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Sunderland**

May, Rebecca (2020) The Growing Problem of Misgendering: The role of the British Government in Protecting Transgender Individuals by Maintaining Equality and Fairness. *Sunderland Student Law Journal*, 1. pp. 35-44. ISSN 2634 -193X

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The Growing Problem of Misgendering: The role of the British Government in Protecting Transgender Individuals by Maintaining Equality and Fairness.

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Abstract

Misgendering occurs when an individual intentionally or unintentionally refers to a person who is transgender, non-binary, or gender variant using terms that are opposing to their authentic gender or identity.¹ This journal will explore the United Kingdom's legal stance in relation to misgendering and investigate whether the current legalisation tailored to transgender individuals is sufficient in maintaining equality and fairness.

Keywords

Misgendering, Transphobia, Gender Recognition Act 2004, Equality

¹ Kevin A. McLemore, 'Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals' (2014) *Self and Identity* 14.

Those who do not identify as their biological gender are targeted by an enacted social stigma² as a direct result of violating social norms and deviating from gender roles.³ This stigma allows for transphobic behaviours such as misgendering to prosper.⁴ Misgendering manifests in numerous ways, such as; preventing an individual accessing their preferred gendered space, using language to describe a person that does not align with their affirmed gender, using their pre-transition name or basing assumptions of a person's gender on their characteristics.⁵ Kevin McLemore conducted a study into the effects of misgendering on transgender individuals.⁶ His studies found the experience of being misgendered had a lasting psychological impact, contributing towards an internalised stigma.⁷ This internal stigma consisted of feelings of a lack of authenticity in society, lower self-esteem, various mental health issues and a palpable feeling of stigma.⁸ A combination of the by-products of misgendering with other forms of transphobic behaviour can be the catalyst for trans-individuals suffering fatal consequences.⁹ This can be evidenced by the Rare research report finding that 88.9% of young transgender participants have contemplated suicide.¹⁰ The report proposed '*...repeated experiences of transphobic bullying and violence*' as the reason for the significantly high suicide rates in trans-individuals.¹¹

²Stigma, Discrimination, Violence & Human Rights' (*Undp.org*)

<https://www.undp.org/content/dam/undp/library/HIV-AIDS/Key%20populations/3_TRANSIT_Chapter%202.pdf> Accessed 11 April 2019.

³ Jaclyn White Hughto, Sari Reisner and John Pachankis, 'Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, And Interventions' (2015) 147 SSM 147.

⁴ Julie L Nagoshi, Craig Nagoshi and Kris Hohn, 'Questioning the Heteronormative Matrix: Transphobia, Intersectionality, And Gender Outlaws Within the Gay and Lesbian Community' (2017) Social Development Issues 39.

⁵ 'What's Transphobia? | Facts About Transphobic Discrimination' (*Plannedparenthood.org*)

<<https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/whats-transphobia>> Accessed 24 March 2019 and see, n.1 Healthline.

⁶ Kevin A. McLemore, 'A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering' (2018) Stigma and Health 3.

⁷ Ibid.

⁸ Ibid.

⁹ Jody Herman, Philip Rodgers and Ann Haas, 'Findings of the National Transgender Discrimination Surve' (The Williams Institute 2014) <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>> Accessed 1 May 2019.

¹⁰'RARE Research Report' (Project for Advocacy Counselling and Education 2019)

<https://www.transgendertrend.com/wp-content/uploads/2017/10/RARE_Research_Report_PACE_2015.pdf> Accessed 7 March 2019.

¹¹ Ibid.

Transphobic behaviour in its numerous forms has a disproportionate impact on the victim and a ripple effect that can be felt throughout the transgender community.¹² Behaviours such as online bullying and verbal abuse help to enable prejudice towards trans-individuals, in turn evolving into transphobic hate crime.¹³ The UK Transgender survey found that 2 in 5 respondents experienced verbal harassment or physical violence because of their identity.¹⁴ 9 in 10 of the most serious incidents are unreported, as 'it happens all the time'.¹⁵ Currently, the UK has no formal legislation regarding discrimination by misgendering, despite the irreversible consequences.¹⁶ The New York Commission on Human Rights established guidelines in order to prevent discrimination of transgender and gender non-conforming communities by employers, landlords and business owners also placing restrictions upon the general public.¹⁷ The Commission can impose penalties "for violations that are the result of wilful, wanton, or malicious conduct".¹⁸

