

# They Know It When They See It: The UK Gender Recognition Act 2004

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*This article is a critical feminist analysis of the UK Gender Recognition Act of 2004. This Act is radical in enabling transgenders to gain certificates recognising their new 'acquired gender' without undergoing hormonal or surgical treatment. The Act has considerable implications for marriage, for motherhood and fatherhood, for women who are the partners of men or women who 'transition' and for 'women-only' spaces. It is based on confusing and contradictory notions of the difference between sex and gender. As such it should be of great interest to feminists but there has been a dearth of feminist commentary. The understandings of sex and gender and of the importance of the Act will be explored here through analysis of the parliamentary debates and public responses.*

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The 2004 Gender Recognition Act (GRA) in the UK is radical legislation. Many countries and states in the western world, such as South Australia, Austria, Germany, The Netherlands and Spain, have mechanisms in place that enable transgender persons who have undergone surgical treatment to gain new birth certificates and the rights and privileges of their, as the GRA puts it, 'acquired gender' (Press for Change n.d.). The UK Act goes further. It is unusual in enabling transgenders who have had neither surgical nor hormonal treatment to gain recognition in their new gender. It reflects an important change in the language and understanding of 'transsexualism' too. The language of 'gender' rather than 'sex' is used in the legislation. The government's arguments for the legislation suggest that they do not believe that 'sex' can be changed and are moving towards recognising change of 'gender' as something like a lifestyle option. This could be seen as a triumph for feminist understandings of gender as socially constructed. However, though the Act is apparently about 'gender', a subject which feminists have usually understood to be their own political stamping ground, no women's or feminist groups made submissions in the lead-up to this Act. A whole conversation about what constitutes sex and gender and what, for example, a woman is, including the creation of legislation with considerable social and political implications, has been taking place offstage as if it was not the concern of women or feminists to be involved in the discussion of these issues. In this article I will analyse the arguments about sex and gender that were aired in the debates and discussions around this legislation and make some suggestions as to how these might be relevant to the interests of women and feminism.



## Origins of the Legislation

The Act is very much the child of an international movement of transgender activists, represented in the UK by organisations such as Press for Change (PFC), the Gender Trust and the FTM Network. The two main campaigners from PFC, Christine Burns and Stephen Whittle, were awarded an MBE and an OBE, respectively, for their campaigning efforts for transgender rights and towards the GRA. Such organisations in the UK are part of an international transgender activist movement which works for legislative change recognising the rights of transgenders, and exchanges ideas and tactics through Internet websites and discussion lists. These campaigning efforts have led to more than legislative change enabling change of 'sex' or 'gender'. In some countries transgender activists have gone so far as to demand that children who develop the idea that they are 'transgender' should be able to have treatment to prevent puberty so that they do not develop the physical form of their despised biological sex (Jeffreys 2005). In an important test case on this issue in Australia a 13-year-old girl gained the right to be identified as a boy at school and to access hormonal treatments to suppress menstruation and, from age 16, to be treated with male hormones (Jeffreys 2005). Significant changes in law and policy are taking place in response to a movement which, according to some feminist commentators (Raymond 1994; Hausman 1995), was constructed out of and depends upon a socially constructed medical diagnosis, that of gender identity disorder.

'Transsexualism' is an invention of the last half-century since the hormones and surgery which enable persons to engage in what was, until recently, seen as 'changing sex' are recent medical developments. The acceptance that surgery is an appropriate therapy for what was understood to be a psychological condition was rejected by the majority of the medical profession in the US as recently as the 1950s and is still rejected by some (Hausman 1995; Meyerowitz 2002). The recognition of transsexualism as a medical condition in sexology formed the basis for the development of a transgender movement which was inspired by the effectiveness of the feminist and lesbian and gay movements in gaining more equality for their constituencies. It benefited from two developments in recent decades. One was the development of the Internet which has enabled the proliferation and considerable growth of a variety of 'communities' created around particular interests. Another is the arrival of queer theory in the lesbian and gay and feminist communities. Queer theory, stemming from the work of Judith Butler in particular, has promoted the 'transgression' of gender boundaries as progressive political practice (Butler 1990).

The transgender community is not united in its understanding of what the condition should be called, what causes it and how it should be treated. In this article I distinguish between what I identify as 'traditional' transsexuals, who are likely to subscribe to the way that transsexualism has been understood in the science of sexology, stemming from the work of Harry Benjamin, seen as the father of the medical study of transsexualism, and those who take a 'queer' approach (Benjamin 1966). The traditional approach sees the phenomenon as originating in biological anomaly and as requiring surgical and hormonal treatment. This perspective is promoted most clearly in the *International Journal of Transgenderism*. Traditional transsexuals may be activists, on such issues as the right to surgery paid for by the

state, or the right to marry, but most seek to assimilate seamlessly into mainstream society as their new 'sex' (Lewins 1995). Those who describe themselves as 'trans-genders', on the other hand (Bornstein 1994), are likely to be informed by queer theory and to see themselves as challenging traditional sex roles rather than fitting in. Queer theorists such as Butler (Butler 1990) argued that not only was gender a social construction, which was an orthodoxy of feminist theory in general, but that those persons of one physiological sex who 'performed' the practices of the 'gender' most usually associated with the other sex were behaving in a way which was transgressive. Such 'performance' demonstrated that gender was indeed a social construction and could have a disruptive effect on the sex/gender system on which male dominance is based. Those seen as engaging in these transgressive performances included not just traditional transsexuals but drag queens, transvestites and even butch lesbians and effeminate gay men.

