



GENDER RECOGNITION BILL 2008

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Hon J A Brown MHK

INTRODUCTION

1. These explanatory notes relate to the Gender Recognition Bill 2008. They have been prepared by the Chief Secretary's Office in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

SUMMARY AND BACKGROUND

Purpose of the Bill

3. The purpose of the Gender Recognition Bill is to provide transsexual people¹ with legal recognition in their acquired gender. This is necessary to bring Manx law into compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention")².
4. Currently transsexual people are not recognised in their acquired gender for most purposes under the law of the Island. Although transsexual people can obtain some official documents (e.g. driving licence or passport) in their new name and gender, they cannot enjoy all the rights confined by law to people of the gender to which they feel they belong.
5. In practical terms, legal recognition will mean that a male to female transsexual person will be legally recognised as a woman, and a female to male transsexual person will be recognised as a man in Manx law. Amongst other things, the transsexual person will be entitled to a new birth certificate³ reflecting their acquired gender and they will be able to marry someone of the opposite gender to his or her acquired gender.

The Human Rights Position

6. On 11th July 2002, the European Court of Human Rights in Strasbourg ("the European Court") delivered its judgement in the cases of *Goodwin v the United Kingdom* and *I v the United Kingdom*⁴. Both applicants were post-operative male to female transsexual

¹ Further information about transsexuality (gender dysphoria) can be found on NHS Direct website at: <http://www.nhsdirect.nhs.uk/articles/article.aspx?articleId=435§ionId=1>

² The text of the convention can be found at: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

³ A new birth certificate will only be available to a person for whom there is an entry in the Isle of Man birth register.

⁴ The full text of the European Court judgements can be found on its website at: <http://www.echr.coe.int/echr/>

persons who had complained about the legal status of transsexual people in the United Kingdom.

7. The Court found that the UK had breached the rights of these two transsexual people, under Article 8 (Right to respect for private life) and Article 12 (Right to marry) of the European Convention.
8. All State Parties to the European Convention have an obligation under international law to comply with the rights set out in the convention and to take into account the European Court's interpretation of those rights in the development of national legislation and practice. And, in particular, where the European Court has found a State to have violated a person's rights under the European Convention that State has a positive obligation to address the violation.
9. In addition to the judgement of the European Court, on 10th April 2003 the House of Lords gave its judgement in the case of *Bellinger v Bellinger*⁵. Mrs Bellinger, a male to female transsexual person, was seeking legal recognition of her 1981 marriage to a man. Their Lordships were sympathetic to Mrs Bellinger's plight but ruled that the marriage ceremony was not valid. However, they declared that section 11(c) of the UK's Matrimonial Causes Act 1973⁶ was incompatible with the Human Rights Act 1998⁷.
10. The United Kingdom therefore amended its legislation so as to respect the rights of transsexual people under the European Convention. The result was the Gender Recognition Act 2004⁸ ("the UK Act") which received Royal Assent on 1st July 2004 and which came fully into force on 1st April 2005. A copy of the UK Act can be found on the website of the UK's Office of Public Sector Information at:
http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040007_en.pdf
11. As the UK's ratification of the European Convention extends to the Isle of Man and, for the purposes of the convention, the Island is considered to be part of the UK "State Party" the same obligations to secure the convention rights and comply with judgements of the European Court apply to the Isle of Man. In addition, now that the Human Rights Act 2001 is in force, the legal status of transsexual people in the Isle of Man could be challenged in the Island's Courts. Given the case law of the European Court and the House of Lords it is almost certain that current Manx law in relation to transsexual persons would be found to be incompatible with the European Convention.

The Bill

12. The starting point for the Gender Recognition Bill was consideration of the UK Act but it does not replicate all of the UK Act's provisions. The provisions of the UK Act that have not been incorporated into the Bill fall into three main areas:
 - the Gender Recognition Panel and the issuing of gender recognition certificates;
 - social security and pensions provisions;
 - discrimination in employment.

⁵ [2003] 2 All ER 593

⁶ Section 11 of 1973 Act deals with the grounds on which a marriage celebrated after 31st July 1971 shall be void, and paragraph (c) states that a marriage shall be void if "the parties are not respectively male and female".

⁷ The full text of the House of Lords judgement can be found at:

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm>

⁸ 2004 c.7

13. The matters that are covered by the Bill are described fully in the Commentary section of these Notes; the reasons for not including certain provisions within this Bill are set out briefly in paragraphs 14 to 21 of these Notes.