Behaviours violating these guidelines include intentionally failing to use an individual's preferred name, pronouns and title, refusing individuals access to a bathroom consistent with their gender identity or enforcing dress codes and grooming standards based on sex or gender.¹⁹ An individual who mistakenly uses the wrong pronoun will face no repercussions, however, a person who refuses to use the individual's preferred pronoun or intentionally misgenders may be subjected to penalties.²⁰ This poses the question whether the UK

¹² Public Statement on Prosecuting Homophobic, Biphobic And Transphobic Hate Crim (Crown Prosecution Service 2017) <<https://www.cps.gov.uk/sites/default/files/documents/publications/homophobic-biphobic-transphobic-hate-crime-public-statement-2017.pdf>> Accessed 24 March 2019.

¹³ See, Ibid; Haeyoun Park and Iaryna Mykhyalyshyn, 'L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group' (*Nytimes.com*, 2016) <<https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html>> Accessed 10 March 2019; 'Sexual Orientation and Transgender Identity Hate Crime' (*Citizensadvice.org.uk*) <<https://www.citizensadvice.org.uk/law-and-courts/discrimination/hate-crime/sexual-orientation-and-transgender-identity-hate-crime/>> Accessed 10 March 2019.

¹⁴ P Mordaunt, 'National LGBT Survey: Summary Report' (Government Equalities Office) <<https://www.gov.uk/government/publications/national-lgbt-survey-summary-report/national-lgbt-survey-summary-report>> Accessed 10 March 2019.

¹⁵ Ibid.

¹⁶ See, n.10 Rare Research Report.

¹⁷ 'NYC Commission on Human Rights Announces Strong Protections for City's Transgender' (*The official website of the City of New York*, 2015) <<https://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender>> Accessed 1 May 2019.

¹⁸ 'Gender Identity/Gender Expression - CCHR' (*Www1.nyc.gov*) <<https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>> Accessed 5 May 2019.

¹⁹ Ibid.

²⁰ Ibid.

Government should introduce similar guidelines and would imposing these guidelines impact the occurrence of transphobic behaviour.

Allocating a consistent degree of legal entitlements and recognition irrespective of gender origins may potentially 'normalise' trans-individuals, which could reduce the social stigma contributing to discriminatory behaviours.²¹ This can be done by amending legislation to prevent trans-exclusion, in turn leading to societal acceptance the same way in which the social attitude towards homosexuality changed with the partial decriminalisation of homosexuality in 1967.²² Historically, Britain has been inept in providing legal rights to the trans-community.²³ The case of *Corbett v Corbett* [1971] states that a person's sex could not legally be changed regardless of a full gender reassignment.²⁴ However, the introduction of the Gender Recognition Act 2004 (GRA), means the transgender community is finally seeing legal recognition of their identity.²⁵

The creation of the GRA 2004 was ground-breaking.²⁶ It provided identity validation as well as legal acknowledgement that trans-communities required tailored legislation.²⁷ Despite the benefits the GRA 2004 provides, it is not without criticism. It faced a backlash from the LGBT charity Stonewall due to the exclusion of those who identify as non-binary or are under 18, as well as the requirement for trans-individuals to prove their gender identity.²⁸ The recognition process involves undergoing numerous intrusive medical assessments,²⁹ attending interviews,³⁰ receiving a diagnosis of gender dysphoria³¹ (GD) and living as their

²¹ House of Commons Women and Equalities Committee, 'Transgender Equality' (House of Commons 2015).

²² See, Sexual Offences Act 1967; Katie Alston, 'The Transgender Arguments Dividing Society' (*BBC News*, 2018) <<https://www.bbc.co.uk/news/uk-43255878>> Accessed 13 April 2019; and Rachel Schraer and Joey D'Urso, '10 Ways in Which Gay Rights Have Changed' (*BBC News*, 2017) <<https://www.bbc.co.uk/news/uk-40743946>> Accessed 13 April 2019.

²³ Prof Stephen Whittle, 'A Brief History of Transgender Issues' (*the Guardian*, 2010) <<https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues>> Accessed 24 March 2019

²⁴ *Corbett v Corbett* (Orse Ashley) (No. 2) [1971] 110.

