

# The Women and Equalities Committee Inquiry into Reform of the Gender Recognition Act

26 November 2020

## Introduction

I provide this evidence to the committee as a private individual. I have studied law in the UK, obtaining a Graduate Diploma in Law from City University and a Post Graduate Diploma in Legal Practice from BPP.

Gender recognition is an area of law of interest to me and I have researched it carefully. One of my articles about the then proposed changes to the Gender Recognition Act 2004 ('GRA') was published by the Oxford Human Rights Hub blog<sup>1</sup>.

As well as an academic interest, I have four close friends who are trans. Three have applied for and obtained a Gender Recognition Certificate ('GRC'). The fourth is unable to apply as she does not yet meet the requirements.

I am therefore familiar with both the legal aspects of gender recognition and the practical realities of trans lives.

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<sup>1</sup> BOWYER R. *Gender Recognition Reform – The Current Debate is Misconceived* (OxHRH Blog, 4 October 2018). Available at <http://ohrh.law.ox.ac.uk/gender-recognition-reform-the-current-debate-is-misconceived> [Last accessed 25 November 2020]

## Answers to questions

**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?**

- 1) The legal formulation for when the single-sex or separate-sex exceptions in the Equality Act 2010 ('EA 2010') can be applied is if it is a "*proportionate means of achieving a legitimate aim*"<sup>2</sup>. I believe this language is clear and workable for legal professionals, but not necessarily for service providers and service users.
- 2) The Equality and Human Rights Commission ('EHRC') has however produced a statutory code<sup>3</sup> ('the Code') aimed at people who need to apply the EA 2010 in respect of services and public functions. The Code provides clear and specific guidance on the operation of the exceptions<sup>4</sup>. For example, it makes clear the exceptions must be applied on a case-by-case basis<sup>5</sup>. The Code does not replace the statute, but a failure to comply with the Code can be admissible in evidence and must be taken into account by a court or tribunal where it is relevant<sup>6</sup>.
- 3) Although the Code provides detailed legal guidance on the exceptions, I believe the way they work in practice is actually very simple. In the tiny number of occasions where a service provider feels it necessary to discriminate against a trans person, they should ask themselves, "*Do I have no other reasonable but **less or non-discriminatory** option available?*". If there is a less or non-discriminatory solution available, then it should be taken instead.
- 4) Despite the clear guidance in the Code, there seems to be wide confusion about the exceptions. In my view this is due to misleading and bad faith comment that has proliferated in the media and online since the government announced its then intention to reform the GRA. Misleading comment has not come just from lay people, but ideologically driven websites, which have published misleading analysis from legal academics and professionals who are invested in their positions.
- 5) The fact that these exceptions exist is problematic for transgender people as the areas of their lives where they often encounter problems are single-sex spaces. Regardless of how long it is since they have transitioned or how extensive their medical transition, they are always at risk of being denied access to toilets or changing rooms. Without access to toilets and changing rooms, trans people are unable to work, exercise or be part of society. The exceptions, coupled with

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<sup>2</sup> Para. 28(1) Part 7 Schedule 3 EA 2010

<sup>3</sup> *Services, public functions and associations: Statutory Code of Practice 2011*. Available at [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf) [Last accessed 26 November 2020]

<sup>4</sup> See paras. 13.57-13.60

<sup>5</sup> Para. 13.60

<sup>6</sup> Section 15(4) Equality Act 2006

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misinformation, encourage service providers to discriminate against trans people, regardless of the legality.

- 6) The paucity of court cases around the exceptions does not mean that discrimination is not happening. A close friend, who is a trans woman, was barred from her local pub for using the women's toilet. Like many trans people, she did not bring a legal action for discrimination, but tried to shrug it off and get on with her life.
- 7) Although there have been calls to remove these exceptions by trans rights groups<sup>7</sup>, I believe that it is important that the statutory exceptions are not removed for the following reasons:
  - a. Protection from discrimination on the grounds of *gender reassignment* starts from the moment a person proposes to undergo gender reassignment<sup>8</sup>. It would clearly be inappropriate if a trans person who had taken no actual steps to transition, but merely proposed to do so, were to use facilities such as open changing rooms that matched their gender identity, as this could cause distress and alarm to other service users.
  - b. Prior to the incorporation of the statutory exceptions in the EA 2010, in the case of *Croft v Royal Mail*, the courts created their own exception in relation to single-sex spaces in the course of employment<sup>9</sup>. Unless unambiguous language were added to the statute, I believe removal of the statutory exceptions would just result in the creation of judicial exceptions. Although the Court of Appeal has done an excellent job in balancing the rights of trans women and women as a whole in *Croft*, another court may not approach the issue with the same skill and sensitivity.
- 8) However, there are many situations where it is unlikely that the exceptions could be applied. For example, the Code gives the example of a changing room in a shop and suggests that the presence of cubicles means privacy and dignity can be assured for all users<sup>10</sup>. I would propose, that instead of removing the exceptions, a schedule is added to the EA 2010 explicitly listing those situations where the exceptions would not apply. This would help to discourage unnecessary (and likely illegal) discrimination against trans people and also help ensure they have access to employment and public services.
- 9) Service providers and users would then only need to concern themselves with the operation of the exceptions in more complex situations. As discussed above, in these

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<sup>7</sup> For example, Stonewall have recommended removing the exceptions related to single-sex spaces. See <https://www.stonewall.org.uk/women-and-equalities-select-committee-inquiry-transgender-equality> [Last accessed 26 November 2020]

<sup>8</sup> Section 7(1) EA 2010.

<sup>9</sup> [2003] EWCA Civ 1045. Available at <https://www.bailii.org/ew/cases/EWCA/Civ/2003/1045.html> [Last accessed 26 November 2020]

<sup>10</sup> Paragraph 13.58.

