

# Women and Equalities Committee

## Oral evidence: Reform of the Gender Recognition Act, HC 129

Wednesday 16 June 2021

Ordered by the House of Commons to be published on 16 June 2021.

[Watch the meeting](#)

Members present: Caroline Nokes (Chair); Elliot Colburn; Philip Davies; Kim Johnson; Anne McLaughlin; Kate Osborne; Bell Ribeiro-Addy; Nicola Richards.

Questions 218 - 257

### Witnesses

I: Baroness Falkner of Margravine, Chair, Equality and Human Rights Commission; Melanie Field OBE, Executive Director for Policy, Strategy and Wales, Equality and Human Rights Commission.

II: Jo Churchill MP, Parliamentary Under Secretary, Department of Health and Social Care.



## Examination of witnesses

Witnesses: Baroness Falkner of Margravine and Melanie Field.

Q218 **Chair:** Good afternoon and welcome to this afternoon's evidence session of the Women and Equalities Select Committee. Before we start this afternoon's meeting, I consider it important to mark the five years today since Jo Cox, a sitting female Member of Parliament, was murdered as she was going about her work in her constituency. Women have the right to participate fully in politics and public life without fear of violence or intimidation. On behalf of colleagues, I want to pay tribute to Jo's life and the legacy she left behind her.

Today's session is the final evidence session of the Committee's inquiry into reform of the Gender Recognition Act. We have representatives from the Equality and Human Rights Commission on the first panel, and Minister Jo Churchill MP, from the Department of Health and Social Care, on the second panel. The Committee invited Kemi Badenoch, the Minister for Equalities, to give evidence. However, we were disappointed when she declined the Committee's invitation to talk on such an important piece of legislation.

I would like to start by asking both of our witnesses for the first panel to very briefly introduce themselves, for no more than a minute, before we move on to questions.

**Baroness Falkner of Margravine:** Hello. I am Kishwer Falkner and I am the chairwoman of the Equality and Human Rights Commission. I took up post on 1 December 2020.

**Melanie Field:** Hello. I am Melanie Field. I am the executive director of strategy, policy, legal and Wales at the Equality and Human Rights Commission.

Q219 **Chair:** Can I ask you both to respond in turn? I am very conscious that successive Equalities Ministers under Theresa May's Government were very committed to reform of the Gender Recognition Act and regarded it as a significant priority. Do you think that the commitment of the current Government to bring forward meaningful reforms matches the commitment that we saw from their predecessor?

**Baroness Falkner of Margravine:** Thank you for inviting us to the session. Before I directly answer that question, it is worth me setting out some context. The context is that, when we were invited to attend this Committee's inquiry, we made it clear that we had very little to say on the matter. The Government have indicated that they are not moving to change legislation, therefore nothing has changed and there is very little that we find we would wish to say on this. However, Madam Chair, you have insisted and therefore we sit before you.

I put those comments into context because I do not wish to appear at all unco-operative. One of the reasons that we did not wish to appear in



front of you in this inquiry is because we feel that a lot of the ground that you may wish to cover is ground better covered by Government than by a regulator, whose duty it is simply to enforce the law as we find it.

Having said that, I do not think I can really comment on my subjective views as to whether the previous Government were more enthusiastic or whether this Government are less enthusiastic. Ultimately, as everyone will recognise, the proof of a pudding is in its eating. I would leave it at that.

**Q220 Chair:** Following on from that, you did not want to appear, you did not want to give evidence and you do not feel that you have very much to say on this. Do you recognise the criticisms that have been levied by some in the sector who feel that the Equality and Human Rights Commission is failing to advocate on behalf of those with protected characteristics?

**Baroness Falkner of Margravine:** Across nine protected characteristics—

**Q221 Chair:** Specifically people who either are undergoing or wish to undergo gender reassignment.

**Baroness Falkner of Margravine:** It is tempting to give you the BBC-style response that we get criticised by other groups as well, for not doing enough to engage with their interests, in terms of a contested space, in terms of human rights and a balance of rights. Our job is to protect, promote and defend the rights of nine different protected characteristics. We try to do that without fear or favour, but we have a strategic plan. We are bound to deliver to that and we have a finite budget within which we are required to deliver for that.

We note some criticism from women's groups, as well as LGBTQ and trans groups. We note the criticism. In an open letter to the LGBT and trans groups that I think we published on 20 May—if that date is incorrect I can get you the correct date—we invited those groups to give us and direct us towards, for example, strategic litigation that might either illuminate discrimination for that group or illuminate a need for clarification of law for that group.