The Gender Recognition Panel

14. The Gender Recognition Panel is the body, consisting of legally and medically qualified persons, established by the UK Act to assess applications from transsexual people for the issuing of a gender recognition certificate, with legal recognition under the UK Act following from a person obtaining a full gender recognition certificate⁹.
15. Before being issued with a certificate a person must be able to demonstrate that they meet strict evidential criteria, and the Panel must be satisfied that the applicant:
- has, or has had, gender dysphoria;
 - has lived fully in the acquired gender for at least the preceding two years; and
 - intends to continue to live in the acquired gender until death.
16. An Isle of Man Gender Recognition Panel is not established by the Bill, instead legal recognition in the Island of a person's acquired gender results from the issuing of a full gender recognition certificate by the UK Panel.
17. Isle of Man residents can already apply to the UK Panel for a gender recognition certificate under the same conditions as a person who is resident in the UK; the diagnosis and treatment of a transsexual person from the Island is likely to have taken place in the UK; and it is more likely that the privacy of a person seeking a gender recognition certificate will be maintained through application to an off-Island body.

Social security provisions

18. Under the Island's Reciprocal Agreement with the United Kingdom, the Isle of Man Government is obliged to keep certain social security and pensions provisions in line with those of the UK.
19. In January 2005, Tynwald approved four Orders¹⁰ relating to the UK Act that had been made by the Department of Health and Social Security (DHSS). The Orders were made under the Pensions Act 1995 and the Social Security Act 2000 (Acts of Tynwald). Their effect was to apply (with appropriate modifications) those provisions of the UK Act relating to social security and pensions, together with necessary related provisions, as part of the law of the Island.
20. Consideration was given during the drafting process as to whether the social security and pensions provisions should be incorporated into the Bill. However, given that these provisions have already been applied to the Island under Acts of Tynwald, and also given that the Bill is inextricably linked to the UK Act through the gender recognition certificate process, it was considered that the revocation of the DHSS subordinate legislation and incorporation of equivalent provisions into the Bill would have been an

⁹ Further information about the operation of the Gender Recognition Panel can be found at its website: <http://www.grp.gov.uk/index.htm>

¹⁰ The four Orders are:

The Social Security Act 2000 (Amendment) (No.3) Order 2004 – SD 873/04;
The Pension Schemes Order 2004 – SD 874/04;
The Gender Recognition Act 2004 (Application) Order 2004 – SD 875/04;
The Gender Recognition Act 2004 (Application) (No.2) Order 2004 – SD 876/04

unnecessary complication. However, see paragraphs 49 to 51 in relation to clause 14 of the Bill.

Discrimination in employment

21. Comprehensive employment anti-discrimination legislation is in the process of being developed by the Department of Trade and Industry. The Employment Equality Bill will provide protection for transsexual people who experience discrimination in the workplace.

COMMENTARY

Clause 1: Interpretation

22. **Clause 1** defines certain important expressions that are used within the Bill.

Clause 2: Effect of gender recognition certificate, etc

23. **Clause 2** deals with the effect in Manx law of a person changing their gender as a result of the UK Gender Recognition Panel issuing them with a full gender recognition certificate.
24. Sub-clause (1) establishes that when a person's gender has become the acquired gender as set out in a full gender recognition certificate (so that a person who was born biologically male will, in law, become a woman for all purposes and a person who was born biologically female will, in law, become a man for all purposes) this does not rewrite the gender history of the transsexual person.
25. However, sub-clause (2) provides that the acquired gender does apply for the interpretation of enactments, instruments and documents passed or made before, or after, this Bill comes into force or before the person's gender recognition certificate was issued.
26. Sub-clause (3) provides that the fact that a person's gender has become the acquired gender is subject to any exceptions made by the remainder of the Bill and by any other future enactment or subordinate legislation.

Clause 3: Civil Registration

27. **Clause 3** gives effect to Schedule 1 concerning registration practice and related matters.

Clause 4: Marriage

28. **Clause 4** gives effect to Schedule 2 which amends existing marriage law to take into account the marriages of persons who may have changed gender.

Clause 5: Parenthood

29. **Clause 5** provides that although a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child. The continuity of parental rights and responsibilities is thus ensured.

