

Gender Recognition Act 2004: transsexuals in sport: a level playing field?

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GENDER RECOGNITION ACT 2004: TRANSEXUALS IN SPORT—A LEVEL PLAYING FIELD?

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The Gender Recognition Act 2004, which received Royal Assent on July 1, 2004 states that its purpose is “to provide transsexual people with legal recognition in their acquired gender”.² Whilst the effects the Act on society in large are likely to be minimal, the issues for the sports world are potentially seismic, and it is those issues that are the subject of this article.

The Act states that a person will have a legal right to a new birth certificate reflecting their acquired gender after having lived in that gender for the preceding two years and having been “diagnosed” with gender dysphoria. Section 2(1) states:

“Determination of applications

(1) In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant—

(a) Has or has had gender dysphoria

(b) Has lived in the acquired gender throughout the period of two years ending with the date on which the application is made.”

Furthermore, if an applicant has been recognised in their acquired gender in another country, if that country has been approved by the Secretary of State, recognition will be granted in the United Kingdom. The person will then be entitled to full legal recognition in their acquired gender, which as things stand, means that they may have the right to compete in any sporting contest in that acquired gender.

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2. Gender Recognition Act 2004 (c.7), Explanatory notes, para.3.

Disclosure of information

Once the Gender Recognition Panel has granted an application for gender reassignment under s.1, the applicant is granted a gender recognition certificate and that person then becomes, for all purposes, the acquired gender.³ Section 22 of the Act addresses prohibition on disclosure of information gathered in the operation of this Act. The implications of this section for sport are of some importance and require further examination. Section 22(1) states:

“It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person.”

There is an absolute right to privacy for individuals who have received a gender recognition certificate. Thus, sporting organisations have no right to the information. They *may* enquire as to the gender status of potential participants but there appears to be no *requirement* for the participant to divulge the information requested, therefore revealing a potential loophole in the legislation. Furthermore, it is an offence for anyone who has information concerning any application made under s.1(1) of the Act, to disclose that information if it enables the person to be identified (s.22(4)(a)) unless the person in question has agreed to the disclosure (s.22(4)(b)). It is clear from the provisions of the Act that both post-operative transsexuals, and also pre-operative transsexuals can apply for a gender recognition certificate and therefore gain full legal status (if the certificate is granted) in their acquired gender. It would therefore be theoretically possible for pre-operative transsexuals to compete in sport in their “acquired” gender.

It appears that the Act has been passed without proper consideration of the full effects on the equality of sporting competition. Guidelines on the interpretation of s.19 of the Act, which deals with the issue of sporting integrity, will be made available to UK Sport sometime in 2005. Section 19 reads:

“A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport *may*, if subsection (2) is satisfied, prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act” (emphasis added).

The effect of this section is that individual sports bodies and organisers will be able to decide on a case-by-case basis whether a person who has been

3. Gender Recognition Act 2004 s.9(1).

granted a gender recognition certificate under the Act should be refused entry or participation into any particular sporting event. The Act does not make clear whether or not the sporting body in question will have a legal right to obtain such information or whether disclosure will be on a purely voluntary basis. If there is no legal right to obtain this information, problems may arise, *e.g.* if information is requested and no response is forthcoming. As already stated, it will be an offence to disclose information obtained as a result of the operation of this Act. Furthermore, such disclosure may fall foul of the Human Rights Act 1998, Art.8, which provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁴

Information gathered by particular bodies under the Gender Recognition Act would potentially be covered by this Article. It would be extraordinary if any of the qualifications under the second part of Art.8 were to apply to disclosure of information in connection with the Gender Recognition Act, and therefore it would seem likely that any such disclosure may, despite s.19, violate an individual's right to privacy under Art.8. Similarly, the disclosure of such information may conceivably violate the Data Protection Act 1998. No statement has been made under s.19 of the Human Rights Act indicating that the provisions of the Gender Recognition Act are incompatible with the Human Rights Act, and it would be absurd for such an important human rights instrument then to be declared incompatible with the Human Rights Act.