One of our strategic priorities is to become a more delivery-focused regulator. That involves probably undertaking more litigation and expending more resources in litigation. There are other measures, but it is only litigation, ultimately, that changes people's lives on the ground. We unequivocally reject those criticisms.

Our activities to date, if you are covering all protected characteristics, will demonstrate a huge litigation case file, with several inquiries into political parties and institutions like the BBC, into Government, public sector equality duty inquiries, for example, into the Home Office and Windrush. In terms of race, I could give you numerous examples. In terms of disability, I just met the Disability Minister this morning and he was



mindful of how much work we are doing in that area. In religion and belief, as you know, we have intervened in a case just recently.

I would like perhaps for you to be more specific about which particular area you think we are falling down on. Given a budget of £17 million, in fact with the spending review under consideration, we feel that we are an extraordinarily good delivery authority. That is what our strategic focus is: to change lives on the ground.

**Q222 Chair:** It would be fair to say that your objective to change lives on the ground is now not about advocacy but simply about regulation.

**Baroness Falkner of Margravine:** No, that is not the case, because our statute is very specific as to all the things we have to do, which include advising you in Parliament about deficiencies in Bills that have come before us. We have been heavily engaged, for example, just very recently, on the Domestic Abuse Bill. I use that as an example. It is to foster good relations. We do that actively.

Our mandatory responsibilities are to advise Government. We do that mandatorily. We engage across Government, as I have just mentioned. I met the Minister for Disabilities this morning. I met the Minister for Equalities yesterday. I am meeting you today. We appear before your Committee. It is my fourth appearance before your Committee in one guise or another, one a quarterly regular meeting with you, and I look forward to my next quarterly meeting with you next month. We have appeared in front of the Joint Committee on Human Rights. Melanie is giving evidence to a House of Lords committee tomorrow. If you want us to go through the full panoply of the work that we are doing, we could use up the whole hour to do that.

**Q223 Chair:** Which of those specific events do you regard as advocacy?

**Baroness Falkner of Margravine:** There are all the conversations we have with Ministers, our stakeholders, the groups with which we interact, dealing with complaints from stakeholders, dealing with the Scotland and Wales Governments as well, which I regularly interact with and meet. All those are places where we engage in public policy, legislation, future-proofing, levels of discrimination, where we think we need to be going and where we think there are problems. 100% of it could, in some way or another, fall within the ambit of advocacy.

**Q224 Chair:** Melanie, in your written response, you argued that a simplified system for obtaining legal recognition for trans people would be better at supporting them. Can you elaborate on exactly what you meant by "simplified"?

**Melanie Field:** We looked at the Government's proposals for reform and where there were proposals to remove what trans people had identified as barriers within the system. I think there is evidence from Government surveys that trans people felt that the process was overly bureaucratic



and expensive. This was a survey of trans people who had not applied for a GRC, or they felt that they did not meet the criteria.

We looked at the Government's proposals through the lens of the four principles that we set out in our consultation response, which were about removing unnecessary barriers, ensuring appropriate safeguards, removing the medicalisation of the process, in that that can encourage people to go down the route of medical interventions that may not be in their best interests, and ensuring that the rights of all affected by gender reassignment are protected.

As we know, following the consultation the Government decided not to proceed with reform, but they decided to digitise the process, which will help people access what are actually quite onerous paper-based forms, if you have a look at them online. They also reduced the fee to a nominal amount of £5 at the beginning of May, which we also welcomed.

Q225 **Chair:** Do you think digitisation and the reduction of the fee removes enough barriers?

**Baroness Falkner of Margravine:** It is a step on the way. One of the important things we need here is further evidence. That announcement is a recent one. It is a significant move, from a fee of £140 to £5. Digitisation itself may be hugely transformative. We have all seen from the period where we have started working virtually that it simplifies our lives to a great extent. The other important thing is concentration on improving access to health, clinics and information.

Q226 **Chair:** There are going to be questions about that later, so do not fret on that.

**Baroness Falkner of Margravine:** If I could finish that train of thought, we also believe that a reformed system should contain proportionate mechanisms to ensure the rights of all groups who may be affected by the changes and to ensure that all those are respected and protected.

Q227 **Chair:** There are two questions following on from that. You have described it as "a step on the way". What more steps would you like to see?

**Baroness Falkner of Margravine:** We would like legal clarification on some of the more difficult, more contested spaces. For example, if you wanted to go into the single-sex issue and our code of practice for service users, one of the things that comes to mind there is objective justification. How do you define that? There is quite a lot of work that we think needs clarification in terms of the legal interpretation, how the courts are going to move forward to interpret current law as it exists. We think that that is an important area where we need to gather more evidence.