Clause 6: Succession, etc

- 30.** In **clause 6**, sub-clause (1) provides that a person's gender becoming the acquired gender does not affect the distribution of property under a will or other instrument made before the Bill comes into operation. For wills or other instruments made after that day, the general principle stated in clause 1 will apply, e.g. if a will refers to the "eldest daughter", and a person who was previously a son becomes the "eldest daughter" following recognition in the acquired gender, that person will (subject to clause 7) inherit as the "eldest daughter".
- 31.** Sub-clause (2) provides an exception to the general principle of clause 1. The descent of any property that passes with a peerage or dignity or title of honour will take place as if a person recognised in the acquired gender were still of their birth gender, unless the will or other instrument governing the property departs from this rule by express provision.

Clause 7: Trustees and personal representatives

- 32.** Where a trustee or personal representative is responsible for conveying and distributing property from a trust or estate, **clause 7** relieves that person from any fiduciary duty to inquire whether a gender recognition certificate has been issued to any person (or has been revoked), even if that fact could affect entitlement to property which they are responsible for distributing. The beneficiary will nevertheless retain his or her claim to the property and may enforce that claim, e.g. by following the property into the hands of another person who has received it instead.

Clause 8: Orders where expectations defeated

- 33.** **Clause 8** makes provision for any situation where the disposition or devolution of property under a will or other instrument is different from what it would have been but for the fact that a person is regarded as being of the acquired gender. If, for example, an instrument governs succession by reference to the "eldest daughter" of the settlor, and there is an older brother whose gender becomes female under the Act, then the person who was previously the "eldest daughter" may cease to enjoy that position.
- 34.** A person who is adversely affected by the different disposition or devolution of the property may make an application to the High Court. The court, if it is satisfied that it is just to do so, may make such order as it considers appropriate in relation to the person benefiting from the different disposition of the property.

Clause 9: Sport

- 35.** **Clause 9** provides that a body responsible for regulating participation in competitive sporting events may only prohibit or restrict the participation in such events of a person who is recognised in the acquired gender, and is seeking to compete in the acquired gender, if this is necessary to secure fair competition or the safety of other competitors.

Clause 10: Gender-specific offences

- 36.** Many definitions of sexual offences in the law of the Isle of Man remain gender-specific and hence refer, for example, specifically to acts committed by a man upon a woman. **Clause 10** ensures that where criminal liability would exist, but for the fact that a person, either the victim or the perpetrator, has become of the acquired gender, the criminal liability will continue to exist regardless of the gender change.

Clause 11: Foreign gender change and marriage

- 37.** In **clause 11**, sub-clause (1) provides that a person who has changed their gender in a country or territory other than the Isle of Man and UK is not thereby recognised in the acquired gender in the Island.
- 38.** Sub-clause (2) provides that a person who has entered into a foreign post-recognition marriage is not regarded as being married under the law of the Island.
- 39.** However, sub-clause (3) provides that if a full gender recognition certificate is subsequently issued to the transsexual person who has entered into the foreign post-recognition marriage, then the marriage is no longer to be considered void on the grounds that (at the time when it was entered into) the parties to it were not, in the eyes of Isle of Man law, respectively male and female.
- 40.** Sub-clause (4) provides that sub-clause (3) does not apply to a foreign post-recognition marriage if prior to the issuing of the full gender recognition certificate either person has entered into a later legally valid marriage.
- 41.** Sub-clause (5) fully defines what is meant by entering into a foreign post-recognition marriage.

Clause 12: Prohibition on disclosure of information

- 42.** In **clause 12** sub-clauses (1) and (2) establish that it is an offence for a person to disclose information they have acquired in an official capacity about a person's application for a gender recognition certificate or about the gender history of a successful applicant. This information is termed "protected information".
- 43.** Sub-clause (3) explains what is meant by acquiring information in an official capacity. This includes information obtained in the course of a person's duties as a civil servant or holder of any other public office; or as the employer of the transsexual person; or in the course of conduct of business or the supply of professional services to the transsexual person.
- 44.** Sub-clause (4) sets out exceptions to the general prohibition on disclosure of information. For example, disclosure will not constitute an offence where the person to be identified has consented to the disclosure or where the disclosure is in accordance with an order of a court or tribunal.
- 45.** Sub-clauses (5) and (6) make provision for the Council of Ministers to prescribe further circumstances in which the disclosure of protected information does not constitute an offence.
- 46.** Under sub-clause (7), a person who discloses information in contravention of this clause is guilty of an offence and that person is liable on summary conviction to a fine not exceeding £5,000.