²⁵ Gender Recognition Act 2004.

²⁶ 'Gender Recognition Act' (Stonewall) <<https://www.stonewall.org.uk/gender-recognition-act>> Accessed 24 March 2019.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ S.3 Gender Recognition Act 2004.

³⁰ *Ibid.*

³¹ S.2(1)(a) Gender Recognition Act 2004.

acquired gender for two years^{32,33} This process then concludes with the individual acquiring all supporting evidence and submitting it to a gender recognition panel, who have the power to approve or deny any application without meeting the applicant.³⁴

Since the GRA 2004 was implemented 15 years ago, only 4,910 people have legally changed gender.³⁵ The LGBT survey found the reason for such small figures was due to potential applicants finding the current process to be bureaucratic, expensive and intrusive.³⁶ The Government responded by seeking testimonies in order to reform the recognition process which would make considerations for the inclusion of non-binary individuals.³⁷ In 2017 a proposal was announced to streamline and de-medicalise the process established in the GRA 2004.³⁸ The proposals intended to improve the recognition procedure by the removing the necessity for a diagnosis of GD, and reducing the length and intrusiveness of the gender recognition system.³⁹

Disregarding the proposed reforms, the GRA 2004 rendered half of the trans-community unable to meet the fundamental requirements established, to gain legal recognition.⁴⁰ This is due to the necessity for a GD diagnosis as, not all transgender individuals have GD.⁴¹ The proposed reforms allow for fully inclusive self-identification, enforcing the ideology that an individual's identity belongs to them and not another.⁴² Despite criticisms of the recognition process, allowing for a medical diagnosis and lengthy interview process provided a degree of filtration of applicants. The requirement of a medical assessment, and evidenced dedication to transitioning, resulted in those who did not meet the stipulations finding their application

³² S.2(1)(b) Gender Recognition Act 2004.

³³ See, n.26 Stonewall and Gender Recognition Act 2004.

³⁴ S.1(3) Gender Recognition Act 2004.

³⁵ Minister for Women and Equalities, 'Reform of The Gender Recognition Act – Government Consultation' (UK Government 2018).

³⁶ Ibid.

³⁷ Ibid.

³⁸ Justine Greening, 'New Action to Promote LGBT Equality' (GOV.UK, 2017) <<https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>> Accessed 1 May 2019.

³⁹ Ibid

⁴⁰ See, n25.

⁴¹ 'Frequently Asked Questions About Transgender People' (National Center for Transgender Equality, 2016) <<https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>> Accessed 4 May 2019.

⁴² See, n.38 Justine Greening.

denied.⁴³ However, following the proposed reforms by implementing a less intensive and de-medicalised process, there is the potential for individuals who are not transgender to take advantage of the legislation streamlined minimal process in order to change their gender and documents for personal gain.⁴⁴ This poses the question whether there will be limitations on the number of times an individual can change their gender, as well as whether the assessment process will have measure in place to prevent the process being infiltrated by applicants with ulterior motives.⁴⁵ There is also the question as to whether there will be suitable considerations for gender fluid individuals who are able to change gender as and when they please.⁴⁶

The Equality Act 2010⁴⁷ (EA) has also come under scrutiny from Stonewall.⁴⁸ The aim of the EA 2010 was to simplify the law by combining multiple statutes into one, to increase the strength of certain areas.⁴⁹ The act addressed certain characteristics and provided them legal protection to minimise the risk of discriminatory behaviours regarding employment, the provision of goods, services, housing and facilities.⁵⁰ The EA 2010 provides protective measures for trans-individuals, however, this is on a conditional basis.⁵¹ Gender reassignment is a protected characteristic.⁵² In order to have this characteristic an individual must be; proposing to, undergoing or undergone a process (or part of a process) to reassign their sex.⁵³ This necessity omits non-binary, non-conforming and those with no intention of clinically

⁴³ S.2 Gender Recognition Act 2004.

⁴⁴ See, Alex Bollinger, '17 Men Were Busted Pretending to be Trans Women to Run For Office in Mexico' (*Lgbtqnation.com*, 2018) <<https://www.lgbtqnation.com/2018/05/17-men-busted-pretending-trans-women-run-office-mexico/>> Accessed 4 May 2019 and Peter Baklinski, 'Sexual Predator Jailed After Claiming To Be 'Transgender' To Assault Women In Shelter' (*LifeSiteNews*, 2014) <<https://www.lifesitenews.com/news/sexual-predator-jailed-after-claiming-to-be-transgender-in-order-to-assault>> Accessed 4 May 2019.

⁴⁵ *Ibid.*

⁴⁶ Jasmine Andersson, 'What Does Genderfluid Mean and Is It Different to Non-Binary?' (*inews.co.uk*) <<https://inews.co.uk/inews-lifestyle/people/gender-fluid-what-mean-definition-non-binary-difference/>> Accessed 4 May 2019.

⁴⁷ Equality Act 2010.

⁴⁸ 'Women and Equalities Select Committee Inquiry on Transgender Equality' (*Stonewall*) <<https://www.stonewall.org.uk/women-and-equalities-select-committee-inquiry-transgender-equality>> Accessed 4 May 2019.

⁴⁹ Equality Act 2010: What Do I Need to Know? A Summary Guide to Your Rights (Government Equalities Office 2010) <<https://www.citizensadvice.org.uk/Documents/Advice%20booklets/equality-act-2010-overview.pdf>> Accessed 20 March 2019.

⁵⁰ See, n47 Equality Act.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ S.7 Equality Act 2010.

transitioning.⁵⁴ Rendering the protective measures to only be applicable for transsexual individuals.⁵⁵ Transsexuals form part of the transgender community, the differentiating feature is that these individuals are willing to undergo gender reassignment surgery.⁵⁶ Sex is also a protected characteristic, implying that legally acknowledged trans-women should be treated equally to that of a biological woman, especially when accessing services.⁵⁷ However, this is restricted, as the act allows for the exclusion of trans-individuals from single-sex spaces.⁵⁸ The act states that exclusions are justified if it is proportionate, and achieves a legitimate aim.⁵⁹ This invalidates trans-individual's identity, reminding them they do not have full 'woman' status, irrespective of whether they have undergone the clinical transition and legally recognised as that gender.⁶⁰ Despite this, the inclusion of transgender individuals is a step forward in protecting those on the gender spectrum. The Government acknowledged these inequalities within the proposal to reform the GRA 2004, stating they had 'no intention of amending the Equality Act 2010'.⁶¹

The regularity of inequalities within legislation and the rise in transphobic hate crimes⁶² has resulted in the Women's and Equalities Committee report 2015 (WECR) finding the Government to be failing the trans-community.⁶³ Despite numerous statutes being passed, they have either failed to be implemented or protects individuals on a conditional basis.⁶⁴ The report made over 30 recommendations,⁶⁵ which would provide equal rights to the trans-community whilst also including preventative measures to promote identity validation and

⁵⁴ See, n.47 Equality Act.

⁵⁵ 'Transsexual' (*TheFreeDictionary.com*)

<<https://medical-dictionary.thefreedictionary.com/transsexual>> Accessed 1 May 2019.

⁵⁶ Ibid.

⁵⁷ S.11 Equality Act 2010.

⁵⁸ S.28, Equality Act 2010.

⁵⁹ Ibid.

⁶⁰ See n.48 Stonewall.

⁶¹ 'Reform of The Gender Recognition Act - Government Consultation' (Minister for Women and Equalities 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf> Accessed 2 May 2019.

⁶² Nick Duffy, 'Anti-Transgender Hate Crimes Up by a Third in One Year' (PinkNews, 2018) <<https://www.pinknews.co.uk/2018/10/16/anti-transgender-hate-crime-reports-up-third-year/>> Accessed 5 May 2019.

⁶³ 'The Women and Equalities Committee, 'Transgender Equality' (The Stationery Office by Order of the House 2015).

⁶⁴ Ibid at 5.