This does not clarify the position regarding the specific provisions of the Gender Recognition Act and s.19 does not appear to give sporting bodies the legal right to force disclosure of whether any particular individual has received a gender recognition certificate under authority granted by the Act. Whether or not they have the authority to exclude someone who refuses to divulge details is unclear. If disclosure is to remain voluntary, there is the very real possibility that somewhere and at some time, sport will be confronted with an uneven playing field in a major event. It is possible to imagine a

4. Human Rights Act 1998, Art.8, ss.1, 2.

male competitor acquiring female legal status through the operation of this Act, and therefore having the right to compete as a female on the sports circuit. Indeed, a Canadian mountain bike racer, Michelle Dumaresq, who had sex reassignment surgery in 1996, competed for Canada in the 2002 World Championships, finishing 24th in the downhill discipline.⁵

How uneven is the playing field?

A cursory glance at the track and field world records below illustrates the issues.⁶ (These records have been chosen for illustrative purposes due to the ease of comparison and also the quantifiable nature of the compared figures.)

Fig.1: Selected Track and Field Outdoor World Records (as at January 28, 2004). All times in hours, minutes and seconds.

Female records as a percentage of male records (times in hours, minutes and seconds)

Event	Male	Female	Diff. (per cent)
100m	9.78	10.49	93.23
200m	19.32	21.34	90.53
400m	43.18	47.60	90.71
800m	1:41.11	1:53.28	89.26
1500m	3:26.00	3:50.46	89.39
Mile	3:43.13	4:12.56	88.35
2000m	4:44.79	5:25.36	87.53
3000m	7:20.67	8:06.11	90.65
5000m	12:39.36	14:28.09	87.47
10000m	26:22.75	29:31.78	89.33
Marathon	2:05:42s	2:15:25s	92.82

Female records expressed as a percentage of male records (measurement expressed in feet and inches)

Event	Male	Female	Diff. (per cent)
High Jump	8ft $\frac{1}{2}$ in	6ft $10\frac{1}{4}$ in	85.23
Long Jump	29ft $4\frac{1}{2}$ in	24ft $8\frac{1}{4}$ in	84.04
Triple Jump	60ft $\frac{1}{4}$ in	50ft $10\frac{1}{4}$ in	84.73

The hurdles and throwing events have not been included in this table due to the different weights of objects thrown by male and female competitors and the different hurdle heights for men and women. Similarly, the comparison for the marathon world record should be treated with some caution due to the variable nature of marathon courses.

5. www.bbc.co.uk, November 14, 2003. In *Nature* (October 2004) a group of scientists led by Andrew Tatem of the University of Oxford Department of Zoology predict that in 2156 women will overtake men.

6. Current International Amateur Athletic Federation World Records.

From these figures, a male competitor of above average ability who acquires female status under the Gender Recognition Act and competes as a female may reach the highest level in female sport. Whilst some account would need to be taken for hormonal alterations due to gender reassignment, this would be unquantifiable.

The differences recorded above are likely to be the same for many other sports. A situation where an average male sports participant would have the capability to outstrip most female athletes has serious competitive implications, and in a world where the financial rewards for sporting success are increasing year on year, the pecuniary implications are obvious. As already discussed, the fear is not that male competitors will choose this as an option purely to attain success, (as has been scandalously hinted at in some sections of the press), but that this will eventually be the inevitable by-product of the Act. Without the clear legal right to force disclosure of matters relating to the Gender Recognition Act, sporting authorities will be unable to protect the competitive integrity of their sports.

Reaction to the Bill

Following the publication of the initial Bill, there was much predictable comment from the print media. To describe these as uninformed and sensationalist is being charitable. Some of the comments appeared at times to be a deliberate misrepresentation of the truth, designed to appeal to the prejudices against transsexuals. For example, Neil Wilson, in the *Daily Mail*,⁷ commented:

“If the government succeed in pushing the Gender Recognition Bill through Parliament, swapping gender could become almost as simple as getting divorced, enabling a man to compete in a female sporting event simply by claiming to be a woman. Surgery would not be necessary”.

In a similar vein, Doug Gillon in the *Glasgow Herald* wrote⁸:

“Dame Edna Everage for the Olympic 100m? Farce or reality? The unopposed second reading yesterday for the Gender Recognition Bill in the House of Lords raises the possibility of the designation ‘men’ and ‘women’ becoming redundant.”

7. N. Wilson, *Daily Mail*, January 13, 2004, p.73.

8. D. Gillon, *The Glasgow Herald*, December 19, 2003, p.34.

The stance taken by *The Sun* on the subject was predictably sensationalist. Mark Bowness commented⁹:

“A BIZARRE sex-change law could give Tim Henman his best chance of winning Wimbledon for Britain.

The Gender Recognition Bill will allow people to legally change their sex—without undergoing surgery.

It would also mean male sportsmen could take on women for major titles and vice versa.

That means Henman could put on a dress and enter Wimbledon women’s tournament.”

The *Sunday Mirror*, under the headline, “Offside: It gives you the willies; Transsexuals will be able to compete in Olympics”, expands on that theme. David James continues¹⁰:

“This week’s you couldn’t make it up story comes from the world of athletics. And the drug scandals rocking the sport don’t have a patch on this. Transsexuals will soon be able to compete in the Olympic Games, according to new rules which are being validated by the International Olympic Committee.”

Clearly, the prospect raised by some of these newspapers of middle-ranking male sports competitors deciding to “become transsexuals” to rise to the top of their particular sport is risible. Indeed, Lord Filkin, (the Minister for Constitutional Affairs responsible for steering the Bill through the House of Lords) addressed this very issue in Parliament. He stated¹¹:

“There has been some speculation in the media over the last few days on the implications of the Bill for sport. Frankly, I have been puzzled by some of what has been said. Let me make it clear that it will not be possible for a man simply to declare that he is of the opposite gender and then compete in women’s competitions. A person seeking recognition in the acquired gender will have to apply to the panel, and a gender recognition certificate would be issued only if the panel were satisfied that all the criteria were met.”

Furthermore, Lord Carlisle of Berriew stated¹²:

9. M. Bowness, *The Sun*, December 18, 2003.

10. D. James, *The Sunday Mirror*, November 16, 2003, p.82.

11. Lord Filkin, *Hansard*, HL, col.1290 (December 18, 2003).

12. Lord Carlisle of Berriew, *Hansard*, HL, col.1302 (December 18, 2003).

"I read some grossly exaggerated publicity this week about supposed cheating by transsexuals, who apparently in droves were going to change their gender so that they could win Wimbledon and score the winning goal in the Cup Final. For a start, it is quite difficult to do either, and changing one's gender does not generally achieve it for one."

Some precedents

As already stated, some media attention had already been directed towards the perceived flaws in the original Bill, (and subsequently the Act) and several examples of male-to-female transsexuals competing in sports in their acquired gender have been raised. The most obvious example is that of Dr Richard Raskind, who underwent a sex change operation and competed on the women's tennis tour as Renee Richards, reaching the quarter finals of the US Open in 1978. She succeeded in preventing the United States Tennis Association ("USTA") reliance on a sex-chromatin test for determining that she was female after surgery,¹³ which therefore had the effect of allowing her to compete on the tour. She was already aged 44 when she reached the quarter-finals of the US Open, and was therefore some way past her best athletic years. She was still though able to attain the position of a world top-15 player by that stage, and it is not inconceivable that had she taken this step when she was in her 20s, she may have reached the very highest point in her tennis career.

A much lesser known case, (reported in the *Times*¹⁴), concerned Stella Walsh. She was born Stanisława Walasiewicz and competed for Poland in the women's 100m sprint in the 1932 and 1936 Olympics, winning gold in 1932 and silver four years later. However, following her death in 1980, (a victim of a shooting during a robbery), Barnes reveals that¹⁵:

"A post mortem revealed that she had both male and female chromosomes, a tiny penis and testes and no female organs. Legislation would have called her a man."

Heidi Krieger, the East German shot putter, who won the 1980 European title had her body altered from taking anabolic steroids. In 1997, she underwent a sex change operation and now has a wife.¹⁶

13. *Richards v United States Tennis Association et al.* 400 N.Y.S.2d 267.

14. S. Barnes, *The Times*, Sports Section p.53, January 23, 2004.

15. *ibid.*

16. *The Times*, Sports Section, p.92, November 4, 2004. See also the Box "Playing the Gender game" *The Times*, February 10, 2005, p.52.