Clause 13: Power to modify statutory provision

- 47.** Sub-clause (1) of **clause 13** provides that the Council of Ministers may by Order modify other statutory provisions in relation to persons whose gender has changed as a consequence of a full certificate being issued to them. The power is strictly limited and is provided due to the specific nature of this legislation. Legislation has made distinctions on the basis of gender for centuries, and the use of gender-specific terms,

though it has reduced, nevertheless continues in some contexts. This provision allows the Council of Ministers to address any future unforeseen difficulties or complexities that might arise in the operation of other legislation as a result of the facility to change gender under this Bill.

48. Sub-clause (2) provides that an order made by the Council of Minister under sub-clause (1) cannot come into operation unless it is approved by Tynwald.

Clause 14: Validity of subordinate legislation

49. The Department of Health and Social Security (the "DHSS") has the power to apply certain UK legislation (with exceptions, adaptations and modifications) to the Island under section 1 of the Pension Schemes Act 1995 and section 1 of the Social Security Act 2000. It was necessary to make orders under section 1(3) of the 1995 Act and section 1(6) of the 2000 Act, to provide the enabling power ("enabling orders") for specific provisions of the UK Act to be applied to the Island by order ("application orders"). The enabling orders must be made and come into operation before the application orders are made. However, in the case of the Gender Recognition Act 2004 (of Parliament), the enabling orders and the application orders were all made at the same time.
50. The legal validity of the Gender Recognition Act 2004 (Application) Order 2004 and the Gender Recognition Act 2004 (Application) (No.2) Order 2004 ("the 2004 application orders") is therefore questionable. The validity of the Social Security Act 2000 (Amendment) (No.3) Order 2004 and the Pension Schemes Order 2004 ("the enabling orders") is not in doubt and it would therefore be possible for the DHSS to make new application Orders under the 1995 and 2000 Acts. However, as it is not known whether any transsexual persons have benefited from the provisions of the original Orders since they were made, Chambers considers that it is preferable for those Orders to be given retrospective legal certainty through a provision in this Bill, which is achieved through **clause 14(1)**.
51. Amongst other provisions, the 2004 application Orders applied section 22 of the UK Act to the Island so that if a person in the Island gained information concerning a transsexual person in an official capacity, the disclosure of such information was prohibited except in the circumstances set out in that section. As an equivalent prohibition on disclosure of information provision is included in clause 12 of the Bill that aspect of the 2004 application Orders is revoked by **clause 14(2)**.

Clause 15: Short title, etc

52. Sub-clause (1) of **clause 15** gives the Bill its short title. Sub-clause (2) provides that the Council of Ministers has the power to make an Appointed Day Order to bring the Bill into operation, and different days may be appointed for different provisions and purposes.

Schedule 1

53. **Schedule 1** deals with registration practice in the Island following the issuing of a gender recognition certificate.
54. Paragraph 1 requires the Chief Registrar to establish and maintain a register to be called the Gender Recognition Register. The form of this register is determined by the Chief Registrar and it is not to be open to public inspection or search.

55. Paragraph 2 applies where there is an entry in the Manx birth register for the person to whom a full gender recognition certificate has been issued.
56. Where an original gender recognition certificate and a certified copy of that person's birth certificate are delivered to the Chief Registrar he must make a copy of the gender recognition certificate, make an entry in the Gender Recognition Register (GRR) containing prescribed information about the person's birth and other matters, and establish a traceable connection between the GRR and birth register entries.
57. As the birth register is open to public inspection the connection may not include any mark on the original register entry as this could indicate to a member of the public that an associated entry existed in the GRR. The copies of the full certificates to be held by the Chief Registrar and any information held in relation to the link between GRR and birth register entries must also not to be open to public inspection or search.
58. Paragraph 3 requires the Chief Registrar to include each entry in the Gender Recognition Register in the relevant index kept in the General Registry. Whilst entries in the index drawn from the GRR may be searched in the same way as other entries the index must not reveal they are contained in that register.
59. Paragraph 4 provides that anyone who is normally entitled to a certified copy of a person's Manx birth register entry is entitled to a certified copy of the entry in the GRR, but such a certified copy must not disclose the fact that it was drawn from the GRR.
60. Paragraph 5 deals with "short birth certificates" compiled from an entry in the GRR. Under section 37 of the Civil Registration Act 1984 any person is entitled, on payment of a fee, to a copy of a short certificate compiled from the original birth register entry (as opposed to a full certified copy of the original certificate) of any other person. Such a certificate includes the name, surname, sex and date of birth of the person but not any particulars relating to parentage or adoption. This paragraph ensures that where a short birth certificate has been compiled from the GRR it does not disclose that fact.
61. Paragraph 6 gives the Chief Registrar the power to re-register an entry in the GRR in the same way registrar has in relation to entries in the birth register under sections 13, 17 or 17A of the Civil Registration Act 1984 when the circumstances set out in those sections apply to an entry in the GRR.
62. Paragraph 7 gives the Chief Registrar the power to correct an entry in the GRR in the same way an entry in the birth register can be corrected.
63. Paragraph 8 deals with the situation where a person's gender recognition certificate has been quashed by a court under section 8(6) of the UK Act following an allegation that the certificate was obtained by fraud. The person concerned must inform the Chief Registrar that the certificate has been quashed and the Chief Registrar must then cancel the entry in the GRR. Failure to notify the Chief Registrar that a gender recognition certificate has been quashed is an offence and on conviction the person is liable to a fine of up to £5,000.
64. Paragraph 9 provides that a certified copy of an entry in the GRR will have the same evidential value as a certified copy of the entry in the original register.