⁶⁵ Ibid at 8.

stop discrimination.⁶⁶ One recommendation called for amendments to be made to the EA 2010, stating “...that the single-sex/separate services provision shall not apply in relation to discrimination against a person whose acquired gender has been recognised under the GRA 2004.”⁶⁷ This allows for trans-individuals to access to spaces that align with their affirmed gender, if they are legally recognised as the gender to which they claim membership.⁶⁸ The Government responded stating:

“We agree with the principle of this recommendation, that those who sought and have completed a gender transition – and who have secured a Gender Recognition Certificate – should be afforded the full legal and social status of their acquired gender.”⁶⁹

Despite this agreement the GRA 2004 and EA 2010 have yet to be amended. The report also recommends mandatory training for police officers on transphobic hate crime. This would allow officers to respond more efficiently to transphobic behaviours.⁷⁰ A recommendation was also made to further add to the reforms of the GRA 2004, by reducing the age for applicants from 18 to 16 without parental consent, this would allow further inclusion of trans-individuals regardless of age.⁷¹ However, a study by Madeleine S.C. Wallien found that most children with GD will not remain gender dysphoric after puberty.⁷² This poses the issue as to whether 16 year olds who are not allowed to make important decisions by voting should be allowed to rewrite essential documents and identify as their new gender.⁷³

To conclude, the transgender community is susceptible to numerous mental health issues along with a multitude of detrimental factors which renders them vulnerable.⁷⁴ Implementing preventative measures similar to the NYC guidelines in order to discourage discrimination against the trans-community can only be beneficial. Due to its ability to render trans-oriented

⁶⁶ Ibid at 6.

⁶⁷ Ibid at 27.

⁶⁸ Ibid at 28.

⁶⁹ Ibid at 31.

⁷⁰ Ibid

⁷¹ Ibid

⁷² Madeleine Wallien and Peggy Cohen-Kettenis, 'Psychosexual Outcome of Gender-Dysphoric Children' (2008) *JAACAP* 47, 1413.

⁷³ Tina Daeley and Dr Jan Eichhorn, 'Are You Old Enough to Vote At 16?' (*BBC Guides*) <<http://www.bbc.co.uk/guides/zsbtbk7>> Accessed 6 May 2019.

⁷⁴ See, n.14 Mordaunt.

discrimination unlawful, promoting the ideology that all are equal irrespective of sexual identity.⁷⁵ Imposing repercussions on those who intentionally discriminate or misgender acts as a deterrent, simultaneously reducing the frequency of transphobic behaviour. A way in which these guidelines could become part of UK Law would be to make gender identity a protected characteristic under the EA 2010. The suggested reforms to the GRA 2004 by shortening the recognition process would allow for a 'fast track' element, which would in turn save costs on medical assessments, whilst simultaneously validating the trans-community and highlighting their years of campaigning for equality and fairness. However, the counter argument regarding the assessment developing into a process which is minimal and unquestionable may result in individuals regardless of criminal record or legitimacy being able to hold ownership of a gender recognition certificate and gain unregulated access to vulnerable individuals.⁷⁶

The UK has implemented legislation that provides a degree of coverage that must be earned by meeting specific requirements and can be removed if deemed appropriate. This has resulted in the rights tailed to trans-individuals being conditional. Imposing the suggested reforms within the WECR will allow for trans-individuals to gain some credibility as the gender to which they claim membership to.⁷⁷ Both the WECR and the 2021 census topic consultation identified a lack of quality statistical data regarding gender identity, collecting data would contribute to bringing forth change with are equal and fair.⁷⁸ The UK has a basic starting point in maintaining equality and fairness for the transgender community. However, only with reforms that are implemented within a reasonable time frame and a less lacklustre approach to transgender discrimination can those who are transgender be given equal treatment. The reason for the delays can be presumed to be as a result of Brexit dominating the political

⁷⁵ See, n.17 NYC Commission.

⁷⁶ Alexandra Topping, 'Sexual Assaults in Women's Prison Reignite Debate Over Transgender Inmates' (*the Guardian*, 2018) <<https://www.theguardian.com/uk-news/2018/sep/09/sexual-assaults-in-womens-prison-reignite-debate-over-transgender-inmates-karen-white>> Accessed 2 May 2019.

⁷⁷ See, n.63 Trans Equality.

⁷⁸ 'Gender Identity Update - Office for National Statistics' (*Ons.gov.uk*) <<https://www.ons.gov.uk/methodology/classificationsandstandards/measuringequality/genderidentity/genderidentityupdate>> accessed 6 May 2019; Trans Equality (n63)

world, and the British governments approach to implementing past trans legislation in a timely manner.⁷⁹

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⁷⁹ 'Brexit Bills at Heart of Queen's Speech' (*BBC News*, 2017) <<https://www.bbc.co.uk/news/uk-politics-40345280>> Accessed 4 May 2019.