A Practical Guide to Transgender Law

Update No.2

19th November 2021

This update supports *A Practical Guide to Transgender Law*, authors Robin Moira White and Nicola Newbegin, published in May 2021. It is dated and the updates will be cumulative, each update including all new material until a new edition of the parent volume is published. **Update No.1 can now be discarded.**

The book can be purchased direct from Law Brief Publishing, and via Amazon, Waterstones, Wildy's. It retails at £29.99.

Transgender Terminology

Page xxv 'Gender Dysphoria / Gender Incongruence.

Delete last sentence and replace with:

'Since the case of *JR111* in the Northern Ireland High Court [2021] NIQB 48, a diagnosis of *gender incongruence* should be as acceptable for an application for a Gender Recognition Certificate.'

Chapter 3 – Gender Recognition Act 2004 Page

29, last line of third paragraph

After 'gender dysphoria' insert:

'or, following the case of '*JR111*' in the Northern Ireland High Court [2021] NIQB 48, *gender incongruence,'*

Page 32, eighth paragraph. Replace '2018' with '2019' and delete to end of sentence.

Page 32, ninth paragraph. Replace 'Equal Rights Commission' with Equality Commission'.

Page 42, third paragraph, 4th line. Replace 'up to £5,000' with 'since 2015, an unlimited fine – s85(1) of the legal Aid, Sentencing and Punishment of Offenders Act 2012'

Page 48, after bullet point at top of the page, insert:

The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021 SI 2021/1020, which came into force on 1st October 2021, introduced a further exception to the offence under s22 of the GRA where the disclosure of protected information is necessary for management of offenders and arrangements related to their probation.

Chapter 11 – Healthcare

Page 149:

Children and Young People: Bell v Tavistock and Portman NHS Foundation Trust [2020] EWHC 3274

The appeal was heard by the Court of Appeal on 23 and 24 June 2021. In a strongly worded and highly critical judgment, the Court of Appeal overruled the High Court. The summary of the Divisional Court's decision set out on pages 149-155 should be read with care and in the light of the Court of Appeal Judgment set out below:

Bell v Tavistock and Portman NHS Foundation Trust [2021] EWCA Civ 1363

Summary

The Court of Appeal has overruled the controversial decision of the Divisional Court which gave guidance to the effect that it was 'high unlikely' that a child aged 13 or under, and 'doubtful' that a child aged 14 or 15 years old, would be competent to give consent to the administration of puberty blockers. Even in the case of 16- and 17-year-olds, who are presumed to have capacity by virtue of s 8 Family Law Reform Act 1969, the Divisional Court had stated that it would be 'appropriate' for clinicians to 'involve' the court where there might be 'doubt' about whether the best interests of a 16- or 17-year-old would be served by being prescribed puberty blockers.

This controversial decision was overruled by the Court of Appeal in a judgment handed down on 17 September 2021. The Court of Appeal held that it was wrong of the Divisional Court to provide the above guidance. Instead, it held that treatment with puberty blockers fell within the usual *Gillick* competence rules and it was for clinicians to decide on a case-by-case basis whether a child under 16 was capable of giving consent. Importantly the Court of Appeal also

endorsed the decision in *AB v CD* (summarised at pages 155-157 of the book) that parents could, as with most other medical treatment, consent on behalf of a child to treatment with puberty blockers.

Criticism by the Court of Appeal of the Divisional Court

The case was heard by Lord Burkett the Lord Chief Justice, Sir Geoffrey Vos Master of the Rolls and Lady Justice King. It would be hard to imagine a more senior court. They quashed the earlier judgment and ruled that the 'guidance' given by the Divisional Court should not have been given.

The Court of Appeal were scathing about the previous proceedings and judgment, identifying a number of failures of practice and logic.

First, the claim for relief referred to the Tavistock's prescribing practice, whereas all the Tavistock ever did was to refer young persons on to specialist endocrinologists who took any decisions about prescriptions.