The various ways in which transgenders understand themselves is illustrated in Sally Hines' research, ranging from some who identify completely with their new 'sex' or 'gender' to those who see themselves as belonging to a new transgender community in which no one is completely male or female (Hines 2006). Gradually, however, the new language of 'gender' as opposed to 'sex' caught on so that 'transsexualism' came to be seen as rather old-fashioned and the new term 'transgenderism' supplanted the previous one in much theorising and even legislation and policy such as the Gender Recognition Act. Those who subscribe to the notion of gender as it is used in queer politics, i.e. as a fluid and socially constructed social category, do not consider physical reconstruction to be necessary. These different approaches are reflected in reactions to the GRA whose provisions, in requiring evidence of gender identity disorder, a diagnostic category which stems from sexology, but not requiring surgery, stand awkwardly on the cusp between these various interpretations of the phenomenon.

Feminist theorists in the early stages of the most recent wave of feminism tended to be critical of transgenderism, pointing out that sexology and its practitioners promoted old-fashioned, sexist understandings of 'gender' and the relations between the sexes (Daly 1979; Raymond 1994 [1979]). They understood transsexualism as recreating archaic sex roles that were the obstacle to women's equality rather than constituting a revolutionary way to 'transgress gender'. These early writers understood the task of feminism, as many radical feminist theorists do today (Hausman 1995 and 2001; Jeffreys 1997, 2003 and 2005), as being the elimination of 'gender'. To the extent that 'gender' constituted the behaviour of the male ruling class (masculinity) and the subordinate class of women (femininity) it could have no place in the egalitarian future that feminism aimed to create (Delphy 1993).

This clear understanding was very much undermined by the advent of queer theory which had a powerful influence both in the academy and outside it on the way that transgenderism and other ways of 'transgressing' such as butch-femme role playing and transvestism and camp were seen by many feminists and lesbians. The earlier criticisms made by radical feminists were repudiated by many feminist and gay theorists and activists in favour of the idea that 'gender' did not have to be eschewed because it could be played with and transformed so that a man acting out the female sex role in his appearance, or vice versa, could be seen as engaging in a

revolutionary practice that would 'destabilise' gender (Halberstam 1998; More and Whittle 2004). This queer approach has predominated in the academy in lesbian and gay and transgender studies. It does, however, have its critics who have argued that queer theory and politics are in contradiction to the revolutionary demands and practices of late 20<sup>th</sup>-century feminism rather than a useful addition to that politics (Walters 1996; Wilkinson and Kitzinger 2006; Faderman 1997; Jeffreys 1994 and 2003).

In this article the GRA will be analysed from the perspective of the radical feminist critique of gender roles, i.e. as forms of behaviour which stem from and maintain the unequal power relations between the sexes and which need to be eliminated. From this point of view the GRA is retrogressive legislation which inscribes traditional gender roles into law so that they can be identified and regulated by the state. The sources I will look at here include the parliamentary debates around the legislation, the inquiry documents that led to the drawing-up of the Act and the writings of transgender and feminist activists and theorists in relation to the GRA and transgenderism more generally.

## **Sex, Gender and Transgenderism in the Gender Recognition Act**

The government says that it was necessary to introduce the legislation in order to bring the UK into accordance with European Human Rights Law, as Lord Filkin, Parliamentary Under-Secretary of State, Department for Constitutional Affairs explained in the House of Lords: 'we have an obligation—it is one with which we are perfectly comfortable—to adjust our domestic law in order to be compliant with ECHR law' (*Hansard*, col. 364, 13 January 2004). The decision in the case of *Goodwin v. UK* in the European Court of Human Rights found that UK law in relation to transsexualism was in violation of two articles of the European Convention on Human Rights to which the UK is a signatory. These were article 8 on the respect for private life and article 12 on the right to marry (Sohrab 2004). The 2004 Act is to 'make provision for and in connection with change of gender' (GRA 2004, preamble). The Act defines 'acquired gender' as 'the gender to which the person has changed' or 'the gender in which the person is living' (*ibid.*, article 1). Under the Act persons applying for 'recognition' of their 'acquired gender' must appear before a panel which will decide whether to 'recognise' them or not. The panel must grant the application if the following conditions are met by the applicant. They must have or have had 'gender dysphoria', have performed what is usually called the 'real life' test, i.e. lived in the acquired gender throughout the period of two years ending with the date on which the application is made, and intend to 'continue to live in the acquired gender until death' (*ibid.*, article 2).

The applicant must provide evidence of their 'acquired gender' in the form of either 'a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner' or 'a report made by a chartered psychologist practising in that field and a report made by a registered medical practitioner' (*ibid.*, article 3). Unlike legislation of this kind elsewhere it does not require that applicants should have undergone medical

treatment in the form of hormones or surgery. As legal theorist Ralph Sandland points out, those gaining certificates will still be in what would be understood in traditional medical understandings of transsexualism as 'transition' (Sandland 2005). The classic diagnosis of gender identity disorder usually leads to two years of the real life test of living as the 'acquired gender' before hormonal and surgical treatment.

