

Il faut répéter ici ce que Locke a tant recommandé, définissez les termes.

Voltaire — *Dictionnaire philosophique*: A comme abus des mots

Summary

- A. The definition of terms around sex and gender are widely misunderstood and misrepresented. The government or the Equality and Human Rights Commission (EHRC) must urgently clarify them.**
- B. Equality monitoring is frequently not fit for purpose and the government or the EHRC must issue guidance on how to effectively and lawfully gather Equality Act 2010 equality monitoring data.**
- C. The single-sex exemptions in the Equality Act are misunderstood by many and open to abuse. The government or the EHRC must issue guidance on the operation of the single-sex exemptions so that organisations know how to apply and enforce them to fully protect women and girls.**
- D. The government must ensure that the rights, safety, wellbeing and dignity of women and girls are at the heart of any proposals to change to the Gender Recognition Act or the Equality Act.**

Introduction

1. Legislation is reasonably clear on the meaning of many terms, but those opposed to equality legislation or who seek to have it changed to suit their demands or who wish to misrepresent what it actually says frequently seek to confuse organisations and others about meanings. They seek to obscure precise meanings already given to some terms by inculcating terms with ideological alternative meanings. These simply confuse and obfuscate and do nothing to enhance clarity. Such moves must be resisted if we are all to properly understand rights and responsibilities.
2. For example, the term 'gender' is frequently used as a more genteel synonym for sex. However, the Equality Act 2010 ("the Act") is quite clear that sex relates solely to the immutable biological characteristic of female and male and not, say, to how one feels, identifies, behaves or presents. Whether an individual is female or male depends on the gametes her/his body is structured to produce — and we are all either female or male, even those with an intersex condition.
3. 'Gender', on the other hand, has no such definition (in legislation or otherwise) and can be interpreted in a myriad of different ways, all of which are nebulous and ephemeral and incapable of independent, subjective description or verification.
4. The same problems arise with such terms as 'non-binary' and 'gender-fluid'.
5. The poor definition and understanding of terms lies at the heart of many of the problems with the discussion of rights and responsibilities. This includes the use of terms for the protected characteristics under the Act that are not defined or even used in the Act.

Equality monitoring

6. I have been investigating the use of the various terms used in the recruitment monitoring forms used by companies, organisations, charities, public authorities, etc and I have documented over **230 examples** of these highlighting the issues to the organisations on Twitter. These are published on my website at <https://www.sexnotgender.info/>.¹
7. I chose recruitment equality monitoring forms because they give a public indication of an organisation's understanding of the Act, their attitude and willingness to ensure prospective employees are made aware of their rights and their awareness of their responsibilities and commitment to upholding them.
8. Very few of the organisations have responded.
9. In pointing out the issues I have found, it is hoped that organisations will carefully look at not only their recruitment equality monitoring but also their internal monitoring, their equality policies, reports, etc to make sure they are fully compliant and represent best practice and fit for the purpose for which they are intended.
10. In compiling this list and analysing their monitoring forms, I have been hampered by the lack of authoritative guidance on equality monitoring. I had expected the Equality and Human Rights Commission (EHRC) to be at the forefront here but the advice they do publish is scant and inadequate.² I first engaged with the EHRC on this in November 2019 and I am still waiting for answers to the questions I raised.³ Promised guidance has yet to be published.
11. In summary, most organisations on my list ask for the 'gender' of the applicant (sometimes with a bewildering array of options) instead of asking for her/his sex. I have highlighted some particular bad examples, including by the Equality and Human Rights Commission themselves (ironically taken from the candidate pack for the recent vacancy for Chair, filled by Baroness Falkner of Margravine) and the Information Commissioner's Office.⁴
12. Additionally, out of a total of 44 ministerial and non-ministerial government departments, 35 were advertising jobs in October 2020: all 35 asked for 'gender' but not one asked for the sex of the applicant.⁵ Not one mentioned the Equality Act as the reason for asking for equality information.
13. Also, very few asked about the protected characteristic of gender reassignment, presumably on the false assumption that this was covered by asking for 'gender'. However, the vast majority of those asking for 'gender' included the two sexes — female and male — so, at best, they have conflated the two entirely separate protected characteristics, thus collecting reliable data on neither.
14. If an organisation chooses not to gather data on specific protected characteristics (such as sex), it cannot have the information required to ascertain whether or not it could be discriminating on protected characteristics in recruitment. This could be vital in an employment tribunal.
15. If it chooses to discriminate on characteristics (such as 'gender') that are not protected characteristics under the Act, it may inadvertently indirectly discriminate on protected grounds.

