

Children to love and care for - is it a realistic option for trans people?

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In the UK, the Gender Recognition Act 2005 (GRA) affords legal recognition in the acquired gender (sex) role to transsexual people who have been diagnosed as having gender dysphoria, who have lived for at least 2 years in their new gender and who commit to do so permanently in the future. The legal recognition is (almost) complete and includes the right to marry or contract a civil partnership in the acquired gender. Under the Act, transsexual people can apply for a gender recognition certificate (GRC), which will make them legally a member of their acquired gender. If their birth was registered in the UK they will be provided with a new birth certificate in that gender (GRA, s.21).

Spanish legislation is now coming into force, and its remit is apparently even wider than that of the Gender Recognition Act requiring less bureaucratic process on the face of it. Unlike the laws of many nations; Sweden, Germany, Denmark, etc neither Spain's or the UK's legislation requires a trans person to be made sterile i.e. unable to bear children, before legal recognition in the new gender role can be given. As I write this, activists in Belgium are challenging an updating of their own gender recognition law, in which the Belgium parliament is still insisting on a requirement of sterility.

Just because a law is made today does not mean it is going to be anymore liberal than previous laws and we must always be on our guard. The Japanese law which came into force 2 years ago, not only requires sterility but that the trans person has never been the biological father or mother of a child. Japanese society clearly

thinks trans people are monsters who must automatically be at risk of causing harm to a child.

In this paper I am going to look at the question of trans people and raising children in their families in the light of the Adoption and Children Act 2002 (ACA) in the UK. Amongst other things, from December 30th 2005, the ACA enables unmarried and non-partnered (including same sex) couples to adopt a child.

Many transsexual people, whatever the relationship they live in with their partner have been looking forward to these 2 changes for a long time. Firstly, to resolve many of the ongoing problems that arose from having a legal status contrary to their appearance and daily life activities. Secondly, both changes would help in finally creating a means of clarifying their legal relationship with the children in their families so avoiding fear or failure of the law. Finally, for a significant minority who for numerous reasons will be unable to enter a marriage they will be able to consider raising children. There has never been any bar on single trans people adopting a child, nor any bar on trans people fostering, but the reality of embedded social attitudes never made either possibility a real possibility.

As the father of 4 children whom my wife, Sarah, conceived after donor insemination, I am all too aware of the difficulties of not having a legal relationship to my children as their parent. As a result of the Gender Recognition Act, Sarah and I married last year, and in this April we were able to jointly adopt the children making me their father. We felt a tremendous relief as we realised how many potential legal problems had been resolved through that legal recognition and adoption. Now if Sarah dies, my children will get to stay with me in the family home without a social services assessment and the possibility of them going into foster homes whilst I was assessed to see if I would make a fit parent. It was quite a frightening thought for all of us. If anything terrible did happen to Sarah, we would be facing even more devastating blows whilst we were ripped apart as a family, supposedly to protect the children I had been raising for nearly 14 years.

The New Approach to LGBT Families

It has only been very recently that the law in the UK has dared to consider gay or lesbian couples as having a family relationship and potentially providing the basis of an extended family life. It was not until 1996 that a Scottish Court held that a gay man, in a relationship, could adopt as a single person, almost certainly a decision impacted on by the severe disability of the child concerned.¹ In 1998, in an often cited study for The British Agencies for Adoption and Fostering, Cardiff University researchers had apparently found that only three out of 2,000 approved adoptions were by gay people.² However, in October 1999, Dame Elizabeth Butler-Sloss, then the new president of the family division of the High Court, said

"I was, when I started, surprised and dubious about the stability of children living in a family with two parents of the same sex. But over the years research has shown that for some children, that is the best that is available for them. Consequently, it would be quite wrong, when looking at the welfare of the child, not to recognize that different children need different types of parents. We should not close our minds to suitable families who are clearly not within the old fashioned approach."³

which was followed closely, the same year, by the decision of the law lords that a gay couple could be treated as a family.⁴

¹ Tim Teeman "Senior Scottish judges grant adoption to gay couple" The Pink Paper, 2nd. August, 1996, issue 441, page 2.