The basis of recognition before the panel is the medical model in the form of the diagnosis of 'gender dysphoria', more generally called 'gender identity disorder' (GID). Evidence from medical professionals is required to vouch for the fact that the aspirant has this condition before the panel. GID is the diagnosis that forms the basis for the treatment of transgenderism by surgery or hormones. Underlying the notion of GID is the idea that 'gender' is biological, but the government's position in the parliamentary debates on the legislation does not indicate a belief in biological causation.

The diagnosis of childhood GID follows old-fashioned notions of what constitutes appropriate behaviour for those assigned to the sex classes of male and female. It is precisely this idea, that certain distinct behaviours are appropriate for males and females, that underlies feminist criticism of the phenomenon of 'transgenderism' (Raymond 1994). The criteria for diagnosing GID are set out in the US Diagnostic and Statistical Manual (DSM). These include:

repeatedly stated desire to be, or insistence that he/she is the other sex; in boys, preference for cross-dressing or simulating female attire; in girls, insistence on only wearing stereotypical masculine clothing; strong and persistent preferences for cross-sex roles in make-believe play or persistent fantasies of being the other sex; intense desire to participate in the stereotypical games and pastimes of the other sex; strong preference for playmates of the other sex (*Psychology Today* n.d.).

The gender recognition panel will probably exercise their own preconceptions of correct gender behaviour as well as the evidence of medical specialists to decide who to 'recognise'. Men who transition often learn how to be 'women' from imitating their wives' gestures, facial expressions, clothing, make-up, even their positions in bed at night, according to Diana Aitchison of the UK wives support group of the transvestite/ transsexual organisation, the Beaumont Society (Aitchison 1998). The panel will be able to adjudicate on how successful they have been.

The issue of whether transgenderism is biologically based or not was the subject of much discussion in the consultation leading up to the legislation organised by the Home Office Interdepartmental Working Group (Home Office 2000). The Working Group received comments from 99 individuals, almost all from transsexual people and their friends and families, and from Members of Parliament. The Group also met representatives of seven organisations arguing for transgender rights (Press for Change, Change, the FTM Network, the Gender and Sexuality Alliance, Gires, Liberty and the Gender Trust). Appendices to the Working Group's Report from some of these groups support the idea that GID has a biological foundation. The first appendix to the Report is from Professor Louis Gooren who states that GID is a

'medical condition' and a 'disorder of sexual differentiation'. The evidence for his argument that GID has a biological basis is research he and others carried out, which found that:

in one of the human brain structures that is different between men and women, a totally female pattern was encountered in six male-to-female transsexuals. They were able to show that this was not due to the transsexuals' previous cross-sex hormone treatment. These findings showed that a biological structure in the brain distinguishes male-to-female transsexuals from men (Home Office 2000, Appendix A).

This study has not been replicated.

Some proponents of a biological basis for GID now argue that transgenderism should be understood as a form of intersexuality and biologically based in a similar way. In another appendix to the Report Dr Zoe-Jane Playdon argues: 'I would advise government to treat transsexualism "as if it were" an intersex condition' even though it is not. She does not seek to argue that evidence exists to support the notion that there is a biological basis for GID. She says that there is no 'conclusive evidence'. Instead she makes the surprising argument that the sexologist Harry Benjamin proposed a 'somatic' origin for the condition and 'until a theory is falsified, it must be held to be true' (Home Office 2000, Appendix B).

This evidence for a biological basis does not seem to have convinced the Working Group, however. Behind the legislation lies a much vaguer and more expansive understanding of transsexualism despite the requirement that applicants should be diagnosed as having GID. The Report of the Interdepartmental Working Group is cautious about stating a biological basis, defining the issue thus:

People with gender dysphoria or gender identity disorder live with a conviction that their physical anatomy is incompatible with their true gender role. They have an overwhelming desire to live and function in the opposite biological sex. Some people become aware of their transsexualism as children while others discover their feelings later in life. Once experienced these feelings are unlikely to disappear (Home Office 2000, section 1.1).

The Report states, 'The cause of the condition remains obscure'. It states sensibly that 'Gender reassignment is commonly termed a sex change, but in reality it is an alteration only in a person's physical characteristics. The biological sex of an individual is determined by their chromosomes, which cannot be changed' (Home Office 2000, section 1.4).

The result of this consultation is legislation which is mired in a profound confusion over the difference between sex and gender. The Act speaks of change of 'gender' rather than change of sex. Lord Filkin, responsible for taking the Bill through the House of Lords explains:

It is fundamental to the Bill that legal recognition is given to transsexual people on the basis of their gender regardless of their chromosomal sex. If the acquired gender is the male gender, the person's sex becomes that of



a man, and, if it is the female gender, the person's sex becomes that of a woman (*Hansard*, GC6, 13 January 2004).

He continues in a way which suggests that the government is aware that they are introducing the idea that 'gender' might be changed as a lifestyle choice: 'it gives legal rights to people to live their lives in the way that they believe is important' (*Hansard*, GC7, 13 January 2004).

Opponents of the legislation in the parliamentary debates showed a sophisticated level of analysis of the distinction between sex and gender and the serious confusion between these terms that underlies the Act. It is an irony that it was Conservative peers in the House of Lords that made arguments about the differences between sex and gender that feminist critics of the Bill might have been expected to make. Some simply see the premise of the Bill that women can become men and vice versa as absurd. Thus Earl Ferrers comments that 'The real answer is that the Bill is so bad because it is based on a deception ... "Here is a person who was born a female", and then you say, "We have decided 40 years later that he was born a male". That is a deception' (*Hansard*, col. 649, 14 January 2004). Some, however, reveal a good understanding of the way in which gender and sex differ. Lord Tebbit, once a minister in the Thatcher government, states quite sensibly: 'There is a major defect in the Bill in its confusion over sex and gender. Is the Bill about a change of sex or a change of gender?' (*Hansard*, col. 357, 13 January 2004). Lord Lucas says, 'I do not think there is any way in which we can sensibly define gender as a biological phenomenon' (*Hansard*, col. 620, 14 January 2004).

The extent of the confusion over sex and gender on the government side is revealed in contributions by Lord Filkin. He says vaguely, 'The word "sex" now has more of a social and psychological connotation than it would have had 20 or 30 or so years ago' (*Hansard*, col. 365, 13 January 2004). Then he compounds the confusion by saying, 'the Bill is about legal recognition and it will define a person's sex in law. We consider the arguments about the meaning of the words "sex" and "gender" to be beside the point. There is no stark dichotomy between the meaning of the words' (*Hansard*, col. 365, 13 January 2004). Lord Tebbit swiftly picks up on this casuistry and remarks that there seems to be a new concept being suggested here of 'linguistic relativism' which 'seems to have led him to the conclusion that we should legislate using words whose meanings we do not understand and which mean different things to different people' (*Hansard*, col. 367, 13 January 2004). Tebbit introduced a series of unsuccessful amendments to the Bill in which the word 'gender' was simply replaced by the word 'sex' in order to 'smoke out in some way the Government's view of the distinction between those words or to ascertain whether they believe that there is a distinction between them' (*Hansard*, GC1, 13 January 2004). The debate on the Bill, he explains, is between:

those of us who think that sex is not a lifestyle choice that we make for ourselves, but a choice that is made above and beyond us and is inherent in our biological nature. Sex, some of us think, is not a psychological phenomenon. I suspect that gender may, at least in the mind of the Bill's supporters be a psychological and mental and fashion phenomenon (*Hansard*, GC22, 13 January 2004).

Biology is not mentioned in the arguments from the government's side for the GRA. However, the legislation gives 'gender' an essential quality by seeking to set in aspic the change that it recognises. The Act has, as one requirement of recognition in a new gender, an assurance that the aspirant will remain in their new 'gender' for life and not revert back to the gender in which they were reared. Behaviours which are subject to choice and not biology cannot be dictated in this way. In fact the issue of 'reversion', which can take place back and forth a number of times (*The Guardian*, 31 July 2004), is a growing problem for those who seek to be 'definite' in diagnoses of GID. The problem is increasingly being raised by individual transgenders themselves, who are suing gender identity clinics for what they perceive as misdiagnosis, and by organisations of survivors who are demanding reconstructive surgery and even an end to the practice of giving physical treatments, such as surgery or hormones, to transgenders (*The Guardian*, 31 July 2004; Jeffreys 2006). Since the opponents of the Bill in parliament did not accept that GID was a secure diagnosis which guaranteed that a person would wish to be in their new gender for life, they brought up the tricky issue of reversion in the debates. Baroness O'Cathain pointed out that it was well known that persons could get GID diagnoses without fulfilling the usual prerequisites. They could take short cuts and learn what to say,

By selecting the right medical expert and learning to say the right thing at the right time, transsexuals could quite easily pass the test laid down by the Bill at present ... I read recently that there are websites which teach transsexuals the right things to say when being interviewed by medical professionals. They advise them, basically, on how to cheat (*Hansard*, col. 371, 13 January 2004).

She points out that there is evidence that people regret having a sex change and uses the example of the Alan Finch case in Melbourne as evidence. Alan Finch, the Australian male-to-female (MTF) who changed his mind and returned to living as a male, has set up the Gender Identity Awareness Organisation to campaign against the surgery and offer support to those who 'have, or have had, gender identity issues' and their families and friends (Gendermenders n.d.). The organisation's website lists harmful health consequences of surgery and hormone treatment, the statistics on suicide after surgery and the percentages of those who change their minds. Gendermenders seeks to promote non-surgical treatments for those with 'gender identity issues ... with an emphasis on reconciling gender identity with biological sex' and warns 'these individuals of the pitfalls and often tragic consequences of sex modification surgical procedures and hormone therapy'. It wants 'reconstructive reversal surgery' to be available to those who are dissatisfied. Alan Finch says that transsexualism was invented by psychiatrists and he campaigns against what he calls 'the sex change industry' (Australian Story 2003).