Q228 **Chair:** When you, just a moment ago, referenced all those who are impacted by the GRA and the importance of protecting others with



protected characteristics, what is your view on spousal consent?

**Baroness Falkner of Margravine:** We wrote to you back on 27 November 2020. I think we indicated that we felt that we had moved in our approach. We think that this is potentially a barrier, so there is scope to amend the current position so as to provide for a full GRC to be issued in the circumstances where a spouse or civil partner has not formally lodged an objection, within a specified time period, to the legal relationship continuing on the issue of a full GRC.

We consider that removing the requirement for the spouse or civil partner's express consent would reduce the barriers to legal recognition facing some trans individuals whose husbands, wives or civil partners do not wish to actively sanction their legal transition. We think that this strikes the right balance between the trans person's rights and their spouse's rights, in terms of Articles 8 and 9 of the European Convention on Human Rights.

Q229 **Kim Johnson:** Good afternoon, panel. I have a couple of questions on the Government's response to the GRA consultation. Melanie, what is your view of the proposed changes announced by the GEO in its response to the Gender Recognition Act consultation? Do you personally think it goes far enough?

**Baroness Falkner of Margravine:** I should clarify for the purposes of the Committee—and this is a public hearing—that we do not share our personal views with the Committee. We share the policy views, as formulated by the executive lead and the board.

Q230 **Kim Johnson:** Thank you for clarifying. However, Melanie, I would still like to know whether the organisation thinks it has gone far enough.

**Melanie Field:** I probably covered this in what I said previously about the fact that we welcomed the changes that the Government announced, so the digitisation of the process and the reduction in the fee. Kishwer has just outlined a specific area where we think there is potentially scope for an additional barrier to be removed, so moving more to the Scottish model in relation to spousal consent. Given that the Government have said that they are not going to proceed with legislation at this stage, we would be looking to see what proposals the Government might put forward in the future and then respond to those.

Q231 **Kim Johnson:** Kishwer, do you have anything further to add from your previous comments?

**Baroness Falkner of Margravine:** No. I think I have covered where I want to go.

Q232 **Kim Johnson:** The GRA consultation highlighted that many GRC applicants felt that the process was dehumanising and bureaucratic. Does the Government's response to the consultation address this?



**Baroness Falkner of Margravine:** I will simply reiterate what I have said earlier, before engaging with that particular point about how people who responded to the Government's consultation felt. These are questions that you really need to be putting to Government and not to us. We are an arm's-length body. We are an independent regulator. It is not for us to comment, at this stage, in the absence of a process where the Government are now consulting on legislation or are doing pre-legislative scrutiny on amendments or are engaged in any sort of formal process to change legislation.

The Government have announced publicly that they do not believe that there is, at the moment, any justification for a change in legislation. We accept that. It is not our role to do any more than to advise Government on where we think there may be areas that practice, legislation or policy could be improved on.

You are quite right. In the Government's own consultation response, there were large numbers of trans people who felt—I think I have the figures here—dehumanised and harassed. I point you to the National LGBT Survey, which showed that 34% of people, for example, found the process too expensive. That is a third of people who should have that problem now addressed in a change from £140 to £5.

38% found the process too bureaucratic, so that is another third. The evidence may show, after a bit of time has passed, that digitisation has improved that process by making it less bureaucratic, although we think that there are other things that can be done there, which we have set out in the public domain, about the level of identification that you need to have presentable and so on.

Then there were 44% who simply thought that they did not satisfy the requirements for obtaining a gender recognition certificate. That is a matter of greater dissemination of information to those people about what the law is, what the process is and how they can do that.

**Q233 Kim Johnson:** Thank you for clarifying in terms of the point of the Government and your stance in terms of answering some of these questions. You might be able to answer my following two questions. Nearly two-thirds of respondents to the Government's consultation were against the requirement for a diagnosis of gender dysphoria to obtain a GRC. Why do you think that the Government chose not to address this in their proposed changes? Should they reconsider their position? Are we going back to "This is a Government question"? Are you able to respond in terms of your organisation?

**Baroness Falkner of Margravine:** Again, I cannot really go very much further in explaining the Government's position. As you know, in another capacity in life, I am a parliamentarian. I, for example, am curious as to why we do not have a social welfare Bill. I am curious as to why we do not have an employment Bill. I am curious as to why there is a lot of other legislation that does not appear in the Queen's Speech. Necessarily,



## HOUSE OF COMMONS

Covid has slowed all our abilities to deliver, including the EHRC and, I know, including Parliament.