¹ 'The List | Sex. Not Gender.', 16 October 2020, <https://www.sexnotgender.info/equality-monitoring/the-list/>.

² 'Good Equality Practice for Employers: Equality Policies, Equality Training and Monitoring | Equality and Human Rights Commission', accessed 18 February 2020, <https://www.equalityhumanrights.com/en/publication-download/good-equality-practice-employers-equality-policies-equality-training-and>.

³ 'Equality and Human Rights Commission | Sex. Not Gender.', 18 October 2020, <https://www.sexnotgender.info/equality-monitoring/equality-and-human-rights-commission/>.

⁴ 'Bad Practice | Sex. Not Gender.', 20 September 2020, <https://www.sexnotgender.info/equality-monitoring/bad-practice/>.

⁵ 'Government | Sex. Not Gender.', 23 October 2020, <https://www.sexnotgender.info/equality-monitoring/government/>.

16. Given these errors and use of incorrect terms, it's not clear how a public authority can meet its Public Sector Equality Duty or how it has met it in the past given the data could have been corrupted by those who didn't provide their sex.
17. Nor is it clear how it can have had due regard to the other duties given the data it has collected.
18. There is a particular issue where an employer would accept someone who 'identifies' as female for a position that requires someone who is female. Many employers seem confused as to whether someone who says they are transgender (whether within or otherwise of the definition of the protected characteristic of gender reassignment), 'non-binary', 'gender-fluid', etc or who holds a Gender Recognition Certificate should be considered female for these purposes. This confusion must be clarified by new, authoritative and unequivocal guidance, particularly on s.27 of the Act relating to the understanding of 'proportionate means of achieving a legitimate aim'.⁶
19. If an organisation does not have the correct understanding of the protected characteristic of sex, it cannot properly apply the single-sex exemption of s.27 of the Act, potentially making unlawful any attempt to apply it. This could result in someone who is male being appointed to a position that requires someone who is female.
20. Similar concerns must also be raised about positive action measures of s.158 and s.159 of the Act.
21. Language and the meaning of words are important and proper use and understanding of terms is vital so that the public is aware of what rights they have and what an organisation's duties are. Any confusion or inconsistency over meaning may prevent people from accessing their rights in law.
22. It is also of concern that if an organisation is collecting personal information for equality monitoring purposes but in fact collects data on personal characteristics that are not protected characteristics, they may be collecting and processing personal information without having established a lawful basis under the General Data Protection Regulation.⁷ Again, promised EHRC/ICO guidance has yet to be published.⁸

⁶ Author Jane Anger, 'TRANSGENDER LAW IN PRACTICE?', accessed 17 October 2020, <https://legalfeminist.org.uk/2020/10/16/transgender-law-in-practice/>.

⁷ 'Lawful Basis for Processing' (ICO, 5 November 2020), <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>.

⁸ 'Equality and Human Rights Commission | Sex. Not Gender.'

Questions

23. This submission follows the Act and biology in its definition of sex, male, female, man and woman, boy and girl and would I further refer the Select Committee to the definitions in Griffin (2020).⁹
24. I respond to selected questions below.

Will the Government's proposed changes meet its aim of making the process "kinder and more straight forward"?

What impact will these proposed changes have on those people applying for a Gender Recognition Certificate, and on trans people more generally?

25. I will respond to these two questions together.
26. The Government's changes simplify the process and make it even easier to apply for and obtain a GRC and helps further by reducing the cost, resulting in a kinder and more straightforward process, thus achieving its aim.

Should a fee for obtaining a Gender Recognition Certificate be removed or retained? Are there other financial burdens on applicants that could be removed or retained?