The problem of 'misdiagnosis' or reversion demonstrates the pitfalls of legislation which seeks to essentialise and regulate a socially constructed form of human behaviour. In the parliamentary debates Baroness O'Cathain is critical of the way in which GID is diagnosed and points to the case of the well-known psychiatrist specialising in transsexual issues, Dr Russell Reid, who was investigated by the General Medical Council for his practice of prescribing hormones to men after a



one-hour consultation at his private clinic, which is contrary to the usual standards of care. Some men treated by him consider they were misdiagnosed and made complaints. As a result of the investigation Reid sold his clinic to a female-to-male transsexual, Dr Richard Curtis, who transitioned from being a female to a male general practitioner in 2005. As O’Cathain points out, Dr Reid attracted some adverse publicity through his involvement in the treatment of Body Integrity Identity Disorder (BIID). Reid referred patients who wanted their healthy legs removed to the surgeon Robert Smith at Falkirk General Hospital. Smith was stopped by the hospital from doing the surgery after removing legs from two men (BBC 2000). O’Cathain considers, quite reasonably perhaps, that the development of a diagnosis of Body Integrity Identity Disorder by psychiatrists involved in diagnosing and treating transsexuals should throw the diagnosis and treatment of GID into question.

The Home Office Interdepartmental Report stated that, though unlikely, ‘the possibility of a reversion to the birth sex cannot be ruled out’ (Home Office 2000, section 4.10). Opponents of the Bill sought to get amendments that would allow persons who changed their minds to go back before the Panel and get re-certificated. They also asked what would happen to persons who changed their minds more than once and whether the legislation would be able to accommodate them. The government rejected these arguments as not being serious but the issue of reversal does create problems for the tidiness of GID diagnoses. If ‘gender’ is a movable feast, or what Butler calls ‘transferable property’, then the very basis of the legislation comes into question.

The GRA thus recognises ‘gender’ as a matter of choice, rather than biology, though a choice which can only be made once. However, biology, though ignored, does have some significant implications for what happens after ‘recognition’, the most significant of which is reproduction. The issue of reproduction by transgenders was another problem brought up both in the consultation document and in the debates. Since neither hormone treatment nor surgery was required for a change of gender on the grounds put forward by Press for Change that the health of some persons might make this unsuitable, it is quite possible for persons with certificates to reproduce in the ordinary way, i.e. through penis-in-vagina sex, or through a sperm donor. The report says that the arguments against sterilisation have to be set against concern among the ‘general public’ ‘if someone who was legally a man gave birth to a child or someone who was legally a woman became the father of one’ (Home Office 2000, section 4.14). Surya Monro explains that this was already taking place in the UK before the legislation went through: ‘some transgender men cease to take hormones for a period of time in order to have a baby, then revert back to their male identity once the baby is born’ (Monro 2003, 443–444). The legislation creates a new situation in which someone legally male may give birth and raise a child as the ‘father’ although, according to the legislation, the birth certificate should specify that the person who gave birth is the ‘mother’ rather than the ‘father’.

The legislation has significant implications for marriage too. The legislation requires that to gain recognition of their new gender, aspirants must divorce anyone they are currently married to in order to avoid the creation of a ‘same-sex’ marriage. Opponents of the Bill in the parliamentary debates such as Baroness O’Cathain

vigorously criticised this requirement on the grounds that those the Lord has joined together should not be sundered by the state (*Hansard*, col. 396, 13 January 2004). Lord Tebbit pointed out that it made little sense to retain a ban on same-sex marriage when two persons with identical genitalia could be married, and each could produce children from biologically entire bodies as long as one of them held a certificate (*Hansard*, col. 397, 13 January 2004).

Campaigners for same-sex marriage, such as Sue Wilkinson and Celia Kitzinger who have sought unsuccessfully to have their Canadian same-sex marriage recognised in the UK, have been very critical of the strange contortions that the legislation engages in to reserve marriage only for those identified as being different genders by the state (Wilkinson and Kitzinger 2006). They are critical too of the divorce requirement. The government passed the Civil Partnership Act in the same year allowing lesbians and gay men to gain legal recognition of their relationships and those who have reluctantly had to be 'put asunder' are expected, according to the Act's sponsors, immediately to enter Civil Partnerships (Wilkinson and Kitzinger 2006). Unfortunately these can seem second-rate arrangements and require a divorced wife, for instance, to accept that she is a lesbian in relation to her husband of decades and she may have strong objections to so classifying herself. Already there is a legal challenge under way. An unnamed (for legal reasons) 31-year-old finance manager from Edinburgh who underwent sex change in 2004 has petitioned the European Court claiming that UK law is a breach of human rights. The petitioner does not want to have to end their marriage (*The Sunday Times*, Scotland, 30 October 2005; Kitzinger and Wilkinson 2006).