Schedule 2

65. **Schedule 2** concerns the amendment of existing marriage legislation to take account of the legal recognition of a transsexual person's acquired gender.

- 66.** Paragraph 1 makes a consequential amendment to section 1 of the Marriage Act 1984 (“the 1984 Act”) in relation to marriages within prohibited degrees to take account of the fact that a person may have legally changed their gender.
- 67.** Paragraph 2 inserts new section 5A into the 1984 Act to explicitly exempt any clergyman from being obliged to solemnise the marriage of a person whose gender has become the acquired gender in accordance with this Bill.
- 68.** Paragraph 3 amends section 13 of the Matrimonial Proceedings Act 2003 (“the 2003 Act”) to add two new grounds on which a marriage is voidable:
- The first situation is where one of the parties to the marriage has been issued with an interim gender recognition certificate. An interim certificate is issued to a person who otherwise fulfils the criteria for a full certificate but who is still married in their birth gender.
 - The second situation is if at the time of the marriage one party to the marriage did not know that the other was previously of another gender, the former may seek to annul the marriage.
- 69.** Paragraph 4(a) inserts new subsection (2A) into section 14 of the 2003 Act to provide that a court may not annul a marriage on the grounds that an interim gender recognition certificate has been issued unless it is satisfied that proceedings were started within six months from the date of the interim certificate being issued.
- 70.** Paragraph 4(b) consequentially amends subsections (2), (3) and (4) of section 14 of the 2003 Act:
- The amendment to subsection (2) provides that, subject to subsection (4), a court may not annul a marriage on the grounds that one party to a marriage did not know that the other party was previously of another gender unless proceedings are begun within three years from the date of the marriage. This means that the situation is treated in the same way as several other grounds on which a marriage is voidable;
 - The amendment to subsection (3) provides that a court may not annul a marriage on the grounds that one party to a marriage did not know that the other party was previously of another gender unless it is satisfied that the applicant was, at the time of the marriage, genuinely ignorant of the facts. Again this means that the situation is treated in the same way as certain other grounds on which a marriage is voidable;
 - The amendment to subsection (4) provides that, as with the other grounds for annulment under subsection (2), a court may, on an application made to it, grant leave for the institution of proceedings after the expiration of the period of three years from the date of the marriage if certain conditions are met.
- 71.** Paragraph 5 amends paragraph 2 of Schedule 4 to the 2003 Act which deals with the grounds on which a marriage celebrated before 1st April 1976 is voidable. Sub-paragraph (a) adds the situation where an interim gender recognition certificate has been issued as grounds for annulment under the paragraph. Sub-paragraph (b) inserts new sub-paragraph (4A) to provide that a court may not annul a marriage on the grounds that an interim gender recognition certificate has been issued unless it is satisfied that proceedings were started within six months from the date of issue.

FINANCIAL EFFECTS OF THE BILL AND EFFECTS ON PUBLIC SERVICE MANPOWER

72. The Bill is not expected to increase the expenditure of Government or to reduce the income of Government. The Bill is also not expected to require any additional public service manpower.

COMMENCEMENT

73. The Gender Recognition Act will enter into operation on a day appointed by Order made by the Council of Ministers, and the Council of Ministers may appoint different days for different sections of the Act and for different purposes.