Secondly, since no illegality was found with anything the Tavistock did, the case should have ended there.

Thirdly, the Divisional Court departed from established judicial review practice in failing to confine itself to examining the decision-making process, rather than the disputed evidence base.

Fourthly, it allowed the calling of controversial 'expert' evidence by the claimants despite that 'evidence' not complying with the rules regarding expert evidence and instead being in large part argumentative and adversarial.

Fifthly, despite repeatedly saying it would not do so, it drew conclusions from that controversial 'expert' evidence, and in particular statistical aspects of the evidence that were non-sequiturs. In doing so it '*implied factual findings*' that it was *'not equipped to make'*.

The correct position as held by the Court of Appeal

First, in holding that the Divisional Court should not have given the guidance it did, the Court of Appeal provided a resounding re-affirmation of the decision of the House of Lords in *Gillick v West Norfolk and Wisbeck AHA* [1985] 3 WLR 830, namely that a child under 16 has legal capacity to consent to medical examination and treatment if the particular child has sufficient maturity and intelligence to understand the nature and implications of the proposed treatment. The test is child and treatment specific. The Court of Appeal confirmed that the ratio of *Gillick* is that it is "*for doctors and not judges to decide on the capacity of a person under 16 to consent to medical treatment*". The Court of Appeal held that there was nothing about the nature or implications of treatment with puberty blockers that took it outside of the ratio in *Gillick*.

Secondly the Court of Appeal endorsed the Tavistock's own Standard Operating Procedures in the steps they take to ensure that informed consent to treatment is given. This should allow the Tavistock to rapidly return to providing its unique (and uniquely valuable) service.

Thirdly, the Court of Appeal at paragraphs 47-51 expressly endorsed the recent judgment of Lieven J (who had also been one of the Divisional Court judges in *Bell*) in *AB v CD* [2021] EWHC 741 (Fam). In *AB v CD* it was held that treatment with puberty blockers is not in any special category of treatment meaning that parental consent is vitiated and that, as such, parents / those with parental responsibility retained the right to consent to a child being treated with puberty blockers. (The result in *AB v CD* led to a public statement by NHS England that parental consent could be relied upon in limited circumstances by existing patients who had already been prescribed puberty blockers, it still did not enable GIDs to start referring new patients again for treatment with puberty blockers based on parental consent, despite the decision in *AB v CD*. This is discussed in more detail in the book at pages 155-159.)

What does this mean in practice for trans young children in future?

Given the unequivocal judgment of the Court of Appeal, it was to be hoped that NHS England would act quickly as it did after the Divisional Court's judgment and amend its service specification to return to its pre-Divisional Court position. This has not happened and the authors are aware that further litigation is in prospect / underway aimed at forcing treatment to be provided to trans young people.

Will the Court of Appeal Judgment be Appealed?

Ms Bell and her supporters expressed public dismay at the result. The authors understand that permission to appeal has been refused by the Court of Appeal but is being sought from the Supreme Court.

Chapter 13 – Name and Gender Marker Change

Page 203, 2nd paragraph, final sentence.

Delete and replace with:

Christie Elan-Cane's appeal was scheduled to be heard by the UK Supreme Court on 12 and 13 July 2021

Chapter 15 – Prisons

Page 218, third paragraph

Delete whole paragraph and replace with:

In ***R (FDJ) v Secretary of State for Justice v Sodexo Justice Services, Dr Sarah Lamble*** [2021] EWHC 1746 (Admin), a natal female prisoner who alleged that she had been sexually assaulted by a transgender woman prisoner at HMP Bronzefield but had made no complaint about that assault at the time, brought an application for judicial review of both the Prison Service's policy on the care and management of transgender prisoners and a specific local policy used to regulate the wing of Bronzefield Prison which housed transgender prisoners. The Claimant argued that the policies did not sufficiently protect natal women prisoners and sought to have them declared unlawful. Judgment was handed down on 2 July 2021 (Holroyde LJ and Swift J).