Coming to your question about gender dysphoria, the WHO has, interestingly, moved that from its international classification of diseases, so that what it describes as gender incongruence is no longer classed under mental and behavioural disorders. It believes that gender incongruence rightly belongs in a newly created chapter on sexual health. We are not sure we quite understand where they are going with that, because we have not received enough information yet.

In terms of our own policy positions, as you know, we are only 11 years old at this point in time. In the 11 or 12 years of our existence, there are areas where there have been great shifts in changes to the levels of discrimination and the levels of protections that exist. We ourselves wish to continue to review our policy positions to keep them up to date, but particularly to keep them up to date in terms of unfolding legal clarifications. We keep a sharp eye on that. Should we find any litigation that we wish to take forward, we think that that would be the way to move forward to test some of these tricky issues.

On the whole, we are looking at where the WHO is going with that change in classification. We will be making our own mind up about that as we go forward. At the moment, our current policy is that we recommend to Government that they should not have that diagnosis.

Q234 **Kim Johnson:** Melanie, do you have anything further to add to Kishwer's response to that question?

**Melanie Field:** I would agree with Kishwer that it is for Government to determine their legislative programme. The changes that they have made following the consultation—the reduction of the fee and the digitisation of the process—did not require primary legislation. Those are both welcome.

Q235 **Kim Johnson:** You argue that further research and ongoing monitoring is required on self-identification. Does the EHRC or the GEO plan to conduct any research or monitoring in this area?

**Baroness Falkner of Margravine:** Sorry; I was speaking strictly to the gender dysphoria question.

**Kim Johnson:** Sorry; that second question was to Melanie, particularly around that point about self-identification.

**Melanie Field:** Sorry; I am not sure what you are referring to. In relation to non-binary gender identities, in our response to the Government's consultation we recommended that further understanding was needed before any legislation was brought forward in that area. Is that what you are referring to?

**Kim Johnson:** That was what I was referring to.



**Melanie Field:** At the commission, we are not planning to do any research on that at the moment, no.

Q236 **Kim Johnson:** Thanks for clarifying. My final question is to both of you. Last month, former members of the LGBT advisory panel told us that the Government have created a hostile environment towards LGBT people. Do you share these concerns? What discussion has the EHRC had with GEO Ministers about this?

**Baroness Falkner of Margravine:** I really do not think it is for me to comment on Government advisers and their views.

**Kim Johnson:** Thank you for your concise answer.

Q237 **Chair:** Kishwer, at various points in responding to Kim, you have indicated that she has asked questions that are for Government and not for the EHRC, but Government Ministers refused to attend this. When you are giving advice to Ministers, and undoubtedly you did this morning when you were speaking to the Equalities Minister, do you advise them to attend sessions like this?

**Baroness Falkner of Margravine:** This morning I met the Minister for Disabilities.

**Chair:** I thought you said you met the Minister for Equalities.

**Baroness Falkner of Margravine:** I met the Equality Minister yesterday.

Q238 **Chair:** Did you suggest then it would be a good idea to attend committee sessions?

**Baroness Falkner of Margravine:** We did not discuss this session. We had a wide-ranging agenda, but we mainly concentrated on the work programme going forward on the CRED report on race.

Q239 **Bell Ribeiro-Addy:** Thank you, panel. My first few questions are to both of you. The debate around changes to the GRA has been extremely polarised. Witnesses have told us that, although the EHRC has a duty to foster good relations, it has not opened up that space. How do you respond to this and what steps has the EHRC taken to encourage healthy discussion?

**Melanie Field:** In preparing our response to the Government's consultation, we held a number of roundtable conversations with various groups of stakeholders, during which they had the opportunity to express concerns or support for the proposals that the Government had on the table. Because of our role, there were particular concerns raised in relation to the interaction between the Government's proposals and the protections in the Equality Act. In those roundtables and subsequently, we have sought to clarify how the law works, in as far as it is clear, given the lack of case law in this area.



**Baroness Falkner of Margravine:** I wonder whether you might be able to repeat the question. I was listening so intently to Melanie that I forgot the question.

Q240 **Bell Ribeiro-Addy:** People have said that the EHRC has a duty to foster good relations but feel that it has not opened up the space in relation to all the changes in the GRA. What steps has the EHRC taken to encourage healthy discussion?

**Baroness Falkner of Margravine:** That is a really important and significant question. It is one that I mull over all the time, particularly when you have such heated, contested debate. I really believe in diversity of thought among groups, because it helps us arrive at better solutions. Here you have a space where there are two groups and the debate between them can no longer be described as a dialogue. The role of a third party to try to convene a dialogue only becomes valuable when there is some consensus on where the give might be. I cannot quite see, at this point in time, where the give would be.