27. Noting that the fee for obtaining citizenship (which is in many ways analogous to the GRC process) is well over £1,000 (and that a TV licence costs £157.50 per annum), the current GRC fee of no more than £140 (most pay significantly less) seems extraordinarily low. It seems unlikely that the current fee recovers all the costs of administering the scheme, including the costs of processing the submission, the costs of the Gender Recognition Panels, the Registrar's costs of processing and issuing new birth certificates and the maintenance of the Gender Recognition Register. It is likely, therefore, that it is already a burden on the taxpayer and no cogent reason for reducing or removing the fee.

Should the requirement for a diagnosis of gender dysphoria be removed?

28. No. See also paragraphs 30 to 41 below.

Should there be changes to the requirement for individuals to have lived in their acquired gender for at least two years?

29. No. See also paragraphs 30 to 41 below.

What is your view of the statutory declaration and should any changes have been made to it?

30. The following paragraphs also address the previous two questions.
31. It is not clear what value the statutory declaration gives to the GRC process. The applicant must declare that she/he meets the conditions in section 2(1)(b) and (c) of the GRA:

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

(c) intends to continue to live in the acquired gender until death,

⁹ Lucy Griffin et al., 'Sex, Gender and Gender Identity: A Re-Evaluation of the Evidence', *BJPsych Bulletin*, undefined/ed, 1–9, <https://doi.org/10.1192/bjb.2020.73>.

32. The requirement of (b) is simply met by the production of evidence the applicant had, for example, been using a name stereotypically associated with the other sex for two or more years previously. The Gender Recognition Panel (GRP) accepts this as evidence that the applicant 'has lived in the acquired gender' for the duration. This places a very low bar on the meaning of 'living in the acquired gender'.
33. For (c), the applicant has to make a statutory declaration that she/he intends to continue to 'live in the acquired gender'. If all that is required for past compliance is a name change, it is assumed this is all an applicant is required to have in mind and to commit to continuing when declaring she/he will continue to 'live in the acquired gender until death': that is, to continue to use the same name she/he has been using for the previous two years. This is a superficial requirement at best.
34. However, the assumption underpinning 'acquired gender' is that the applicant, on receipt of a GRC, is (for some purposes only) henceforth of the other sex. But if that is to have any meaning — however superficial — it must surely mean refraining from doing things that are either stereotypically associated with the applicant's sex or can only be performed by her/his sex, as opposed to her/his 'acquired gender'.
35. It is a matter of court record that an individual (who is now a mother) stopped taking testosterone in September 2016, applied for a GRC in January 2017, was granted a GRC in April 2017 and started fertility treatment just ten days later to become pregnant.¹⁰ Pregnancy is *the* most defining act of being female yet this individual, after having made a statutory declaration for the GRC application that she 'intends to continue to live in the acquired gender [ie 'male'] until death', took that course. This individual has not been prosecuted of any breach of that statutory declaration.
36. The only conclusions from this are that either there is no defining characteristic of male or female and 'living in the acquired gender' that can be identified or that the statutory declaration is meaningless, unenforced and unenforceable.
37. Paragraph 71 of the Government's 2018 GRA consultation document states:

Having a statutory declaration would reflect the important legal consequences of gender recognition. It provides a level of certification that the application is genuine and it acts as a safeguard with legal penalties if the system is abused.
38. A similar view was taken by proponents of the proposed changes to the GRA: that a statutory declaration —and the penalties for breaching it — is a more than sufficient safeguard to prevent those with malign intentions from applying for a GRC; that it is sufficient to discriminate a 'genuine applicant' from one that is not genuine.
39. History shows only too well the lengths to which some men are willing to go to gain access to potential victims. A small sum of money or lying in a statutory declaration will not ever deter some men. One doesn't have to look far to find men who have taken up particular careers just to gain access to women and children. As transwoman, Dr Debbie Hayton, has said:

*Abusers will take opportunities wherever safeguarding is weakest.*¹¹
40. So, even though the current use of a statutory declaration appears to be ineffective and, indeed, inoperable, it at least may provide a small deterrent to some and a means of obtaining a prosecution for anyone found to have obtained a GRC under false pretences.
41. Overall, the GRA currently has limited safeguards to prevent or dissuade those with malign intent from applying for and being granted a GRC. One of those is the requirements that the applicant has been able to obtain a diagnosis of gender dysphoria. This safeguarding must be maintained

¹⁰ 'In the Matter of TT and YY', accessed 16 May 2020, <https://www.judiciary.uk/judgments/in-the-matter-of-tt-and-yy/>.