Effects of the Act

The Gender Recognition Act however, is not just about maintaining the competitive integrity of sport at the highest levels. The effect is more likely to be seen at lower levels, (merely as a function of numbers), for no one is likely (despite what the tabloid press may suggest) to attempt to gain a gender recognition certificate merely to compete and succeed in sport. If transsexuals, (and realistically we are talking about male-to-female transsexuals because there will be no competitive advantage with female-to-male transsexuals) are denied the right to take part in sporting activities under their acquired gender a significant section of society, (currently there are reportedly around 5,000 transsexuals in this country), will be denied the opportunity to compete in sport. No one will question the right of any individual to change their gender. However, many people will question the right of that person to compete as an equal against female athletes. A case study identified by Hal Higdon,¹⁷ writing on *Gender Mosaic*,¹⁸ explores many of the issues that may arise under this Act. Higdon, relating the story of male-to-female transsexual athlete, April Capwell, writes:

"Ray was April's name before he had the operation 16 years ago that transformed him—physically and hormonally—into her. April now dresses and acts like a female. No one would think twice about her if she hadn't recently turned to her old sport, running, and begun to win awards".

Questions began to be asked about both the morality and legality of her participation in female events. Indeed, Henley Gible, (at the time the executive director of the Road Runners Club of America), stated:

"It's not fair . . . If somebody wants to change identity and become a woman, fine, but I don't think she competes equally with other women".

Unless the situation is resolved, we are going to be left with either a recognition that sporting competitive integrity needs to be upheld, but without the necessary apparatus to do this (if the sporting organisations do not have a legal right to obtain clarification on gender), or a small but nevertheless significant section of society, (male-to-female transsexuals), being denied the right to participate in

17. H. Higdon, "Is she or isn't she? (Transsexual runner April Capwell)".

18. www.geocities.com/gender_mosaic.

almost all competitive sporting activity. It is doubtful that there can be an equitable resolution to this problem, and it seems highly likely that one of the possibilities will be sacrificed in favour of the other.

IOC guidelines

The International Olympic Committee ("IOC") eliminated all "sex" tests in time for the 2000 Olympic Games in Sydney and produced the following guidelines in 2003¹⁹:

"The group recommends that individuals undergoing sex reassignment from male to female after puberty (and vice versa) be eligible for participation in female or male competitions, respectively, under the following conditions:

- Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy.
- Legal recognition of their assigned sex has been conferred by the appropriate authorities.
- Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimise gender-related advantages in sport competitions.

In the opinion of the group, eligibility should begin no sooner than two years after gonadectomy

It is understood that a confidential case-by-case evaluation will occur.

In the event that the gender of a competing athlete is questioned, the medical delegate (or equivalent) of the related sporting body shall

19. International Olympic Committee, Statement of the Stockholm consensus on sex reassignment in sports, October 28, 2003.

have the authority to take all appropriate measure for the determination of the gender of a competitor."

The IOC guidance clearly goes much further than the Act in preventing participation. Under the Act, a transsexual may gain full legal status in their adopted gender without surgery. This appears incompatible with the guidance. Equally, the IOC statement suggests that the sport will have the power to take all appropriate measures to determine the gender of the competitor, and again this is something that points in a different direction to the Act. The practicalities of harmonising the statement with the statute appear insurmountable.

Conclusion

As far as this writer can see, it is going to be impossible to satisfy both sides, and any form of compromise (as the Act appears to be) is likely to be unsatisfactory. The decisions will be left to individual sporting bodies, but the right to require participants to disclose information relating to this Act does not exist; rather it appears that there can only be a voluntary disclosure by the athlete. If this is the case, then it is clearly an inadequate compromise which will do nothing to maintain a level playing field in sport.

On November 11, 2003, the IOC reaffirmed its commitment to the notion of equality. Schamasch, cited on the BBC website stated boldly²⁰:

"We will have no discrimination,' said IOC medical director Patrick Schamasch. 'The IOC will respect human rights'."

It is submitted that neither the Gender Recognition Act 2004, nor the IOC statement manage to achieve this lofty aim.

20. <http://news.bbc.co.uk>, November 14, 2003, 12:26:45.