At this point in time, we have defended the Authentic Equity Alliance's attempt in judicial review to prove that our code of practice was wrong. We have been found to have successfully defended our code of practice. It was not wrong. It was correct in terms of interpreting the law. Ultimately, to answer your question succinctly, as a convener, in fostering good relations between sides, there is nothing concrete that we can find between two sides, where we may be able to bring some light and offer some assistance, until the law itself is accepted, in terms of practice, as being the right mix.

It seems to us from the court cases going forward—these are the court cases being brought in Scotland as well as England—that the users, the service providers, do not yet understand our code of practice, our guidance and so on. All we can do is hope to reinforce where the law stands at the moment. There is not very much more we can do at this particular point in time.

Coming back to some of the earlier questions, Government could decide to clarify the law through bringing in amendments to any of the legislation that is extant. Indeed, one thing the Government could choose to do is post-legislative scrutiny of the two Acts to see if there are conflicts between them, but that is not really for us.

Q241 **Bell Ribeiro-Addy:** Do you both think the GEO has done enough to encourage healthy discussion itself? If it is not really something the EHRC has been able to do, do you think the GEO has?

**Baroness Falkner of Margravine:** That question is better addressed to the GEO, not because I am at all wishing to be disrespectful to you. It is simply because I have a pretty full-on time at the EHRC and have not noticed very much what the GEO has been doing in this space. We take our responsibilities very seriously and clearly. It hurts us to get the kinds



of letters that we get from both sides, because we try to address things in a proportionate and balanced manner and to speak up against wrongdoing wherever we find it.

I really am not across what GEO was doing. I was not expecting that question. I can find out what GEO has been doing and write to you, but I do not think it is going to illuminate very much more than what I am able to tell you. It is a question for the GEO itself.

**Q242 Bell Ribeiro-Addy:** Melanie, in your written response to the Government's GRA consultation, you state that proportionate mechanisms should be built into the system to ensure that the rights of all groups that may be affected by potential changes are respected and protected. Could I ask what those proportionate mechanisms should be?

**Melanie Field:** There are already examples of proportionate mechanisms built into the legislation. We have already talked about the requirement for spousal consent, where we reflected that there may be room for a slightly less onerous requirement. There is already a mechanism built into the Gender Recognition Act that protects the status of children in relation to their mother and father.

As with any legislation, our role in the Equality and Human Rights Commission is to ensure that legislation properly respects and balances the rights of different groups, as with the single-sex exceptions in the Equality Act, which allow for women-only spaces but also permit the exclusion of trans people where that is proportionate. It is thinking about where the law should strike the right balance between the rights of trans people and the rights of natal women, religious groups, for example, and children.

**Q243 Bell Ribeiro-Addy:** Kishwer, I wanted to come back to you about your recent interview with the *Times*. You are reported as having said that women must have the right to question transgender identity. I wondered if you could explain why.

**Baroness Falkner of Margravine:** It was in the context of the Maya Forstater case. Would you like me to move to that particular case?

**Bell Ribeiro-Addy:** Yes.

**Baroness Falkner of Margravine:** That was in the context of the Maya Forstater case, where we intervened in the protected characteristic area of religion and belief. Our submission to the employment appeal tribunal was clear that a person's religion and belief had to be distinguished from the method in which they expressed those beliefs.

We never have taken a view and we do not take a view on whether Ms Forstater's expression of her beliefs was correct or incorrect. We took a view that she has the right to believe. It was our firm legal view that she has the right to hold those beliefs, and the employment appeal tribunal has upheld our view.



Q244 **Bell Ribeiro-Addy:** From my understanding, the EHRC specifically intervened on her right to freedom of speech, stating that the law was misinterpreted. Could you explain why you think the law was misinterpreted and whether you think there should be further guidance?

**Baroness Falkner of Margravine:** Can I pass this one to Melanie? She was the person who wrote the submission on behalf of the EHRC.

**Melanie Field:** I did not write the submission but it was on my watch. We intervened on the question of the holding of a belief, not on freedom of expression. Our position was that her belief, as set out in her claim, was a belief that was protected under the religion or belief provisions of the Equality Act 2010 and Article 9 of the Human Rights Act. It was about the holding of a belief and whether that belief is a protected belief.

We believed that the employment tribunal that came to the initial judgment got the law wrong, in that it conflated the question of whether the belief itself was protected with whether the way the belief was expressed was reasonable. The original employment tribunal judge came to the view that the belief was not worthy of respect in a democratic society and based that view on the way the belief had been expressed, rather than on the nature of the belief itself. Those questions need to be addressed in law separately.

**Baroness Falkner of Margravine:** It is our mandate to defend the rights of individuals to hold beliefs. Freedom of thought, conscience and religion is a fundamental right in a democracy.

Q245 **Bell Ribeiro-Addy:** Yes, I definitely agree with that. Following on from that and carrying on with your interview, how do you propose protecting the rights of those with a protected characteristic of gender reassignment, while also allowing other groups to question their identity?

**Baroness Falkner of Margravine:** I am not quite sure that I understand the question, because that is what happens now. People have the right to hold a belief, to question whether natal men are men and natal women are women. They have the right to express that, within bounds, under our current laws. They do so and I am not quite sure where you are wanting to go with this.

Q246 **Bell Ribeiro-Addy:** I suppose it is about how we protect people in that case.

**Baroness Falkner of Margravine:** Do you mean how do we protect people who hold that belief?

Q247 **Bell Ribeiro-Addy:** No, how do we protect people with the characteristic of gender reassignment, if we are saying that people also have the right to question them in a way that is often discriminatory?

**Baroness Falkner of Margravine:** If it is discriminatory, that is very clear. Please direct those cases to us. We will take that up without fear or favour. If it is discriminatory and against the law as it stands in the



## HOUSE OF COMMONS

Equality Act, in terms of gender reassignment as a protected characteristic, that is fine. There is a distinction between acts that are illegal—take, for example, hate speech against trans people—and simply holding a belief.

You have commented on this before and naturally you would expect me to say that respectful holding of beliefs is always more desirable than disrespectful holding of beliefs. We all have to rub along with each other, irrespective of where we sit. You do that in Parliament every day. You are doing that in this Committee. You come from different beliefs and ideologies and you do that. If there was any unlawful conduct, we would absolutely wish to pick that up.

In our letter in response to the criticism that we faced from the LGB Alliance, we asked it to refer cases to us. We look to take forward strategic litigation in this area.<sup>1</sup>

**Q248 Bell Ribeiro-Addy:** Does questioning identity not verge on to questioning someone's right to exist as they are? In which case, does that not quite quickly go into discrimination? How is the EHRC defining where that falls?

**Baroness Falkner of Margravine:** One has to disaggregate your question to ask whether you are asking a legal question or simply a philosophical question. This is where the tricky part of it lies. There could be questioning of my identity. I have four protected characteristics: a Muslim woman, who is non-white, who is of a certain age. One can question any of those aspects: am I a practising Muslim? Am I not? You can question it. I do not think questioning it would break the law. It depends. There are lines in law and particularly in speech law where you enter an arena of what is unlawful and what is lawful. We all have to live within the law as we find it.

**Q249 Bell Ribeiro-Addy:** Where I am getting to is how you can ensure that freedom of belief does not lead to negative outcomes for those who have had gender reassignment. How do you draw that line? Where do we draw this line?

**Baroness Falkner of Margravine:** These are very loaded and subjective terms. On "negative outcomes", we all have different interpretations of what negative outcomes are. Something that may be egregious in terms of its negativeness to one person may not be so to another. These are all the challenges that freedom of belief and freedom of speech proponents deal and grapple with every day.

I was not going to bring in personal beliefs, but I speak for EHRC when I say that we believe freedom of speech is an important facet of a healthy, vibrant democracy. It seems to me that the curtailments of freedom of

---

<sup>1</sup> The letter mentioned by Baroness Kishwer Falkner refers to the EHRC's response to an open letter from the LGBT Consortium. The EHRC's response to that letter was published on the EHRC's website on 28<sup>th</sup> May 2021



speech is where you are wanting to go. I may be wrong, but it seems to me that you are pushing me in that direction. Curtailments of freedom of speech need to be extremely carefully thought through and considered. Democracy, of itself, is enormously diminished if you start diminishing freedom of speech.

Q250 **Bell Ribeiro-Addy:** Absolutely, I agree with you on that. I suppose it was always my understanding—do state whether this is the EHRC’s position—that the right to complete freedom of speech is curtailed at the point where you challenge someone’s right to exist as they are, freely and without harm from said speech.

**Baroness Falkner of Margravine:** My interpretation of the EHRC position and the board, for whom I speak today to you, is that we apply the law as we find it. We have vigorous protections in the United Kingdom in terms of non-discrimination and equality. We will be fearless in applying them anywhere where we find any form of discrimination.

Q251 **Bell Ribeiro-Addy:** Finally, on the interview overall, witnesses have described the existence of persistent anti-trans narratives. They have said that trans people do not feel as though the commission is standing up for them. Given what they have said, what impact do you think the interview—I know you have explained the context of it—would have had on trans stakeholders?