² Eben Black "UK to accept adoption by Gay Couples" The Sunday Times, 23rd. April, 2000, page 1

³ Judicial Studies Board "Equal Treatment Bench Book: Sexual Orientation", Chapter 7, September 2005, <<http://www.jsboard.co.uk/etac/etbb/index.htm>> acc. 9/12/05

⁴ Fitzpatrick v Stirling Housing Association Ltd [2001] 1 AC 27

In many legal frameworks, the question of legal sex or gender has become increasingly irrelevant in contemporary cultures. With the recognition of equal opportunities and rights for women and men, there are very few circumstances left where the sex or gender of an individual might now be considered legally germane. Indeed, significant changes to various parts of English law have recently been changed to ensure its gender neutrality.⁵ Exceptions we might wish to retain in the future may be procreation related i.e. directly to biological process, or when a claim based on sex equalities is being made with the argument that members of one sex are receiving different or better treatment than members of the other. But some are determined to claim that 'sex' whether gender identity or bedroom activity is an essential feature of the law.

Just as both opposition to the Civil Partnership Bill and the Gender Reassignment Bill, became synonymous with the evangelical Christian movement and its determined belief in Adam and Eve⁶, so did the opposition to the Adoption and Children Act. The implementation of the relevant parts of the ACA 2002 was long in coming after the initial announcement in April 2000, because of the clear and considerable religious opposition to the possibilities of gay and lesbian couple adoption.⁷ The issues have become almost inseparable; gender recognition, civil partnership and gay adoption are all part of the 'devil's work' to those on the religious right.

Baroness O'Cathain, the doyen of the anti-gay parliamentary group, led in the House of Lords by on behalf of extremist Christian groups such as the Christian Institute⁸ leading to an early triumph overturning the proposed Bill in 2002. On its return to the Commons there was even a three line whip for the Conservatives to oppose. Final success did come in the Commons, but it produced considerable

⁵ e.g. the Sexual Offences Act 2003,

⁶ Whittle -----

⁷ Jonathan Petre "Churches protest at Gay Adoption" The Telegraph, 16th October 2002

⁸ Christian Institute "Sideline Stability: The case against abandoning the current grounds for adoption" June 2002, < http://www.christian.org.uk/html-publications/adoption_briefing2.htm#i > acc. 1/12/05

pressure to ensure account would be given to religious sentiment, just as it had been given in the Civil Partnership Act (CPA) and the GRA, so slowing up considerably the preparations for implementation. The final Adoption and Children Act 2002 does not, as such, allow religious adoption agencies to refuse the possibility of adoption to same sex couples, but Part 1, s1(4)iii states that agencies are to give regard to

the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

and Part1, s1(5) says that:

In placing the child for adoption, the adoption agency must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

The religious right are still not satisfied with this. The Catholic Church in Scotland is still seeking an exemption based on a conscience clause.⁹ These provisions could be seen by LGBT people as having provided a possible 'defence' to non-local government agencies, when making decisions in which the sexuality or transsexuality of potential adopters is held, either overtly or covertly, to be unacceptable.

This paper is part of an ongoing project to assess the extent to which the religious voice has achieved a position of power, either real or rhetorical, in relation to whether transsexual people feel they have acquired real recognition and consequent rights. Or, whether transsexual people will not seek to use those rights because of continuing fear of stigma and victimisation from faith communities. As we all know, changes never come easily and this paper looks at the results of a

⁹ Gay.com "Catholics want gay adoption "exemption"", 7/1/06 < <http://uk.gay.com/headlines/9487>> acc. 9/1/06

small collection of research data, in which I sought to clarify the extent to which trans people would take advantage of the new possibilities in forming families involving the care of children.

The Gender Recognition Act

The impact of the GRA has been considerable to trans people in the UK. Since the implantation of the Act in April 2004, 1300 people have been awarded a gender recognition certificate and a further 150 applications are being processed (email from the Gender Recognition Secretariat 31-05-2006). Only 31 applications have been rejected, and most of these are UK born people who have emigrate to overseas states such as Australia, who have been unable to meet the medical evidence requirements.

One of the binding principles of the Act is that its effect is not retrospective. On recognition former family responsibilities are retained as if of the old gender. Former marriages must be ended when applying for the gender recognition. Families, for example where a couple live together and have children by donor insemination will not be recognised until formal mechanisms such as marriage and adoption have taken place (*see below*). And pension benefits can only be obtained from the point of recognition. The House of Lords effectively confirmed this lack of retrospectivity in *Bellinger*.¹⁰ Interestingly, though, in the recent ECtJ case of *Richards v Secretary of State for Work and Pensions*,¹¹ concerning discrimination in a transsexual woman’s pension age entitlement, in his non-binding advice to the court Advocate General Jacobs has suggested that her ‘sex’ has always been that of a

¹⁰ *Bellinger v Bellinger (Attorney-General Intervening)* [2001] EWCA Civ 1140

woman for employment purposes. It will be interesting to consider the potential impact if the final decision undermines such a core principle of the GRA.

The Transsexual Parent

The question of the transsexual parent had risen several years before with the ECtHR case of X,Y and Z v UK Govt.¹² Though the Court held that because there is no common European standard with regard to the granting of parental rights to transsexuals people, states must be allowed a wide margin of appreciation. However, the Court did unanimously decide that Article 8 was applicable and de facto family ties did exist between the three applicants despite arguments to the contrary by the UK government. An original feature of that case had been an initial appeal, using the HFEA, against a blanket ban on the partners of transsexual men accessing licensed fertility treatment.

In 2001, the British Agencies for Adoption and Fostering (BAAF) stated in their evidence to The Adoption and Children Bill standing committee:

“The idea of adoption agencies operating “blanket bans” on certain categories of would-be adopters is rightly condemned; this current restriction enshrines in the law a blanket ban of its own. The assessment process would, as it already does, focus on the strength and stability of the relationship between the two adults as a critical factor in the decision on approval, and the court would, as it does in any other case, still have the final say”¹³

¹¹ Richards v Secretary of State for Work and Pensions, Case C-423/04, Opinion Of Advocate General Jacobs, delivered on 15 December 2005

¹² X,Y and Z v UK Government [1997] Application No. 21830/93 ECHR

¹³ British Agencies For Adoption And Fostering “Memorandum Of Evidence To The Special Standing Committee On The Adoption And Children Bill”, November 2001

clearly showing their principled rejection of a ‘class refusal’ by any adoption agency of a certain type of adoptive parent, almost certainly referring to the claim for exemptions by religious organisations.

Transsexual Adoption

The Easy Cases

Many transsexual people raise children, some as the biological parent (either former father or mother) or, as in the case of many (female to male) transsexual men, as joint parents of their (non-transsexual) female partner’s children. These children are not adopted, they have been conceived by the female partner either having an ‘affair’ with a non-transsexual man, or, as is increasingly the case, by donor insemination provided through licensed fertility clinics.

For this group the draft version of the GRA proposed an exception where the female partner of a transsexual man had received fertility treatment from a licensed clinic and children were born as a result. It was proposed that a Gender Recognition Certificate would automatically give him the status of ‘father’ to the children, provided he was the mother’s partner at the time of treatment, and they sought the treatment together. It was suggested that with the mother’s permission, he could apply to have his name added to the children’s birth certificates.

Unfortunately, but perhaps understandably, these proposals fell at the first hurdle. It would have been very difficult to determine whether a child had been conceived through treatment at a licensed clinic. It would have also been extremely difficult to have arrived at a position where some couples who had had children together would get automatic family recognition and others would not. Those excluded would have been families where children were conceived at clinics overseas, or where mothers had sought insemination through informal networks.

The GRA in its final form does not mention these circumstances at all and for those who have children the easiest route will be to get married once a Gender Recognition Certificate has been issued, and then jointly adopt the children through the 'step-parent' adoption route.

However, it is generally recognised that even where children have been living with an unmarried couple for many years, the courts are unwilling to allow joint adoption until the actual 'marriage' has lasted one or two years. We have yet to see whether the courts will take into account the fact that a couple were unable to marry prior to the implementation of the GRA, as the first adoption in these circumstances is still waiting for a court hearing. (As an interesting aside, the application is being made to the magistrates court as it is non-contentious, but the court has delayed a hearing because of the 'uniqueness' of the case).¹⁴

An Added Complication: the (Disclosure of Donor Information) Regulations 2004, will lift anonymity from future sperm, egg and embryo donors and allow donor conceived children to access the identity of their donor when they reach the age of 18. The new regulations will only apply to people who donate after April 1 2005. This means that the first time 18 year olds will be able to ask for the identity of their donor - if they choose - will be in 2023. But it does also mean that applicants must now agree to tell their children that they are conceived using sperm, egg or embryo donors. The Human Fertilisation and Embryology Authority has recommended that in order

“To remove legal inconsistencies, the new (HFEA) law needs to be brought into line with other legislation, particularly the Civil Partnerships Act, the Adoption Act and the Human Rights Act”¹⁵

¹⁴ Correspondence, October 2005-January 2006

¹⁵ HFEA, New laws for fertility treatment and embryo research - Regulator adds its experience to Government blue print, <http://www.hfea.gov.uk/PressOffice/Archive/1132833178> acc. 24/11/05

but that could be a double edged sword for transsexual people.

