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Gender Dysphoria: A clinical and legal overview - A report of proceedings at The Royal College of Physicians, on 28 November 2018

By Lois Rogers for WPA Protocol Plc

Event: This event was organised by WPA Protocol Plc, one of the UK's leading corporate healthcare trust providers.

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Advice: Specialist legal advice should be sought if a company is contemplating evolving their healthcare benefits into this area.

- **Demand for gender reassignment surgery rising by 15% a year.**
- **An estimated 3,500 people a year coming forward for treatment out of an estimated 200,000 to 500,000 transsexual people nationwide[1].**
- **Recognition of this previously hidden group is expected to have profound social consequences.**
- **Lloyds Bank, Goldman Sachs and Netflix are leaders in offering gender reassignment treatment as a healthcare benefit to workers.**
- **More employers expected to join these companies at the vanguard of this social change.**
- **Other organisations could come under pressure to add the treatment to employee healthcare benefits.**
- **Companies should take expert advice and tread carefully in this new era of equality of healthcare provision.**
- **Generous offers to cover cosmetic secondary surgery for transgender people could create a legal minefield if the same offer is not available to other employees.**
- **Gender reassignment treatment can cost up to £100,000.**
- **Studies showing improved well-being, productivity and career progression post gender reassignment, may well justify costs of treatment.**

Clinical Overview

One of the UK's leading gender surgeons based at London's Charing Cross Hospital, gave the audience a graphic presentation on how surgery can transform a man's genitals into those of a woman; and the even more complex plastic surgery procedures involved in created male genitals for a person who grew up as a woman.

Treatment to change gender is protracted and extremely painful both physically and psychologically. It requires commitment and determination that non transsexuals are unlikely to understand.

The condition known as gender dysphoria is defined as profound unhappiness or dissatisfaction with one's birth assigned gender, leading to the feeling that the genitalia and secondary sexual characteristics are somehow very wrong.

It is now fully accepted that gender identity is distinct from the genitals and cannot be imposed. A graphic example is that of the Canadian baby boy David Reimer, renamed Brenda and brought up as a girl after a botched circumcision removed his penis. Aged 15, he learned he was actually a male but although he underwent surgery to restore his penis he committed suicide in 2004.

Incidence of gender dysphoria is anything between one in 100,000 and one in 60,000.

It is not a lifestyle choice and occurs across all populations of the world.

Latest studies indicate the condition can be identified from differences in the brains of affected individuals.

Functional MRI and PET scanning has shown that gender-linked brain structures known as the sexual dimorphic nuclei are more likely to match the non-biological gender in transsexuals.

David Reimer's death was not an isolated tragedy. The condition causes life-threatening distress and disability. An estimated 20% of affected people commit suicide.

Recognition and acceptance of the problem and the increasing availability of specialist

ABOUT THE AUTHOR

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surgery has however, led to a huge increase in the number seeking gender reassignment.

Numbers have risen from a tiny handful to several thousands a year. A new vocabulary has sprung up around this. The Latin prefix 'cis' is now used to distinguish those whose gender identity matches the sex assigned to them at birth, from 'trans' people who suffer this gender dysphoria.

The surgeon is part of a small group of 13 senior doctors who have set up the British Association of Gender Identity Specialists (BAGIS). They hope that within five years doctors operating in the field will be appropriately assessed and accredited.

Until then he said, there will be a continuing problem of rogue doctors willing to 'assess' people who may have all sorts of other psychological problems and offer inappropriate or dangerous surgery.

He outlined the multiple processes involved in gender reassignment treatment provided by the NHS, starting with a GP visit. An enlightened GP should after full discussion, refer the patient to a gender identity clinic. Waiting times may run to many months. The patient then embarks on 'supervised social transition.' This involves breaking the news of their decision to their employer, and beginning to live and work in their new identity, including a deed poll name change, new bank accounts and driving licence.

Gender reassignment candidates have to live and dress as a member of the opposite sex for a minimum of three months before they start hormone therapy which involves treatment to suppress production of their natural hormones. They receive testosterone injections if they are transitioning to a male identity. Oestrogen tablets, or gels absorbed through the skin are given to transitioning females.

These hormones cause sterility so people should be offered egg or sperm storage. BAGIS is taking the NHS to court to demand this service is funded.

Testosterone will trigger limited outward growth of the clitoris, production of male pattern body hair and muscle development. Oestrogen conversely stimulates some female pattern fat development and limited breast growth.