**Baroness Falkner of Margravine:** I find myself at a loss to give you a thoughtful answer to this question. I gave a recent interview on Radio 4, I think it was last Friday, on the Forstater case. Certainly from what I saw, one of the most widely quoted things that I said that was circulating on social media was that the Forstater case should not be taken as licence to discriminate against or harass trans people. This case is not about people feeling free that they can do that. To be fair to Maya Forstater, I read an article by her where she herself has said that, so I do not think there is very much dispute.

I am afraid I do not know where the Committee is coming from in this, in terms of trying to find cleavages where I do not think cleavages exist. Maybe I have not seen as much media, although I have looked at media quite carefully, but I have not come across very much media where an awful lot of people are saying, “Hurrah, we can go out and bash trans people now on the back of this court ruling”. In fact, Justice Choudhury himself, the judge, emphasised that this should not be taken as a ruling that addressed trans people’s rights not to be discriminated against.

Q252 **Elliot Colburn:** Thank you very much, panel. Baroness Falkner, could I take you back to one of your earlier answers to Bell? It might have been Melanie. Forgive me; I forget who mentioned this. You mentioned that the GEO may want to do post-legislative scrutiny of the Equality Act and the Gender Recognition Act. Would it not be appropriate, or even advisable, for the EHRC to recommend that to the GEO, in your capacity as a regulator?



**Baroness Falkner of Margravine:** It was probably me. Melanie, feel free to come in here as soon as I have completed. It was just one idea. If people believe that there are potential embedded conflicts in this area, one way of looking at it would be to do that. It is one avenue, but there are other avenues. As I understand it, the Secretary of State, in giving evidence to you, I think only a few weeks ago, has said that she is content that the law works and that there is no need for any changes to the law. It is for her to determine whether there are changes to the law.

At this point in the Government's legislative timetable, from what we understand, it is a fairly busy legislative timetable, so it is not a matter of our belief, picking up on the belief issues that we seem to be spending an awful lot of time on. It is our view that the Government seem to have a fairly heavy legislative agenda. We have invested a lot of time on the Domestic Abuse Bill. We are very interested in the impact of the online harms Bill and other legislation coming forward that we think will engage equality and human rights, in terms of the current Queen's Speech agenda. That is where our focus is going to be at the moment.

Of course, these are open discussions and we continue to keep a watching brief on this. I would like to say to you that the important thing is to see where the courts are going in this regard. There is not sufficient case law. The practice of the providers of spaces is not clear enough yet. This is the area where our efforts will be concentrated as we go forward.

Q253 **Elliot Colburn:** You have pre-empted where I planned to go, which is fantastic. This section of the questions is not necessarily about beliefs. It is about the interaction of the Equality Act and the Gender Recognition Act. Judging from the evidence we have received so far throughout the course of this inquiry, that seems to have been the cause of confusion and the basis for a lot of media speculation and stories. This is what it comes down to, when stories come out about things such as bathrooms, sports, or prisons et cetera. It seems to come down to the interaction of these two Acts. This is where there has been a lot of confusion and criticism.

Based on that evidence and that concern about the interaction between the two Acts and the application of the Equality Act exemptions, do you believe there are problems? Starting off with a very basic question, does the EHRC take a view that there are problems in the interaction between these two Acts? In which case, if the EHRC's position is that it does, does the EHRC try to address that itself? Does it make recommendations to Government on how to do so? How does it take that forward?

**Baroness Falkner of Margravine:** The interaction between the GRA and the Equality Act 2010 is complex. We know that. It has implications for how the protections on the basis of sex and gender reassignment work in practice. I think in practice is where you are coming from, in terms of the reference in the question. Of course, concerns have been raised that removing barriers to acquiring legal gender recognition could



## HOUSE OF COMMONS

affect women-only spaces and services provided under the single sex and separate sex provisions in the Equality Act.

One can take a narrow, legalistic view of this. If you want to do that, you can say that reform of the GRA does not erode the special status of these important services and facilities. The exemptions in the Equality Act allow service providers to provide single-sex and separate-sex services where it is justified.

This is the crunch expression, “where it is justified”—objective justification. Your question has such acuity because the practice seems to demonstrate that institutions are overinterpreting the law in terms of the need to provide trans-inclusive spaces. From what we can see in the plethora of court cases, they seem to not be reading the bit in our code of practice on objective justification and the ability to provide trans-exclusionary spaces where there is objective justification to do so. The level of clarity that we can provide is within the limitation of the legislation. All we can do is to read the legislation and interpret it for service providers.

