

Motion 4: Healthcare and rights of transgender and nonbinary individuals

Introduction

At the 2020 ARM, representatives will be asked to debate and vote on prioritised motion 4:

That this meeting affirms the rights of transgender and nonbinary individuals to access healthcare and live their lives with dignity, including having their identity respected and calls upon the government to:

- i. allow transgender and nonbinary individuals to gain legal recognition of their gender by witnessed, sworn statement;
- ii. ensure that under 18s are able to access healthcare in line with existing principles of consent established by UK Case Law and guidelines published by the public bodies which set the standards for healthcare;
- iii. enable trans people to receive healthcare in settings appropriate to their gender identity;
- iv. ensure trans healthcare workers are able to access facilities appropriate to the gender they identify as;
- v. ensure trans people are able to access gendered spaces in line with the gender they identify as.

This briefing provides background information and sets out some of the issues representatives may want to consider as part of the debate on this motion. It provides explanations of the key terms that are likely to be used in the debate and sets out the legal framework which determines the legal status of transgender and nonbinary individuals. Each part of the motion is then briefly considered in turn.

The issues being debated extend beyond matters of medical concern and address emotive questions of significant social importance on which opinion is highly divided. It is important that members of the Representative Body treat the subject, and each other, with respect while debating them. Being conscious of the key terms and their definitions will be useful in this regard and help to avoid any unnecessary offence.



What do the terms mean?

Cisgender	The term for those whose gender identity is the same as their sex assigned at birth. It is often abbreviated to 'cis'.
Gender	Socially constructed characteristics typically expressed in terms of masculinity and femininity that are largely culturally determined and often assigned by sex at birth.
Gender dysphoria	The distress an individual feels due to a mismatch between their gender identity and their sex assigned at birth. The mismatch in and of itself is referred to as gender incongruence.
Gender identity	An individual's internal sense of their own gender.
LGBTQ+	An initialism that stands for lesbian, gay, bisexual, transgender and queer. The '+' is representative of other minority sexual orientations and gender identities including but not limited to asexual and pansexual.
Nonbinary	The spectrum of gender identities that fall outside the historically typical gender binary (masculine and feminine). This includes those who do not identify as either a man or a woman and those who are gender-fluid.
Sex	Refers to physiological characteristics, mainly the biological (reproductive) sex categories male/female.
Transgender	Having a gender identity that differs from one's sex. The term 'transsexual' is generally considered outdated.

What is the current legal situation regarding transgender and nonbinary individuals?

Gender Recognition Act 2004

People in the UK may change their legal gender under the Gender Recognition Act 2004. Under the GRA, people may change their gender if they provide the following:

- a medical diagnosis of gender dysphoria (provided by a registered medical practitioner or a registered psychologist practising in the field of gender dysphoria);
- a report from a medical professional detailing any medical treatment (provided by a registered medical practitioner who does not necessarily need to be practising in the field of gender dysphoria);
- proof of having lived for at least two years in their acquired gender through, for example, bank statements, payslips and a passport;
- a statutory declaration that they intend to live in the acquired gender until death;
- if married, the consent of their spouse;
- payment of a fee of **£140** (or **proof of low income for reduction/removal of the fee**); and
- submission of this documentation to a panel which the applicant does not meet in person.

The GRA process does not allow for recognition of a gender other than man or woman.

Successful applicants receive a Gender Recognition Certificate (GRC) by which their birth certificate is changed. Changing gender involves social, medical, legal and administrative changes. It is important to note that although a GRC changes an individual's legal sex, people may change their gender to interact with other services without changing their legal sex, such as on their passports, driving licences and health records (although this does not extend to changing their name).

The Gender Recognition Act is currently under review.¹

Equality Act 2010

The most significant piece of equalities legislation in the UK is the Equality Act 2010.² It covers nine protected characteristics including gender reassignment and sex.

The protected characteristic of gender reassignment protects transgender individuals from discrimination if they are: “proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.

The Equality Act recognises (and gives protections) to sex as a binary state. Nonbinary relates to a person’s gender identity. Gender identity is not itself one of the nine protected characteristics in the Equality Act.

The legislation adopts a proportionate approach to the protection it offers. This allows service providers to restrict the access of trans people to single-sex spaces where that is “a proportionate means of achieving a legitimate aim”.³

What is current BMA policy on transgender and nonbinary individuals’ rights and healthcare?

The BMA believes all people are entitled to medical treatment on the basis of need which also respects their fundamental human dignity and rights. People should be able to access treatment based on their needs (both physical and mental), including their physiological characteristics.

The BMA has numerous motions supporting the rights of LGBTQ+ individuals and their access to healthcare. The BMA has one specific motion regarding transgender patients. This was passed at ARM 2015:

That this meeting recognises the health inequalities faced by transgender patients and calls upon the BMA to:

- i. lobby the Medical Schools Council and Royal Colleges to ensure that trans awareness is part of both undergraduate and postgraduate training;*
- ii. organise Continuing Professional Development training events in collaboration with relevant external organisations such as trans health advocacy charities/NGOs.*

There is currently no pan-BMA policy specifically relating to nonbinary individuals.

What does this motion call for?

If passed, this motion would significantly expand BMA policy in relation to transgender and nonbinary individuals. It would add the BMA’s support to calls for trans people to be able to receive healthcare in settings, and for trans healthcare workers to access facilities, appropriate for the gender they identify as. It would also go beyond issues directly relevant to the provision of healthcare to cover some broader public policy/societal issues. It would give BMA support to the campaigns for a simplification of the process for individuals to change their legal gender and for trans people to have access to gendered spaces in line with the gender they identify as.

¹ The Gender Recognition Act 2004 can be read here: <https://www.legislation.gov.uk/ukpga/2004/7/contents>

² The Act applies in England and Wales, and almost entirely in Scotland. Northern Ireland has different equality legislation, which also covers political discrimination.

³ The Equality Act 2010 can be found here: <https://www.legislation.gov.uk/ukpga/2010/15/contents>

Some of the factors to consider in the debate are set out below.

i. allow transgender and nonbinary individuals to gain legal recognition of their gender by witnessed, sworn statement

Many trans people report finding the requirement for a medical diagnosis demeaning and patronising, playing into antiquated notions of transgender people being mentally ill. (The government has emphasised it does not take this view but rather views transgender as an aspect of human diversity.) Others find the process too bureaucratic and expensive. It is for these reasons that many trans people have opted not to utilise the GRA;⁴ the government estimates only between 1 and 2.5% of trans people in the UK have used the legislation to legally change their gender. Many instead rely on the protections afforded by the Equality Act 2010.

Trans individuals have reported that providing information on treatment received can be intrusive and distressing and that the current situation makes them dependent on medical professionals to get the necessary diagnosis to gain legal recognition of the gender they identify as. This can be particularly problematic as many individuals seeking to change their legally recognised gender do not meet the clinical requirements to be diagnosed with 'gender dysphoria'. The NHS states that signs of gender dysphoria in teenagers and adults may include:

- certainty that your gender identity conflicts with your biological sex
- being comfortable only when in the gender role of your preferred gender identity (may include non-binary)
- a strong desire to hide or be rid of physical signs of your biological sex, such as breasts or facial hair
- a strong dislike of the genitals of your biological sex.

Given the emphasis elsewhere in medical law and ethics on the autonomous choices of competent adult patients, it has been suggested that a requirement for medical involvement in a process that has widely been argued to be 'non-medical' may be unsustainable.

In summer 2018, the government launched a consultation into changes to the Gender Recognition Act. This followed pressure from many LGBTQ+ groups that the GRA was not fit for purpose and a less arduous process for legal recognition of one's gender was necessary.

A simplified process of giving legal recognition of transgender individuals by a witnessed, sworn statement is the model that is generally supported by trans advocacy groups.

There are existing 'non-assessment based' models used in other countries which include a witnessed statutory declaration and remove the medical requirement for a diagnosis of gender dysphoria and the provision of medical details of treatment received. This model has already been implemented in the Republic of Ireland, Malta, Denmark, British Columbia and other nations. In the Republic of Ireland, the statutory declaration must be witnessed by a person authorised to take statutory declarations and includes that applicants must:

- Have a settled and solemn intention of living in the preferred gender for the rest of their life
- Understand the consequences of the application
- Make the application of their own free will.