Academic evidence as to the risk profile of transgender prisoners was given in writing by Professor Jo Phoenix (Professor of Criminology and Chair in Criminology at the Open University) supporting the Claimant and by Dr Sarah Lamble (Reader in Criminology and Queer Theory at Birkbeck, University of London), intervening. The court held that limited conclusions could be drawn from the statistical evidence.

The court described the Claimant's concerns as 'understandable' but dismissed her application. It was said to be too broad in calling for the exclusion of all trans women prisoners which would ignore the rights of transgender women to live in their chosen gender. The court had examined the care and management policy in depth and commented on the many safeguards and that the policy was to be operated by experienced multi-disciplinary panels. It said, at paragraph 86, per Holroyde LJ:

> ."*…the unconditional introduction of a transgender woman into the general population of a woman's prison carries a statistically greater risk of sexual assault upon non-transgender prisoners than would be the case if a nontransgender woman were introduced. However, the policies require a careful case by case assessment of the risks and the ways in which the risks are to be managed."*

Swift J did express concern that the Prison Service did not appear to hold accurate information as the numbers of transgender prisoners (with and without a GRC). However, it does not appear that better data would have influenced the result.

Page 219 insert at end:

The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021 SI 2021/1020, which came into force on 1st October 2021, introduced a specific exception to the offence under s22 of the GRA where the disclosure of protected information (a person's possession of a GRC or previous gender) is necessary for management of offenders and arrangements related to their probation.

Chapter 17 – Provision of Services

Page 226, after 5th paragraph insert:

R (on the application of Authentic Equality Alliance) v Commission for Equality and Human Rights [2021] EWHC 1623, handed down on 6 May 2021

This case concerned a judicial review challenge to guidance in the statutory Code of Practice '*Services Public Functions and Associations*' issued as long ago as 2011 by the Equality and Human Rights Commission on the principles to be applied to the inclusion of trans people when single and separate sex services are provided (paragraphs 13.57 to 13.60 of the Code). The case focused particularly on the inclusion of trans women. Permission to bring the case to a full hearing was refused in robust terms in the London High Court by Henshaw J on 6 May 2021.

Firstly, it was contended that, a trans woman without a Gender Recognition Certificate should be treated as male for Equality Act purposes and 'proportionate means of achieving a legitimate aim' did not come into it. The judge rejected this as failing to consider the indirectly discriminatory effect on trans women.

Secondly, the fact that *some* trans women might feel able use male toilet facilities and in *some* places gender-neutral facilities might be available was not an argument justifying general exclusion of trans women from female facilities. A greater *proportion* of trans women would be distressed by such a suggestion, and that made the proposition unarguable.

Thirdly, the judge found that the Applicant's propositions conflated sex discrimination and gender reassignment provisions in arguing that exclusion of trans women would always be justifiable.

Lastly, the judge considered the parts of the EHRC Code of Practice which the Applicant singled out for especial criticism. This included guidance that strong reasons are required to treat trans people differently in the provision of services from non-transsexual persons of their acquired gender and *exceptional* reasons would be required for a denial of service. The guidance also made plain that a service provider can have a policy but it has to be applied on a case-by-case basis. The judge noticed that no evidence had been brought before him of the guidance giving rise to difficulties of application by service providers or that was liable to mislead or had misled service providers in a way to place women and girls at risk, at all.

So the case helpfully endorsed the guidance on the inclusion of trans people where single (or separate) sex services are provided to populations including trans people. The principles are:

i) a starting point that that trans people *should* be included consistently with their affirmed gender;
ii) that possession (or not) of a GRC is irrelevant;
iii) that any exclusion must be a proportionate means of achieving a legitimate aim;
iv) with *strong* evidence required for separate provision, and *exceptional* evidence for denial of service; and
v) policies do not remove the need to consider situations or service users on a case-by-case basis.

All useful propositions.

Chapter 17 – Sport

Page 242 add:

New guidance for transgender inclusion in domestic sport published by UK Sports Councils – September 2021

On the basis of a consultation with those involved with UK sport 'from grassroots to elite competition', the report makes recommendations to National Governing Bodies ('NGBs') of UK sport.

The report notes specifically that, while there was widespread support for making sport a welcoming place for all, the respondents to the survey had split into two divergent groups. One group believed in 'inclusion' as the guiding and paramount principle, and the other group focusses on 'fair sporting competition' which required regulation of transgender participation. There is some consideration of the relevant scientific evidence base in the report.

The report leaves decisions to NGB's but establishes 10 'Guiding Principles'.

Summarised, these are:

1. Commitment to inclusion.
2. Sex binary categorisation remains the most useful division.
3. Transgender people can be fairly and safely included in the male category.
4. Competitive fairness cannot be reconciled with self-identification into the female category.
5. Testosterone suppression is unlikely to guarantee fairness for inclusion of trans women in the female category in gender-affected sport.
6. Case-by-case assessment is unlikely to be practical or verifiable.
7. Categorisation by sex is lawful, and so obtaining birth sex information is appropriate.

8. Some transgender people cannot be registered in sex binary categories at some times and it is imperative that gender-affected sports provide other opportunities for participation in these cases.
9. The mix of activities provided by NGB's may depend on whether the intention is physical activity or meaningful competition.
10. Achieving inclusion across all protected characteristics is complex.

It remains to be seen how the application of these principles will play out when applied by NGBs. There will be more legal routes available for challenge by professional sportsmen and women than those who wish to participate in non-professional activities.

New Guidance from the International Olympic Committee

On 16 November 2021 the IOC published the *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations.*

This document is said the have been developed after extensive consultation with athletes and other stakeholders including sports organisations, medical experts and lawyers. It is said to establish a set of principles to be used by sporting bodies on International Federations in exercising *their* responsibility in establishing and implementing eligibility rules. The ten principles are:

- inclusion;
- prevention of harm;
- non-discrimination;
- fairness;
- no presumption of advantage;
- evidence-based approach;
- primacy of health and bodily autonomy;
- stakeholder-centred approach;
- right to privacy; and
- periodic reviews

Amongst these we note in particular a reference to 'all gender identities and the vulnerability of transgender people is acknowledged, and that, subject to eligibility criteria, individuals should be accommodated consistent with their self-identified gender. It is said that individuals making decisions on categories should be 'appropriately trained'. The possibility of separate categories for men and women is acknowledged and fair competition and safety are acknowledged. It is specifically stated that advantage should not be presumed but should be based on evidence. Specific comment is made about the need to consult with any group of athletes who would be negatively affected by eligibility criteria.

The evidence-based approach principle (number 6) is particular interesting in setting clear criteria for the quality and nature of evidence required to establish eligibility criteria and to allow and effective mechanism for affected individuals to challenge a decision.

This represents a move away from the very prescriptive (but definitive) guidance issued in 2015. The Tokyo games having been put back by a year, time is now short for the run up to the Paris Olympics in 2024 and it remains to be seen how these principles are put into practice.

Chapter 18 – Are gender critical views a protected belief?

Page 250, Delete 5th paragraph starting 'The effect…' and 6th paragraph ending '…late June 2021' and replace with:

Ms Forstater's appeal was heard in the EAT on 27/28 April 2021 before the President of the Employment Appeal Tribunal, Choudhury J and judgment was handed down on 10 June 2021.

The EAT overturned the judgment of the ET and held instead that the Tribunal had erred in its application of Grainger V . A philosophical belief would only be excluded for failing to satisfy Grainger V if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) by virtue of Article 17 thereof. The Claimant's gender-critical beliefs, whilst offensive to some , and notwithstanding its potential to result in the harassment of trans persons in some circumstances, did not fall into that category and fell within the protection under Article 9(1), ECHR and therefore within s.10, EqA .

The judgment has some curious features. Principal amongst them was that, whilst there was no appeal on the facts, the EAT made its judgment against a different factual matrix from that relied on by Judge Tayler.

The ET had made a finding of fact at para 90 that:

> "… the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. …"

However, the EAT found that:

> "On a proper reading of the Tribunal's findings, it seems to us that the most that can be said is that the Claimant will sometimes refuse to use preferred pronouns if she considered it relevant to do so, e.g. in a discussion about a

trans woman being in what the Claimant considered to be a women-only space"

One might rhetorically ask whether that would include a circumstance where a trans woman was about to use what Ms Forstater would regard as a female space in a workplace but that does not appear to have occurred to the EAT.

The EAT go on to criticise Judge Tayler's finding about Granger V which they reduce to a finding that it was only intended to reflect the European Convention on Human Rights Article 17 which prevents abuse of rights. The effect is to say that only totalitarian beliefs such as Nazism fail the Granger V test. Many commentators have suggested that this very low bar is not what was intended by the protections for religion and belief under the Equality Act.

However, the EAT sought to draw a distinction between merely *holding* a belief and *manifesting* that belief. In particular it found that only holding the belief rather than manifesting it is protected (para. 78). As such trans people's rights to bring claims for discrimination or harassment under EqA 2010 arising out of the actions of 'gender critical' people remain unchanged (para. 104). The EAT felt the need to state that calling a transwoman a man at work may be unlawful behaviour (para. 104), as it was before the EAT's ruling, and further felt the need to make the following statement at the end of its judgment:

Summary:

a. This judgment does not mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

b. This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.

c. This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct.

d. This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), EqA) for acts of

harassment and discrimination against trans persons committed in the course of employment.

Setting aside what the EAT thinks 'the transgender debate' constitutes, given that trans people have had protection in UK law since 1999, this is an extraordinary statement to see in a judgment.

The EAT's judgment is *not* being appealed and as such the case has been remitted to the ET to determine the substantive aspects of Ms Forstater's claim.

Her substantive hearing it is due to start on 7 March 2022.

Page 252, third paragraph:

Replace 'in late summer or autumn 2021' with 'early 2022.'

Page 255, Numbered paragraph (3)

Delete whole paragraph and replace with:

"To establish that *holding* particular beliefs in respect of transgender persons *per se* falls foul of the *Grainger* test part V, it now appears to be necessary to shown that the belief is an equivalent of Nazism or totalitarianism, such that transgender persons should be not afforded the general rights and protections of other citizens."

NEW CHAPTER – 21 Northern Ireland

This Chapter has been written with substantial assistance from Ciaran Moynagh, Head of Equality and Discrimination Law, Phoenix Law, Belfast.

Legislation

Unlike the Gender Recognition Act 2004 which *does* apply to Northern Ireland because the Province was under direct rule from Westminster from 2002 to 2007, the 2010 Equality Act *does not* and the protection regime for trans people in Northern Ireland resembles the position in Great Britain *before* the 2010 Act came into force.

Equal Opportunities and Discrimination are now 'transferred matters' under the Northern Ireland Act 1998.

Section 75 of the Northern Ireland Act 1998 ensures that a public authority discharges its functions having due regard to equality of opportunity between persons of religious belief, political opinion, racial group, age, marital status, sexual orientation, gender and disability. Schedule 9 of the Act sets out requirements to give effect to the duties public authorities hold. The Equality Commission for Northern Ireland has statutory powers to investigate non-compliance with equality schemes known as 'Section 75 Investigations.' These investigations produce reports and referrals can go to the Secretary of State but very often they are considered toothless or a weaker avenue of complaint. It is also notable that Section 74 does not apply to schools.

The Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 SI 1999 / 311 amended the ***Sex Discrimination (Northern Ireland) Order*** 1976 SI 1976/1042 to add the protected characteristic of 'gender reassignment'.