The philosophical angle of your point is actually the very important part. That is a conflict of rights. When you have nine protected characteristics, you inevitably get a conflict of rights. That point of the conflict of women’s rights versus trans rights and, in some cases, trans-identifying people’s rights is extant. It is there. We pick up a newspaper and read about it every day. That is why we are seeing these legal challenges coming through.

That is the context in which I prefaced my earlier remarks to say that the Government may wish to consider whether building up case law is adequate, which is my understanding is of Secretary of State Truss’s views, or whether they seek to rethink the law. Conflict of rights is where the discussions are. In human rights law, it is becoming clearer that conflicts of rights where one tips the balance in favour of one group against another must be proportionate.

**Q254 Elliot Colburn:** You have prefaced quite a few of my upcoming questions, so we have covered quite a lot off in one go, so thank you for being succinct. Melanie, before I move on, was there anything that you wanted to add?

**Melanie Field:** No, Kishwer covered it more than adequately.

**Q255 Elliot Colburn:** Sticking with this theme of guidance and interpretations of the Equality Act exemptions, one of the criticisms that we have received from Karon Monaghan QC, for example, was that there was no guidance indicating when it is likely to be lawful to exclude trans people. Why has that guidance not been produced? Is it something that the EHRC would consider producing?

**Melanie Field:** As Kishwer explained in her previous answer, this comes down to the question of whether excluding a trans person or treating a



trans person differently in relation to single-sex services is objectively justified. That is a legal test. It is a legal test that is used elsewhere in discrimination law. In other areas, there is case law to suggest the kinds of factors that a decision-maker should take into account when deciding whether something is objectively justified.

The issue with providing guidance on concepts like reasonableness and objective justification is that they are very fact or situation-specific. Guidance can only point to factors and the way that you could weigh those up. Our existing codes of practice and guidance look at factors that have arisen in case law that give us pointers about objective justification. None of those cases related to this specific question, as far as I am aware, so there is very little case law on the concept of objective justification in relation to this particular question. We can only look at general principles when giving guidance.

**Q256 Elliot Colburn:** In relation to the regulation of these exemptions, you have both mentioned quite a lot about case law. Does the EHRC have a role, as a regulator, to regulate these exemptions? Can businesses, Government, public sector bodies and private sector bodies come to the EHRC to help in their understanding of these exemptions? Is it only case law that people can refer to when they have a dispute about the application of these exemptions?

**Baroness Falkner of Margravine:** I am a little conscious of time. My straight answer would be that yes, they can come. Melanie, you can briefly say anything else you want to say. Yes, of course, that is what we are there for. That is exactly the kind of regulator that I would wish for us to be. If you do not understand, we are the point that you should be coming to to find out what the law actually says.

**Melanie Field:** The only thing that I would add to that is that of course we are not an adjudicator of disputes. We can give a view on whether we think something is likely to be lawful, but, at the end of the day, if someone feels they have been discriminated against and takes the case to a court or tribunal, that is for the court or tribunal to judge. As I said in my previous answer, we are giving guidance in the context that there is not very much case law that enables us to be very definite about specific situations and what would or would not be lawful in this particular circumstance.

**Baroness Falkner of Margravine:** Of course, every specific case is different. It is really important to recognise that. That is why I have kept emphasising strategic litigation. We look for strategic litigation, sectoral litigation, litigation where the question is answered for several bodies or users, with larger numbers.

**Q257 Elliot Colburn:** I am conscious of time, so I just have one final question and we will conclude. We were also told in the evidence that we have received that the statutory code of practice produced by the EHRC is "confused about what the purpose or effect of a gender recognition



## HOUSE OF COMMONS

certificate is". I wondered if you had a response to that.

**Baroness Falkner of Margravine:** Can I bat this to Melanie? I am not clear about which particular piece of guidance, but I think Melanie would have greater expertise in this regard.

**Melanie Field:** I am not sure which particular code of practice. I assume it is the services code of practice that is being referred to. We are absolutely clear that the exception that enables a single-sex service to exclude a trans person on the basis of gender reassignment is not predicated on whether a trans person has a gender recognition certificate. A trans person can only be excluded on the basis of gender reassignment where it is proportionate to do so, whether or not they have a gender recognition certificate.

The gender recognition certificate is relevant in relation to the sex of a person. That is a separate protected characteristic. Our view is that, regardless of whether you were excluding a transwoman who was legally female or a transwoman who was legally male from a women's service, you would need to objectively justify that exclusion.

**Chair:** That concludes our first panel. Can I thank the witnesses for their time this afternoon? I hope we have not delayed you too much, Kishwer. Thank you.