This proposal is not, however, uncontroversial. Those who support the status quo (or something similar) argue that requiring a diagnosable condition – gender dysphoria – and introducing time criteria, as well as evidence that the individual has lived in their affirmed gender, serve to ensure that the decision to transition is enduring and considered. Changing the legal recognition of one's gender is a significant decision and some of those considering this change may be in a vulnerable position. It is suggested that the current longer process allows individuals the opportunity to truly evaluate the significance of the issue, increasing the likelihood that the decision reached is the correct one for them. Similarly, the involvement of doctors or other health professionals who have experience in working with those with gender dysphoria may enable discussions about emotional and physical wellbeing that may be helpful to the trans person.

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf

It may also enable doctors and other health professionals to identify when it may be appropriate to offer treatment or other forms of support.

The BMA's Medical Ethics Committee considered this issue in some depth at its meeting in October 2018, in relation to the Government's consultation on amendments to the Gender Recognition Act (see above). After a lengthy debate, no firm conclusion was reached about whether the BMA should support a simplified process for the legal recognition of transgender individuals. Without a clear position on the key questions, the BMA did not respond to the consultation.

If passed, this part of the motion would give the BMA clear policy which it would feed into any consultations on this topic. It could also limit the BMA's flexibility when dealing with future government proposals on the matter as it is not known yet what the changes to the GRA are likely to be. Having policy supporting one option may hamper the Association's ability to engage proactively with alternative proposals for reform.

ii. ensure that under 18s are able to access healthcare in line with existing principles of consent established by UK Case Law and guidelines published by the public bodies which set the standards for healthcare;

This provides clear policy that minors should be able to access healthcare in line with UK case law. This respects the autonomy of patients and their rights to seek appropriate healthcare.

Current NHS guidance states that gender reassignment surgery should not take place until individuals are aged 18. There is currently a judicial review going on in the UK considering whether puberty blockers should continue to be prescribed to children.⁵

Transgender children whose gender identity is not respected can often face increased confusion and risk of self-harm.

iii. enable trans people to receive healthcare in settings appropriate to their gender identity;

Patients receiving healthcare are often in a vulnerable position and every reasonable effort should be made to ensure they are as comfortable as possible. This includes trans people and cis people. Some cis people have argued that in certain healthcare environments cis people and trans people should be separate. It is argued, however, that this does not preclude trans people from receiving healthcare in settings appropriate to their gender identity, as suitable adjustments can be made.

It has been suggested that these issues could be resolved by ensuring the appropriate privacy, dignity and confidentiality of all patients.

While it is important for trans people to receive healthcare in settings appropriate to their gender identity, and also to access suitable facilities, certain physiological characteristics need to be considered in any healthcare they receive. For example, trans women may still have a prostate gland and may need to receive suitable treatment in relation to this, which may include being treated on a women's ward.

5 <https://www.theguardian.com/society/2020/mar/01/families-divided-tavistock-nhs-gender-clinic-judicial-review-goes-ahead>

iv. ensure trans healthcare workers are able to access facilities appropriate to the gender they identify as;

This part of the motion also focuses on the rights and wishes of trans people being upheld. As highlighted in other parts of the briefing ((iii) and (v)), there is a potential tension with the sensibilities of some cis people.

v. ensure trans people are able to access gendered spaces in line with the gender they identify as.

The issue of gendered spaces has been heavily politicised recently and has been the subject of considerable public debate.⁶ For some, trans women are women and therefore should have access to women-only spaces. Those who take this view are clear that granting trans people access to spaces they identify with is important in terms of respecting their dignity and rights. It is clear that trans people face much hostility and discrimination still in our society. It is argued that, by allowing trans people access to gendered spaces they identify with, society sends a clear message that their rights are respected and their self-identification of their gender is valid. It is suggested that this could also reduce general discrimination and physical abuse of trans people, which is common, as well as reducing the mental health problems that often occur in the trans community, which can lead to serious self-harm.

The BMA is aware of other points of view on this issue, including that some cis people have raised concerns about sharing certain spaces with trans people.

Further information

If you have any further questions on the motion or information laid out above, please feel free to contact the BMA's medical ethics and human rights team and/or its equality, inclusion and culture team:

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