Just as the 1999 Regulations in Great Britain did, the 1999 NI Regulations include the requirement that the process for reassigning sex 'is undertaken under medical supervision'. This provision was removed when Great Britain moved to the 2010 Act but remains in place in Northern Ireland. The definition of a person with the protected characteristic of 'gender reassignment' is therefore more restrictive in Northern Ireland.

Protection of those with the protected characteristic of gender reassignment in Northern Ireland applies to the field of work, the supply of goods and services and vocational training, but a number of areas, such as education generally, which are protected in Great Britain are not in Northern Ireland. Similar provisions for 'genuine occupational requirement' exemptions are provided.

Gender Recognition

As stated above the 2004 Gender Recognition Act applies in Northern Ireland.

For NI trans persons seeking gender recognition certificates the Gender Recognition Panel, a branch of Her Majesty's Courts & Tribunal Service in Great Britain, deals with all applications originating from Northern Ireland. The Northern Ireland Courts and Tribunal Service (NICTS) have no role to play. In practical terms, when one is completing the necessary T452 medical report, a gender specialist is required. On the list of registered medical practitioners and psychologists specialising in the field of Gender Dysphoria none are now resident or practising in Northern Ireland since the retirement of the sole relevant Northern Irish practitioner in or around 2018. This creates an obvious barrier for those seeking to apply for a gender recognition certificate. At present the Trust staff will not complete the necessary forms as they do not consider this to be NHS related work. A judicial review case known as JR111 challenges the present position.

An alternative route to recognition for trans people in Northern Ireland is the dual nationality afforded under the Northern Ireland Act 1998 to obtain an Irish passport. The Republic of Ireland has a system of self declaration.

Healthcare

Adult services are centralised at the Regional Gender Identity Service run by the Belfast Health and Social Care Trust. The clinic is known as the Brackenburn Clinic and the majority of referrals are made via a person's GP. Adolescent services are provided by the same Belfast Trust and the regional service is called KOI – Knowing Our Identity. Referrals for this service must come via Children and Adolescents Mental Health Services (CAMHS). It is noteworthy that no surgery occurs in Northern Ireland and all trans persons have to travel for surgical intervention. These usually occur via the NHS extra contractual referral arrangements. There are also no private healthcare providers operating in this field in Northern Ireland.

The Belfast Trust notes they adhere to the Joint Royal College Guidelines (CR181) 'Good practice guidelines for the assessment and treatment of adults with gender dysphoria' for adult services and for KOI the WPATH approach is adopted.

The common problem of waiting lists is also very much alive in Northern Ireland. The demand for services have increased, funding has been reduced and waiting lists continue to soar. A freedom of information request made in December 2020 showed adult services, whilst still accepting referrals only offer "a small number" of assessments and the longest waiting time is 3 years 11 months. Given that KOI only accept referrals via CAHMS their average wait is 3 months for initial appointment.

NI Caselaw

There is relatively little caselaw from Northern Ireland relating to trans matters. Strategic litigation has very much been a tool utilised by the LGBT community in more recent times to secure rights and equality gains. This has been an effective mechanism as very often the mandatory coalition government will not bring forward legislation on what may be considered a 'contentious issue' as consent/agreement cannot be achieved from the Democratic Unionist Party, the largest unionist party in Northern Ireland, and one half of the executive office. Regrettably, the Trans community have not been mobilised to access strategic litigation and this may be due to lack of capacity

in the charity sector for trans people in Northern Ireland that can inform, educate and advocate as well as it is harder to have a willing Applicant put their name to the case and head above the parapet when entering the public domain of High Court litigation. Of course, given sensitivities these applicants very often achieve anonymity.

The Equality Commission for Northern Ireland has been a strong representative body for trans rights especially when it comes to discrimination in the workplace. Very often their cases conclude with the person achieving a settlement and the employer agreeing to do training and educative work.