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situations service providers would need to continue applying the exceptions on a case-by-case basis and carefully follow the Code.

- 10) It has been argued that there are some situations where it should be possible to exclude trans people unconditionally. For example, barrister Karon Monaghan QC in her oral evidence to this committee for the inquiry into Enforcing the Equality Act suggested that *“the legislation itself should carve out exemptions for refuges or for rape crisis centres”*<sup>11</sup>. Unlike the current case-by-case exceptions, her proposed exemption would allow discrimination against transgender people as a class in the provision of refuges or rape crisis centres.
- 11) Such a provision would be contrary to principles of equality, fairness and societal decency. It would mean the denial of help and support to individuals purely on the grounds of their ostensible membership of a particular group. Further, it would be highly problematic for the following specific reasons:
  - a. Transgender women as well as cisgender women experience domestic abuse and sexual assault and are in need of refuges and rape crisis centres.
  - b. In 2018, Stonewall commissioned qualitative research from nfpSynergy from 15 organisations who provided front-line services to support female survivors of sexual assault and domestic violence<sup>12</sup>. All organisations provided support to trans women: for some this was provided without exception and for others support was provided on a case-by-case basis. None of the organisations said they had yet needed to apply the EA 2010 exceptions. Some services felt the exceptions should be kept as a safeguard whereas others were worried the exceptions would be used to turn away trans survivors. If front-line organisations can operate a trans inclusive service then there would be no purpose to such a blanket exemption.
  - c. A trans woman who transitions prior to puberty, takes puberty blockers, then undergoes a full medical transition, would be physically indistinguishable from a cisgender woman. Any discrimination against such as trans woman would be purely ideological.
  - d. Cisgender woman who are mistaken for trans women could also be denied access to refuges and rape crisis centres.

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<sup>11</sup> See Q54 available at

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/oral/92165.html> [Last accessed 26 November 2020]

<sup>12</sup> Available at [https://www.stonewall.org.uk/system/files/stonewall\\_and\\_nfpsynergy\\_report.pdf](https://www.stonewall.org.uk/system/files/stonewall_and_nfpsynergy_report.pdf) [Last accessed 26 November 2020]

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

- 12) For trans people who obtain a GRC, their legal sex is clear; section 9(1) GRA holds that a trans person's acquired gender is their legal gender "*for all purposes*". The legal sex of trans people without a GRC for the purposes of the EA 2010 though is less clear.
- 13) The courts have found that a trans women without a GRC can be treated as a female for the purposes of: the EU Directive on Equality between men and women (*P and S v Cornwall County Council*<sup>13</sup>), s. 54 of Police and Criminal Evidence Act 1984, which concerns the sex of police officers carrying out intimate searches (*A v Chief Constable of West Yorkshire Police*<sup>14</sup>) and the EU Directive on the Equal Treatment of Men and Women in Social Security (*MB v Secretary of State for Work and Pensions*<sup>15</sup>). *MB* is of particular note as the case was decided after the GRA was enacted and hence confirms that there are situations where a trans person will be recognised in their acquired gender by the courts even if they don't have a GRC.
- 14) On the other hand, the EHRC has stated that "*a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions [of the EA 2010], and a trans woman with a GRC would be treated as female.*"<sup>16</sup>
- 15) Some legal commentators have gone as far as arguing that if a trans person without a GRC is allowed to use facilities that match their presentation (as recommended by the Code), then the service provider has created a mixed sex space accessible to everyone male and female alike<sup>17</sup>. I believe this interpretation of the law is far-fetched<sup>18</sup>, but its publication in The Journal of the Law Society of Scotland regrettably gives it weight. If it is correct then the consequences are bizarre and frightening. Under this interpretation of the law, service providers who follow the Code would be unable to prevent cisgender men from using women facilities<sup>19</sup>.

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<sup>13</sup> See CJEU case C-13/94. The court held that a trans woman who is treated unfavourably compared to people belonging to her birth sex has been discriminated against on the grounds of her sex.

<sup>14</sup> [2004] UKHL 21. Available at <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm> [Last accessed 26 November 2020]

<sup>15</sup> See CJEU case C-451/16

<sup>16</sup> Available at <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language> [Last accessed 26 November 2020]

<sup>17</sup> KOMOROWSKI J. *Sex and the Equality Act*. The Journal of the Law Society of Scotland Volume 65 Issue 1. In particular note the comment "*If persons of the other sex are admitted, they cease to be services segregated or exclusive on the basis of sex, and thus lose their exception from the obligations not to discriminate because of sex.*" Available at <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act> [Last accessed 26 November 2020]

<sup>18</sup> It appears to be inconsistent with the Court of Appeal case of *Croft*.

<sup>19</sup> This is because cisgender men would be able to bring a claim for sex discrimination. Normally this is not possible due to the exception in the EA 2010 (para. 27(6) Part 7 Schedule 3.) But if Komorowski's view is correct this exception would no longer apply as the service would no longer be viewed as being provided to only one sex.

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- 16) As noted by the committee, very few trans people have obtained a GRC. Had the proposed reforms to the GRA gone ahead and all those people who wished to obtain a GRC had been able to do so, then this would perhaps be a moot point. However, the government's decision not to proceed with GRA reform combined with the increasing numbers of trans people make this a live and urgent issue.
- 17) To avoid the legal confusion and to ensure that all trans people can benefit from the protections included in the EA 2010, I propose that the definitions of *man* and *woman* in the EA 2010 should be explicitly extended to avoid ambiguity. For example, the definition of *woman* from the *Gender Representation on Public Boards (Scotland) Act 2018*<sup>20</sup> could be adopted and the word *man* could be defined in a symmetrical manner. This act states *woman* “*includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female.*”

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<sup>20</sup> Section 2.