¹¹ 'Exclusive: Trans Rights Defenders On "Wrong Side Of History", Labour Activists Told', HuffPost UK, 26 September 2018, http://www.huffingtonpost.co.uk/entry/labour-activists-join-feminists-to-oppose-self-id-policy-change_uk_5baaaf19e4b0f101d383a4ef.

otherwise the burden of obtaining a GRC is reduced to nothing more onerous than obtaining a provisional driving licence.

Does the spousal consent provision in the Act need reforming? If so, how? If it needs reforming or removal, is anything else needed to protect any rights of the spouse or civil partner?

42. This does not need reforming, removing, or repeal. Spouses must have a convenient way of ending their marriage or civil partnership.

Should the age limit at which people can apply for a Gender Recognition Certificate (GRC) be lowered?

43. No.

Does the Scottish Government's proposed Bill offer a more suitable alternative to reforming the Gender Recognition Act 2004?

44. No. The proposals can only cause harm to women and girls by eliminating existing safeguards and making it even easier for a man with malign intentions to gain access to women and girls.

Wider issues concerning transgender equality and current legislation

Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?

45. It's not clear why this would be seen as an issue: not all transgender people will seek the validation a GRC might bring. The process of applying for a GRC is already straightforward and the increases in the number of GID clinics this year will make it even easier for an individual to get the necessary diagnosis.¹² The proposed reduction in the fee will also make it more affordable. And the move to an online process will all make it far easier to access, complete and submit. Those who may perhaps not currently want to go through the process or who believe — wrongly — that the current process is bureaucratic, time-consuming, costly or in any way demeaning or distressing, can be heartened by the Minister's assurances the new process most certainly is none of these things.

Are there challenges in the way the Gender Recognition Act 2004 and the Equality Act 2010 interact? For example, in terms of the different language and terminology used across both pieces of legislation.

Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?

46. I will respond to these together.
47. The terminology used in the GRA is inconsistent and unnecessarily confusing. The writers of the GRA should have been clearer in their terminology and what the purpose and outcome of the Act actually is. The Minister should have announced a review of these terms.
48. Since the term 'gender' and other associated terms are undefined, the GRA introduces an unnecessary layer of obfuscation of the purpose of the process. The objective of the GRA is

¹² 'Written Ministerial Statement: Response to Gender Recognition Act (2004) Consultation', GOV.UK, accessed 22 November 2020, <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>.

essentially to issue a certificate that the Registrar takes as an instruction to switch the recorded sex of the holder in the register of births, to issue a new birth certificate and to regularise certain matters that arise out of this switch. The use of terms that use 'gender': 'other gender'; 'changed gender'; 'acquired gender'; 'male gender'; 'female gender', etc, simply obfuscate the whole process.

49. If 'gender' means anything at all, it is either something that is fixed and immutable and therefore not amenable to being changed by a certificate or it is so nebulous a notion that the idea of changing it by a formal legal process is absurd.
50. Everyday notions of gender are simply based on perceived compliance or otherwise with regressive, demeaning — and frequently patriarchal — stereotypes of a bygone era, mostly those describing notions of masculinity or femininity. We all may move amongst these outdated notions throughout the day or our lives, but none of that requires any legal sanction.
51. Even though it does not state it in these terms, the GRA is commonly described as the means by which an individual changes her/his sex. This is a fiction: sex cannot be changed. All the GRA does is change the sex noted on a birth certificate. Gender and sex certainly do not have the same meaning but the sleight of hand of the GRA occurs on the GRC, where the holder's male or female 'acquired gender' mutates to become the male or female sex. This essentially becomes the holder's 'legal sex' as opposed to her/his sex, which has not changed.
52. Thus a person with a GRC now has a 'legal sex' different to their sex. This causes confusion, particularly since her/his legal sex is not the sex used for many purposes (eg parenthood, social security benefits, discrimination, succession, peerages, trustees, sport, sexual offences, as excluded in the GRA).
53. Even though the Equality Act was written after the GRA, the wording in the former has been construed by some to mean that which was not intended. The clear example here is the application of the single-sex service exemptions of s.27 of the Act. Many transgender lobby groups have insisted that those with a GRC (and frequently those without a GRC) can access a single-sex service according to their 'legal sex' as opposed to their sex. Some government publications have mentioned in passing what the law actually permits,¹³ but clear guidance must be published by the Minister or by the EHRC to emphasise this and, indeed, enforce it by prosecuting organisations that breach their duties.

Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed

54. Yes. Section 7 of the Act provides additional protection to those meeting its criteria of gender reassignment. These protections are in addition to all other protections afforded by the other protected characteristics. Thus, such persons have more protections against unlawful discrimination than everyone else.
55. I am not aware of any additional protections that are required, but I would emphasise that if any are contemplated, a comprehensive Equality Impact Analysis must be carried out to ensure those additional protections do not interfere with the existing protections provided by the other protected characteristics and with those rights to single-sex spaces provided by s.27 of the Act.

¹³ 'Enforcing the Equality Act: The Law and the Role of the Equality and Human Rights Commission - Women and Equalities Committee - House of Commons', chap. 7, accessed 25 November 2020, <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/147010.htm>.

What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services?

56. There clearly has been an issue with the referral time to GIDS clinics. The Minister has already put in place important and substantive measures to remedy this:

That is why we are opening at least three new gender clinics this year, which should see waiting lists cut by around 1,600 patients by 2022. The full benefit of the increases in clinical capacity that we've been able to secure will lead to greater patient choice, shorter waiting times, better geographical coverage and easier access. It will also make it easier to fulfil the medical requirements of obtaining a GRC.¹⁴

57. A potentially fatal issue has been created by some GP practices, hospitals and other health services wrongly recording the sex of some. While some may not like to be considered as the sex they are, not doing so can cause them to be wrongly diagnosed for their sex, to be assessed according to wrong test reference values for their sex, to be given the wrong doses for their sex, etc. This can lead to substantial harms, including death. An individual can request to be addressed in whatever way she/he wants, but the integrity of the recording of their sex has to be maintained for their health and well being.
58. There is also an issue with wasted NHS resources, such as sending out cervical screening invitations to transwomen. This is as a result of transwomen being recorded as female when they are not.
59. However, it is clear that access to single-sex services needs to be rigorously maintained so that only those of the sex for which the service is intended have access. This applies to clients of the service as well as employees involved in delivering those services.

Are legal reforms needed to better support the rights of gender-fluid and non-binary people? If so, how?

60. Everyone has protections and rights accorded by them by having one or more protected characteristics under the Act and by other provisions of the Act: 'gender-fluid' and 'non-binary' are identities and require no additional protections and no additional rights. Any move to accord additional rights and protections would need to include a cogent definition of these terms and how they could be tested and verified to ensure that right were given appropriately. I do not believe it would be possible to do so other than by mere assertion by an individual, incapable of being refuted.

¹⁴ Truss, Liz, 'Letter from the Secretary of State Responding to Caroline Noakes Regarding the GRA', 22 September 2020, <https://committees.parliament.uk/publications/2689/documents/27434/default/>.

Additional evidence

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62. Bewley, Susan, Damian Clifford, Margaret McCartney, and Richard Byng. 'Gender Incongruence in Children, Adolescents, and Adults'. *Br J Gen Pract* 69, no. 681 (1 April 2019): 170–71. <https://doi.org/10.3399/bjgp19X701909>.
63. Byng, Richard, Susan Bewley, Damian Clifford, and Margaret McCartney. 'Gender-Questioning Children Deserve Better Science'. *The Lancet* 392, no. 10163 (8 December 2018): 2435. [https://doi.org/10.1016/S0140-6736\(18\)32223-2](https://doi.org/10.1016/S0140-6736(18)32223-2).
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65. 'Legal Feminist', n.d. <https://legalfeminist.org.uk/>.
66. Mackenzie, Lisa. 'Losing Sight of Women's Rights (Again): A Response to Cowan et Al.' *MBM Policy Analysis* (blog), 13 November 2020. <https://murrayblackburnmackenzie.org/2020/11/13/losing-sight-of-womens-rights-again-a-response-to-cowan-et-al/>.

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