AS's Application [2016] NIQB 89

The case of AS involved a Trans applicant who due to ill health entered into a civil partnership with their life partner to provide financial protection. The Applicant later achieved an interim GRC before having to bring proceedings to annul the civil partnership so a full certificate could be achieved. This was duly achieved before the High Court in Northern Ireland and a full GRC was granted, and the couple were able to enter into a marriage. Upon receipt of their marriage certificate both had their maiden names recorded as the same name and their marital status was recorded as 'civil partnership dissolved'. The Applicant complained that this public record inevitably showed that one or either of the couple had previously had a different gender identity.

Treacy J agreed with the Applicant that their ECHR Article 8 rights had been breached and gave a declaration that that the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003 were unlawful to the extent that they required the NI General Register Office to keep a public record which might reveal the Applicant's gender history but left the detail of the solution to the GRO to decide upon. The GRO were slow in complying and AS had to bring a further application for judicial review which finally resulted in a compliant certificate and an ex-gratia payment to AS as part of an agreed settlement.

JR111 [2021] NIQB 48

Another judicial review known as JR111 commenced in April 2020 and the first judgment in the matter was handed down in May 2021. This case was brought by a trans woman from NI who transition and has lived in her preferred gender since 1994. The first element of the case is that the Applicant wishes to obtain a gender recognition certificate but challenges the need for any medical diagnosis and if a diagnosis was necessary what that diagnosis ought to be. She claims that such a requirement is in violation of her Article 8 and 14 ECHR rights.

Section 2 of the Gender Recognition Act notes that the panel must be satisfied that certain criteria is made out in the application, and this includes that the person applying has or has had gender dysphoria, a disorder. Scofield J, reject the argument that a requirement of a medical diagnosis was a breach of human rights but found that it was no longer appropriate to prove a person had a disorder, gender dysphoria. The Judge relied upon the advances ICD classification now shifting from trans being a mental disorder and government documentation from the recent consultation process. As a result, the terminology of 'gender incongruence' should now be used by medical professionals and the panel should be accepting of same.

There is a second limb to the case that has not yet been heard at the time of writing. The Applicant is not under the care of any gender identity services and cannot obtain or afford an appointment with a private consultant outside the jurisdiction. The Belfast Trust have refused to provide a medical statement in furtherance of her GRC application as they do not believe that this is NHS work. She is now seeking to establish if the Trust are compelled to provide such medical statements.

Effect of Bell v Tavistock in NI

More recently and in light of the Bell case, the Belfast Trust became nervous and stopped endocrinology referrals for adolescents within NI. A 16-year trans female who had a referral for puberty blockers in February 2021 had her appointment cancelled and was told the matter would have to be referred to a Court. The Belfast Trust eventually made an application for declaratory relief to the High Court seeking a declaration that the young person may be treated with hormone blocking treatment. The young person, her mother and stepfather all consented to the treatment. The young person does not have a consistent relationship with her father and did not want him involved in proceedings. The treating endocrinologist, psychologist and psychiatrist all provided evidence recommending treatment. Ultimately, the Court declined to make a declaratory relief sought as there was no doubt the young person was Gillick competent to Bell standards and there was no contrary argument that treatment was not in her best interests. Accordingly, the Court did not consider it really had a role and dismissed the case. In consideration of the judgment the Trust proceeded to provide treatment.

A final case of note, not from a strategic litigation viewpoint, is a medical negligence case ongoing before the NI High Court. This case relates to a trans man being referred for surgery to London and during same more procedures were carried out than what was consented to and when that was noticed he consent form was then altered post-surgery. Litigation remains live but two urologists have been suspended from the UK medical register for periods of 5 and 12 months respectively. This case highlights the

need for better provision for surgical intervention in Northern Ireland and a closer inspection on the pathways with private hospitals and medical practitioners in Great Britain.

Note. It is intended to produce a Chapter specific to SCOTLAND in a future Update.

Robin Moira White

Nicola Newbegin

Old Square Chambers

19 November 2021

This is text is provided as an update to the book "A Practical Guide to Transgender Law". It is not provided, and should not be relied upon, as legal advice.