Although many trans people would tell their children of this aspect of their conception, there is an implied core conflict with the privacy protection afforded under the GRA s.22, as a consequence of the ECtH's decisions in *Goodwin* and *I*.¹⁶

The Hard Cases

To clarify what we have known to date, despite the work of Press for Change with many hundreds of transsexual people, and repeatedly asking the question, we know of only 3 successful adoptions and 1 successful fostering. One of the adoptions was by a trans woman and her husband. She had obtained an amended birth certificate before the *Corbett* case (as has always been provided to those who have a 'change of gender role' because of a recognised intersex condition), married and then adopted in the early 1970s with no disclosure of her history. The second adoption was by a trans woman, 2 years ago, of her deceased sister's child. As regards the fostering case, the children were those of a family member who had had long term hospital care, and who had chosen the fosterer herself.

However, our survey did turn up a trans woman who had 3 adopted children, adopted successfully with her wife before she transitioned. Having previously adopted the children, the family's only concern appears to be preparing for a civil partnership after a GRC is obtained.

Two further applications have recently come to the attention of Press for Change. In the first, the potential adopters contacted us last year, enclosing a letter from a local voluntary sector adoption agency. The letter turned them down as prospective adopters because the agency were:

¹⁶ *Christine Goodwin v. UK Government*, Application No. 28957/95 [1995] ECHR; *I v. UK Government*, Application No. 25608/94 [1994] ECHR)

“concerned that your openness about your sexual history within the local community will make a child at risk from social isolation and bullying by their peers. Whilst we welcome your clear commitment to the possibilities of become adoptive parents, we feel that we cannot, at this time, accept your application. We would be happy to pass on details of your application to date to other agencies if you do decide to move out of the area, and apply to an other agency”¹⁷

The second concerned a couple who had gone through the application process, and were being seriously considered by their Local Authority agency. Their 2 key workers from the local authority agency contacted PfC in 2004. They requested an appointment for advice and we met them along with the prospective parents. Their primary concern was that the parents were living in a situation where the transsexual partner’s history was unknown. The key workers were seeking advice for the parents on how to disclose their history to the child at an appropriate time. The parents concern was that such disclosure would either put their personal privacy and wellbeing at great risk, or if they told the child that it was ‘a secret’, they would infer that it was something wrong that had to be hidden. The adoption did not go ahead with the parents withdrawing, feeling that they were being put under undue pressure to forego their privacy rights, in particular their right to medical privacy. This case took place after the Goodwin case, but before the GRA had received Royal assent.¹⁸

Again we see the sort of conflict implied by the newly gained rights to privacy of transsexual people.¹⁹

¹⁷ Letter copied and sent by Alan and Susan, January 2005

¹⁸ PfC case files no.463/2004

¹⁹ Christine Goodwin v. UK Government, Application No. 28957/95 [1995] ECHR; I v. UK Government, Application No. 25608/94 [1994] ECHR)

The Research Data

A short survey was sent to PFC's and the FTM Network's email groups - about 1000 people in total. Responses were asked from those who have or might consider adopting, or those who have used or might use donor insemination services.

There were 42 responses, of which only 12 were actually from people who might adopt, and 8 from those whose partners have used or might use donor insemination services.

The low response rate is interesting in itself, as we frequently get response rates of around 250 to 300 to our short surveys. There could be many reasons but it is surprising in terms of the potential capacity for raising children amongst those surveyed.

The questions focused on whether individuals would be more likely to consider adoption since the implementation of the ACA 2002, and the likelihood of using a licensed clinic for donor insemination services since the implementation of the (Disclosure of Donor Information) Regulations 2004. This focused on the possible opportunities that legal recognition provided by the Gender Recognition Act in relation to this and in particular, the question of disclosure.

At this initial stage I want to just provide a few details of the survey responses to date.