## Feminism and the Gender Recognition Act

Despite the many matters of interest to women and feminists that the legislation raises there has been a dearth of feminist commentary on the Act. Comment that has been published so far is from feminist scholars who take a post-modern/queer perspective and they are positive about the legislation though recognising its limitations. Legal theorists Sharon Cowan and Ralph Sandland, for instance, are excited that the legislation breaks the binary distinction between sexes or genders that has hitherto been sacred in British law (Cowan 2005; Sandland 2005). The legislation does this in two ways. It uses the term 'gender' which implies a social construction and separates the practices taking place in 'gender recognition' from any connection with biological sex. But also in not requiring surgery it breaks down the notion that any kind of binary is necessary simply because there will now be many more gradations of transgenderism which will include certificated women with penises and men with vaginas. Ralph Sandland thinks the Act gives a glimpse of 'a beyond in which gender is either meaningless in social or psychological terms, or is figured as choice not prison, as self-expression not prescription' (Sandland 2005, 64). He advises feminists to 'analyse and capitalise on these developments' (*ibid.*, 64).

But Cowan and Sandland also criticise the Act because, though potentially transformative, it is still based on the binary notion that there are two distinctive 'genders' that people can be slotted into. Sally Hines, though she considers the Act a positive step forward, makes similar criticisms in her interesting research into the

way that transgenders understand themselves. She says that some transgenders are 'excluded from these new citizenship rights, whilst others remain unrecognized'. She explains that 'normative binary understandings of gender underpin the legislation' (Hines 2007, 4). Those transgenders who 'remain tied to a medical perspective' may benefit from the Act but those who 'transgress', as she puts it, 'married trans people who choose not to divorce and those who construct gender identities outside the gender binary—remain on the margins of citizenship' (ibid., 11). Her interviewees did not necessarily see themselves as men or women. Some had 'trans' or 'queer' identities. One identified as a 'gender terrorist' (Hines 2006, 62). Karen explains that first of all she 'went way over to the feminine side and became really girlie' but has 'now got a bit of male and a bit of female in me' (ibid., 60). Only three out of her thirty interviewees 'describe themselves solely as "female" or "male", or use the nouns "woman" or "man"' (ibid., 60). Hines' interviewees are likely to have been an unusual sample, and she does acknowledge that other research has found that transgenders overwhelmingly wish to assimilate into mainstream culture as their 'genders' of choice. But, however untypical they may be, they are certainly excluded from the GRA which adheres to and so helps to create a strictly gender-differentiated world.

I agree strongly with the post-modern/queer critique of the GRA for its dependence on binary notions of gender but do not share the enthusiasm of Cowan and Sandland for the potentially revolutionary possibilities offered by the Act. Where a radical feminist approach to transgenderism parts company with the post-modern/queer analysis is in seeing the problem with gender as residing not just in the fact that gender is too rigidly policed and should be more flexible, or even played with, but in the concept of gender itself. Radical feminist theory rejects the notion of transgenderism since this requires the acceptance of 'gender' as a useful category. If the notion of 'gender' is rejected then transgenderism does not make sense. It is useful to examine the views of transgender activists on the links between feminism and transgenderism in order to understand the difference between these approaches.

Theorists of transgenderism who are influenced by queer theory understand transgender activism, of which the GRA is a product, as a cause which feminists should obviously support, since it represents the triumph of the feminist project. Thus Arlene Lev in *Transgender Emergence* says, 'In many ways the transgender community has continued the theoretical analysis that was begun within the feminist movement' (Lev 2004, 130). She quotes female-to-male (FTM) Jamison Green saying, 'Gender theory is the triumph of feminism' (ibid., 130). She explains:

The questions that feminism brought to the public debate about the meaning of 'manhood' and 'womanhood' and the limitations in creating a social caste system based on biological bodies are exactly the kinds of questions that are being raised again within the transgender movement (ibid., 130).

Gordene Mackenzie encapsulates the supposed revolutionary potential of the transgender movement in the statement that 'transgender theory and practice are tearing through the membranes of traditional sex and gender categories, creating new galaxies of gender' (Mackenzie 1999, 194).

The confidence of the queer and transgender theorists about the revolutionary potential of this movement leads to some rather extreme denunciations of the few feminist theorists who have proposed that the transgender project may not be revolutionary. The most well-known of these, Janice Raymond, is criticised for being essentialist and transphobic. Lev calls Raymond's *The Transsexual Empire* (1994) 'deeply transphobic' (Lev 2004, 128). Kate More asked the queer theorist Judith Butler what she thought of the work of Janice Raymond and another book that was critical of transgenderism. Butler replied, 'I think they're horrible!' (More 2004b, 294). Butler goes on to say that the books are 'as pernicious and as hateful as overtly misogynist and racist texts are' and that Raymond's book is 'part of a homophobic radical feminism' (More 2004b, 294).

Radical feminist theorists, and some male critics of queer theory and politics (Murray 1997; Kirsch 2000), argue that 'transgression', which is so lauded in queer approaches, is not a serious strategy for social transformation. The supposedly transgressive behaviour of transvestism, for instance, is a traditional practice of men, common historically in both the homosexual and the ostensibly heterosexual male community. It is practised by drag queens in drag shows which do not seem to have punctured the resilience of the gender system over the many decades of their performance. It is practised by upper-class men in colleges and universities in the US. Marjorie Garber points out in her examination of this western cultural practice that dressing up as women, even to the extent of using prostheses to imitate female body parts, takes place in such all-male bastions of the American upper class as the Tavern Club in Boston and the Bohemian Club in San Francisco, where, she points out, 'Far from undercutting the power of the ruling elite, male cross-dressing rituals here seem often to serve as confirmation and expressions of it' (Garber 1992, 66). Transsexualism is not necessarily distinct from such cross-dressing. Indeed both the transsexualism expert Blanchard and some MTFs themselves see one developing from the other (Blanchard 1989 and 1991; Jeffreys 2005).