Despite the considerable pain and suffering involved, many patients then opt for major genital surgery which they are allowed to request after 18 months of hormone treatment.

The operation to fashion a penis involves removing a thick rectangular section of skin and underlying tissue from the forearm. This tissue is then stitched into a tube and attached to the pelvis incorporating the clitoris. The vagina, ovaries and uterus are removed. Spare skin from the vulva may be used to fashion a scrotum including artificial testicles. The possibility of an erection can be offered by the insertion of tiny tubes either side of the penile shaft, which can be pumped full of saline solution from an implanted reservoir between the legs. A valve allows the user to deflate the penis and return the liquid to the reservoir. Repairing the large area of missing skin from the arm involves a major skin graft from the thigh or buttock.

The procedure which involves around three months off work, is far from risk free. There are complications in 85% of cases overall for penis construction, almost half involving urinary problems. The erection pumps also fail after a maximum of ten years and further surgery is needed to replace them.

For male to female transsexuals, the fashioning of a vagina is achieved by dissecting the penis and using the skin to create an internal tube, while again preserving the sensitive nervous tissue previously at the head of the penis, and reproducing it as a clitoris.

For women the complications are rectal fistulas in about one in 20 cases, where tissue breaks down between the new vagina and the rectum causing major infection issues. As soon as the surgical wounds have safely healed the new vagina has to be physically stretched three times a day. Even with the use of this regular process there is a risk of the artificial vagina beginning to close up.

Other sex change processes not covered by the NHS include body hair removal, surgery to tighten vocal cords and speech therapy to produce a more feminine voice; removal of a prominent Adam's apple, breast implants and surgery to soften jaw line, alter eyebrows, eye sockets and hair line.

Legal Overview

The daunting legal pitfalls around offering this drastic treatment through employee

healthcare schemes were addressed by Paul McAleavey, an employment law specialist from Girlings.

Mr McAleavey confirmed there is no formal requirement to offer any specific healthcare benefits through corporate healthcare schemes. Most policies only cover elective short-term treatment, but he said the issues of transsexual rights and gender reassignment will become increasingly important.

There are already around 5,000 individuals in the UK with Gender Recognition Certificates who have legally changed their sex - a tiny fraction of the government-estimated 200,000 to 500,000 transsexuals in the population.

More from this group are expected to seek fertility treatment; there is likely to be a widening definition of procedures seen to be part of gender reassignment, and more employers are likely to want to put themselves at the vanguard of social change by offering this treatment.

When employers are deciding what healthcare benefits to include or exclude they must ensure the access to and level of benefits could not be construed as causing any form of victimisation, harassment or direct or indirect discrimination.

Indirect discrimination might affect vulnerable people with protected characteristics defined by the Equality Act 2010. This protected group includes individuals before, during and after gender reassignment.

If an employer decides to offer treatment for gender reassignment, there are 10 core treatments offered by the NHS and a further seven non-core treatments that are not considered essential. The treatment for trans men of building a penis and creating male body characteristics, voice and mannerisms, can cost up to £100,000 compared to costs of £70,000 for male transitioning to female.

There is therefore a risk of discriminating against trans men compared with trans women if a healthcare scheme puts an identical financial cap on benefits.

Employers could also risk inadvertently discriminating against gender dysphoric employees by not considering and carefully aligning all benefits.

Counselling for example, is excluded from most healthcare plans but the NHS views it as a core part of the gender reassignment process and there may be a risk of latent indirect discrimination if it is not available.

Equally, offering egg and sperm storage or breast surgery to cis gender employees but excluding such treatments for trans employees would be likely to constitute direct discrimination because of gender reassignment, which cannot be legally justified.

The average length of tenure of any individual in a job is around five years but gender transitioning may take longer than that. Under the Equality Act 2010 former employees may still be able to bring discrimination claims against an ex-employer. Although there is no free-standing obligation for an employer to continue funding treatment, employers should think carefully about what happens with unfinished treatment when employment ends.

Company healthcare trust schemes commonly include an annual benefit limit or an overall maximum limit, but if an employer states they are not covering gender reassignment on the grounds of cost only that may also be seen as discriminatory. However if gender dysphoria treatment is not offered because it is outside the overall cost, nature and scope of the scheme then this is more likely to be legally justifiable.

The government recently launched a consultation on reform of the Gender Recognition Act 2004. It is yet to evaluate the responses, but the consultation could result in the process of changing gender to a less medicalised and more administrative process.

It is currently too early to predict the implications of these developments but they are expected to have profound social consequences.

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf