UGLE to refuse (on that ground) to allow him to be so admitted.

Membership of Private Lodges

12. If a mason who has become female following gender reassignment is a member of a private lodge established in England and Wales, she will (if she remains a member of the Craft), also remain a member of that lodge unless either (i) she chooses to resign

¹³ For the purposes of Rule 179 in the Book of Constitutions.

¹⁴ EA 2010, sections 26(1), (4) and (5) and 101(4)(a).

¹⁵ Rule 157 in the Book of Constitutions; and see the declaration to be made by the candidate (Rule 162) and the statements to be made by his proposer and seconder (Rule 159)

¹⁶ The ceremony of initiation itself prevents this: see the passage in the second Section of the First Lecture (at page 31 in “The Lectures of the Three Degrees in Craft Masonry).

¹⁷ EA 2010, section 107(9) and Schedule 16, paragraph 1(1). The exemption provides that “An association does not contravene section 101(1) by restricting membership to persons who share a protected characteristic”. In that context “sex” (whether male or female) is a “protected characteristic”: EA 2010, sections 4 and 11.

¹⁸ The reference in EA 2010, Schedule 16, paragraph 1(1), to “restricting membership” must be construed with EA 2010, section 101(1), to which it is directed, in mind. In that context, it must be taken as a reference to “restricting admission to membership”. It has no relevance to continuance of membership: that is the concern of EA 2010, section 101(2), to which Schedule 16, paragraph 1(1) has no application. UGLE may continue to rely on the exemption in relation to section 101(1).

from that lodge, (ii) her membership is lawfully terminated under the by-laws of the lodge, or (iii) she is lawfully excluded from that lodge.

13. A private lodge established in England and Wales¹⁹ is, itself, an association²⁰ for the purposes of the 2010 Act, separate and distinct from UGLE. It is unlikely that the by-laws of a private lodge will contain a provision which has the effect that a member who was initiated into (or who joined) the lodge as a male ceases to be a member when he (she) changes sex and becomes a female: and, if there were, that provision would be unlawful under the 2010 Act²¹. Further, there is no ground for the implication of such a provision; and it would not be lawful to seek to amend the by-laws by introducing such a provision²².
14. Exclusion of a member from a private lodge established in England and Wales²³ on the ground that he (she) had become female following gender reassignment would be unlawful; and (in any event) could not, of itself²⁴, be exclusion for “sufficient cause”. The member excluded on that ground would be entitled to reinstatement²⁵.
15. Admission to membership of a private lodge may be by initiation²⁶ or as a joining (or re-joining) member. To be admitted as a joining member, the candidate must already be a member of the Craft²⁷. I have considered whether there is any provision in the Book of Constitutions which would prevent a private lodge established in England and Wales from admitting to membership, as a joining member, a mason who, following gender transition and change of sex, had become female; provided, of course, that she had been regularly proposed, seconded and elected by ballot. I am satisfied that the relevant Rule does have that effect²⁸. It follows that I take the view that it is not open to a private lodge to admit to membership as a joining member a candidate who (although a member of the Craft) has become female.
16. I am satisfied that there is no provision in the Book of Constitutions which would prevent a private lodge established in England and Wales from admitting as a visitor²⁹, a mason who, following gender transition and change of sex, had become

¹⁹ As to the position in relation to overseas lodges, see below.

²⁰ Unless (unusually) the lodge has no more than 25 members; EA 2010, section 107(2)(a).

²¹ EA 2010, section 101(2)(b).

²² EA 2010, section 101(2)(c).

²³ Under Rule 181 in the Book of Constitutions.

²⁴ Exclusion under the by-laws on the ground that she had failed to pay subscriptions to the lodge would, unless discriminatory under section 13(1) of the 2010 Act or otherwise, be unobjectionable.

²⁵ Under Rule 182.

²⁶ As to which the observations in paragraph 10 above are in point

²⁷ Under Rule 163

²⁸ Rule 163(b) requires that the particulars required of the candidate for admission as a joining member and the statements to be made by his proposer and seconder shall be in the same form as those required in respect of a candidate for admission under Rule 159. The effect is that a candidate for admission and his proposer and seconder are required to state that the candidate is a man.

²⁹ Subject to Rules 125(a), 126 (which provides that it is within the power of the Master to refuse admission to a visitor whose presence is in his opinion likely to disturb the harmony of the Lodge) and 127.

female. Nevertheless in my view, it would be open³⁰ to a private lodge to adopt by-laws which required that visitors should be admitted only if they are of the male sex.

17. The presence (whether as members or as visitors) at meetings of private lodges (or at the festive board) of masons who, following gender transition and change of sex, are female has the potential (as it seems to me) to give rise to a real risk of harassment (albeit, and hopefully, unintentional) within the meaning of the 2010 Act³¹. It is pertinent to have in mind that, in deciding whether conduct has the effect of “creating an intimidating, hostile, degrading, humiliating or offensive environment” in that context, the perception of the person claiming to be harassed by that conduct must be taken into account³².

Masons in the process of transition

18. Members in the process of transition - that is to say, while living in the female gender prior to obtaining a Gender Recognition Certificate - will remain male. Unless they choose to resign from the Craft, they will remain masons. In relation to them, some of the issues which I have addressed in this paper will not be in point. But it is important to have in mind that they will be persons to whom the “protected characteristic” of gender reassignment applies³³. So the provisions relating to unlawful discrimination and harassment will apply to them³⁴. It would be unlawful for a private lodge to exclude a member on the ground, only, that he was in the process of transition; and unlawful for a private lodge (or any member of a private lodge) to attempt to persuade a member of that lodge who was in the process of transition to resign from the lodge or from masonry.

Grand Registrar
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³⁰ Notwithstanding EA 2010, section 102(1)(a), in reliance on the exemption in EA 2010, Schedule 16, and paragraph 1(3); but subject to approval under Rule 136.

³¹ EA 2010, section 26(1): “A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic; and (b) the conduct has the purpose and effect of (i) violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.

³² EA 2010, section 26(4)(a)

³³ EA 2010, section 7(1): “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.”

³⁴ In particular, consideration needs to be given to the risk of harassment if other members of his lodge object to a mason in the process of transition (and living in the female gender) attending lodge meetings in female dress.