Feminist scholars such as Janice Raymond (1994), Bernice Hausman (1995 and 2001) and Sheila Jeffreys (Jeffreys 1997, 2003 and 2005), who argue that transgenderism is not politically progressive, are accused by transgender theorists of being essentialists who want to preserve the binary nature of gender against the threat posed to this system by transgenderists. More says:

These feminists, like patriarchs, have an investment in their gender which is entirely unquestioned; transsexuals have questioned the gender assumptions of their biologically determined gender, found them flawed, and then acted, but not by creating a bipolar opposition, instead by foregrounding the constructed nature of the whole system (More 2004a, 255).

This is a surprising accusation since the very opposite is true. Feminist critics of transgenderism want to eliminate gender which they see as a construction of male dominance. They consider that, as the radical feminist legal theorist Catharine MacKinnon puts it, 'Gender ... is a social hierarchy (masculine and feminine), ringed with stereotype, enforced by socialization to subordinate ... as well as by physical force. Socially, it is largely fused with sex (male and female)' (MacKinnon 2005, 247). In this understanding masculinity is the behaviour and status of the

ruling class of men and femininity is the behaviour and status of the subordinate class of women. It would not make sense, therefore, to preserve it.

The theorists of transgenderism take a very different line. Influential queer theorists such as Butler and the theorists of transgenderism quoted here do not want to eliminate gender. Indeed it is precisely the excitements that 'gender' can provide in sexual practice that they often seek to promote. Lesbians, for instance, should be able to be butch and adopt female masculinity if this excites them, and vice versa (Halberstam 1998). Butler identifies as a butch. In an interview she says that she 'situated' herself 'in relation to butchness' in her early 20s, and has had 'an active and complicated relationship with both butch-femme discourse and S/M discourse probably for almost 20 years' (Green 1999, 286). In *Undoing Gender* she explains that 'There may be women who love women' who cannot do this 'through the category women' and that 'they/we' are 'deeply ... attracted to the feminine' (Butler 2004, 197). She asks, 'why shy away from the fact that there may be ways that masculinity emerges in women' (ibid.). MacKinnon does not accept that gender swapping makes 'gender' somehow harmless. Of the sexualising of dominance and submission which makes the 'target or object' of sexuality 'subordinate' and 'usually a female' she writes, 'hierarchy is always done through gender in some way, even if it is playing with gender or reversing gender or same-gendering, it is still using gender for sex. Gender hierarchy is either being played with or played out' (MacKinnon 2005, 273).

The term 'gender' was adopted in the 1990s by many feminist scholars to describe what were previously called 'sex roles'. It has now come to take the place of the word 'sex' to a large extent and has thus been essentialised. Application forms for university places, for instance, are likely to require the ticking of a 'gender' box, which is difficult for those who want nothing to do with gender. The term has been appropriated by those with a politics very different from that of the feminists from the 1970s onwards who have criticised gender, and this is clear in the way in which it is used presently by those committed to queer or transgender politics. It is frequently used in a way which has no connection with women at all, and applies specifically to the ways in which the practices of femininity and masculinity are 'performed' by those for whom they would be considered inappropriate according to the traditional sex/gender system. Thus the 2005 book entitled *Gender Politics* by Surya Monro barely mentions what Monro calls 'non-trans women' (Monro 2005). An adjective is required here before the word 'women' because of the creation of a whole other category, persons biologically male and raised as such but who consider themselves to be women. Butler too is involved in this manoeuvre by adding an adjective in front of the term woman to distinguish those born female and raised as women from transgenders. She calls women who are not transgender 'bio-women' and talks of 'perceived bio-gender' to distinguish that which 'seems to "follow" from natal sex' from the gender that a transgender might pursue (Butler 2004, 94). The term that some feminists considered would be useful has turned out to be useful to those who are sidelining women altogether and conducting a conversation in which women are the absent referent (see Adams 1990 on how animals are made into the absent referent in the politics of meat).