Of all of those who expressed a possible interest in either pathway to parenthood, four - 3 trans women and 1 trans man, stated quite clearly that any 'legal' obligation to disclose even to access donor or adoption services would prevent them to adopt or use clinical services. For example:

DR TM: surely once a gender certificate has been obtained we are men in the eyes of the law? Why on earth should we still have this fight??I have lived 14 years as a man, and undergone agonising surgery, painful humiliation and gut retching embarrassment on my journey to become the man I am today. I have spent a lifetime moving away from the 'female' tag, I just want to be normal, why should i disclose this information and what relevance does it have to anything??!? Does it somehow make me a bad father or some sexually retarded beast?

And

LS: my trans status should have nothing to do with whether I can look after a child!

One (a trans woman who already cared for 3 children from her male partner's former marriage) said they would not wish to be forced to disclose to a child that she was trans, but would if the child wished to know:

MLP TW "As no one knows of my previously perceived gender, I am seen, act, look and am treated as a woman completely and therefore I would refuse to disclose any previously perceived gender. I believe that such a question is a denial of my freedom. I believe that is is not necessary for children to be given such technical information UNLESS they specifically request it."

One very much argued DR TM's view that this was a question of the legal right to privacy and further argued the question of 'whose rights?':

JR TW "I have been against the disclosure of adoptive status ever since this became law. This approach puts the rights of the child above the rights of all others involved in the case, has the potential to create deep hurt and

division and is simply bad law. As to my status, I again fail to see what it has to do with my ability to nurture children. Also sperm donation: this is simply bad law and has already had an effect on the number of egg/sperm donors coming forward. It encourages the use of financial incentives and I fail to see why a child needs to know the history of their conception. We don't say to our children- 'oh by the way, you were conceived naturally by your father and I'. The whole situation is patently ridiculous. Saints preserve us all from political correctness!”

A view echoed by another:

Carol: “In general the level of awareness of civil servants about matters trans is poor and when the legal priority is the welfare of the child (rightly) in such a situation subliminal perceptions drawn on historical stereotypes of trans people as paedophiles, sexual predators or sex workers come to the fore”

However, the remainder took a very realistic and liberal perspective, such as GP who also acknowledged the great personal difficulties that arise from being trans:

GP TW: “ It wouldn't be an issue. I'd be adopting a child because I'd feel able to and confident that I could give that child a loving stable home. As far as disclosure goes I have no problem disclosing who I am and what I'm about. Being trans is part of my life, I don't believe in denying the past. I think also that many mental health issues that arise from transitioning would be a factor in why a particular body would want such disclosure. Again I've met many transsexuals (mtf) that have transitioned smoothly then encountered mental health issues and it would be frightening in my experience for these issues related to transsexuals to be overlooked during such and undertaking.”

And the vast majority of those returning the survey took the view that disclosure of a personal trans status both to an agency or child was a necessity for all, but particularly for the child, and that it would not discourage them from becoming a parent:

Bekky: "On the whole the acts they seem to be a good thing. Adults have a right to know where they are from, and their history, and if these acts go some way to enabling that then that is good."

JB TM: "I am pleased that sperm donors are now traceable by a child when they reach 18 so would not want to go down the unregulated path."

CRW TW: "I have experienced personally the pain of a)not knowing who my father was and b) the pain of finding out! It is far better to be open even if it does cause pain."

BM TM: " as with adopting, I'd want my children to know where they came from. we're currently trying with a private donor, because we'd rather have someone who doesn't mind having children contact him if they want. He has no particular interest in having any contact, but is happy to be known as the father if they do. I think that is important. We also wanted to know what he was like as a person. I think I'd be more likely to use a sperm bank knowing my child could find out who their father was if they really wanted to."

However, there were several references to the possible influences of religion:

AR TW: "I believe the new same sex adoption acts are a fantastic opportunity for giving trans people hope for a future family. But I also feel that Religious agencies ability to refuse adoption is still 'same sex' / 'TS'

discrimination..... As always with government dealings, the devil is in the detail”

SR TM: Someone working at a local authority agency may still have religious beliefs. If they believe in their religion, and their religion is giving the message (via religious agencies) that trans people cannot adopt, surely there is a potential conflict of interest, unless local authority agencies screen to make sure they don't employ people whose religion is giving the message that trans people cannot adopt.”

As said - this is just an initial overview, but what is clear is that few trans people think that raising children can be in their world remit, and secondly - much as though privacy is a prized asset - the vast majority would want to be open and honest with any children. We do not know the reasons for this, but we might conclude that the shame once personally associated with being transsexual is not as powerful as it used to be.

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