Gender in the work of some transgender theorists has become a positive good, so long as it can be swapped and played with. Some of those involved in the transgender movement and responsible for law change are far from playful, however. Thus Karen Gurney, a traditional male-to-female transsexual who was involved with law change in my state of Victoria, Australia, and identifies transsexualism as biological, explains that transsexualism is about 'recognising gender norms, not challenging them' (Gurney 2006, 36). Another transgender activist, the FTM Jamison Green, is far from playful in approach (Green 1999). Green's approach to gender is not very transgressive or revolutionary: 'Since my transition I am just a middle-class white man, ostensibly male, who happens to be heterosexual (in my sexual intimacy), trying to make my way in the world' (ibid., 129). Green is not open to questioning the need for gender since it is the necessary basis of human interaction: 'Everyone uses gender to communicate' (ibid., 126). In a rather surprising example of what radical feminist theorist Mary Daly (1979) calls a 'patriarchal reversal', Green accuses 'Raymond's brand of feminism' of not being able to 'survive without rigid gender roles' (Green 1999, 125). But it is Green who is in fact wedded to gender and shows it by accusing Hausman of taking gender away: 'She even takes gender away from homosexual people by claiming that "gender is a concept meaningful only within heterosexuality and in advocacy of heterosexuality"' (ibid.). Robyn Wiegman's article on the central importance of the 'desire for gender' to queer politics and practice provides another example of the strength of feeling that some queer theorists can express against radical feminist perspectives on gender. Wiegman's piece defines itself as 'a rebellion against the righteous deployment of a singular feminism as a licence to determine whom one can unabashedly hate', in a fulmination against the argument by Jeffreys (1996) that gender is a problem, rather than a positive, for feminist and lesbian and gay politics (Wiegman 2006). When an argument in feminist theory generates enough heat to be identified in a feminist journal as an exercise in 'hate', it does seem likely that an issue of some importance is under consideration.

Even the most well-known proponent of the idea that gender is flexible, Butler, expresses in *Undoing Gender* (2004) a passionate commitment to that very inflexible practice, transgender surgery. She writes that the state should offer surgery to aspirants and says, 'Those who claim that transsexuality is, and should be, a matter of choice, an exercise of freedom, are surely right ... a basic human freedom is being suppressed' (Butler 2004, 88). She also writes of the aspirations of transgenders being about 'the ability to live and breathe and move and would no doubt belong somewhere in what is called a philosophy of freedom' (ibid.). There is nothing flexible about carving 'gender' on to the body with surgery and hormone treatments, as those who regret their 'choices' discover.

Another important difference between queer and transgender theory and feminist theory is that the former tends not to be concerned about the implications of their ideas about transgenderism for the welfare of 'bio' or 'genetic' women. But for feminists the interests of women are the central concern. The GRA does have considerable implications for women, for wives, families and partners of transgenders, in their day-to-day lives. Diana Aitchison from Women of the Beaumont Society, for instance, explains that the transvestite/transsexual behaviour of men



can have very damaging effects on their wives including severe mental breakdowns (Aitchison 1998). Women's organisations and services are likely to be affected too. Men who have changed gender and received certificates, whether possessing entire genitals or not, will be able to access services reserved for women such as domestic violence refuges, rape phone-line training and sheltered accommodation. This is already happening in many areas, but this access will be greatly facilitated by the GRA (Sweeney 2004). The reservation of these safe places for women is the result of the recognition that women suffer violence from men and need places where they can be removed from the possibility of that violence. There are women-only spaces too, such as feminist and lesbian events, which are open to women as an oppressed minority group who might reasonably seek the company of others and strength in that company without the presence of men (Kline 2006). These spaces have experienced successful challenges from MTFs that have led to the cancellation of events and closure of spaces. In one significant case, however, concerning Vancouver Rape Relief, where an MTF took legal action against exclusion from training for the rape counselling phone-line, a decision was eventually reached on appeal by Rape Relief to the Supreme Court of British Columbia that the exclusion was valid (*ibid.*). The fact that some MTFs may receive recognition as 'women' while still retaining their penises and receiving no hormone treatment presents particular problems for such women's spaces where those making use of space reserved and protected for women only may be unable to see any difference between biological males who have been assigned a new status and those who have not.

I argue here that the transgender activist movement, in the form both of 'traditional' transsexuals with a belief in biology and patriarchal gender roles, and of queer theorists who fail to criticise this biological determinism and advocate on behalf of transgenderism, can reasonably be categorised as a gender preservation movement. For those feminists such as Raymond, Hausman and Mackinnon, on the other hand, who identify gender as a hierarchy which needs to be destroyed before women can be free, feminism is a gender elimination movement.

## Conclusion

The Gender Recognition Act should be a matter of concern to feminist scholars because it inscribes patriarchal notions of correct gender roles into law and regulation by the state through a Panel which will 'know it when they see it'. It gives credence to the notion that 'gender' exists and is a reasonable basis for social organisation rather than a social construction which founds the subordination of women. In this sense it is a profoundly retrogressive piece of legislation. The Act is based upon a flawed foundation, i.e. that 'gender' is an essential quality that can somehow manifest in the 'wrong' body and should be recognised by the state. Those women and men who presently eschew gender altogether for very good reasons, and live happily without its thrall, should perhaps find it ominous that a state body is now empowered to 'recognise' gender. 'Gender' is not the possession of just those who aspire to change it, but a hierarchy that affects everyone, even those that the Panel would find itself unable to classify. It raises the question of whether the regulation of such behaviour should be the business of states. The lack

of criticism of this legislation from feminists and other social critics indicates how deeply ingrained is the belief in gender. Even when 'gender' is swapped or reversed it can be given, as here, a revered place in law and policy. The GRA cannot be applauded by feminists who see the 'genders' of femininity and masculinity as the behaviours of two classes in a hierarchy, the ruling class of men and the subordinate class of women. It entrenches 'gender' and will make it harder to loosen the grip of the social hierarchy it represents and upholds.

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