Written evidence submitted by Naomi Cunningham [GRA1698]

Introduction

1. I am a barrister. I have practised almost exclusively in employment and discrimination law since I was called to the Bar in 1992. I worked in law centres and other voluntary legal organisations until 2004, and have been in independent practise since then.

2. Since this is a call for evidence, and not a consultation, I confine my answers to questions that my specialist legal knowledge equips me to answer; I do not answer questions on which I merely have an opinion. I give this evidence in my individual capacity as a practising barrister with relevant specialist expertise, not on behalf of any organisation.

3. I reproduce below (and then answer) only the questions to which I offer an answer. By far my most substantial offering is in relation single-sex and separate-sex spaces and services, which I have studied in detail and written about on many occasions.

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

4. No. A GRC makes it significantly more difficult (at least arguably) to exclude the holder from single-sex spaces and services intended for the opposite (biological) sex. That is a serious incursion on the right to self-determination and privacy of other users of those spaces and services. It is right that before a GRC is granted, there should be objective evidence of a real discomfort in the applicant's own sexed body.

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

5. Yes, for similar reasons.

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.

6. Yes. It would be clearer if both Acts made consistent use of "sex" to refer to actual or deemed biological sex; and "gender" to refer to the social performance associated with one sex or another.

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?

7. This question touches on the operation of a number of different provisions of the Equality Act, and calls for different answers in different cases. I summarise those provisions below, and comment on each individually.

Section 193

8. Section 193 permits charities to restrict the provision of benefits to persons sharing a particular protected characteristic. I foresee no particular difficulty in comprehending or applying section 193.

Section 195: sport

9. I think the definition of a "gender-affected activity" is reasonably clear and workable.

10. The intention of the general exemption from the prohibition of sex discrimination of all matters relating to participation as a competitor in any gender-affected activity is also clear enough: it needs to be lawful to operate sports in separate male and female categories. But I am troubled by the breadth of the drafting, which taken literally would also appear to exempt sexual harassment or discrimination by way of victimisation in relation to participation in a gender-affected activity. I assume this is simply the result of drafting error: it does not seem conceivable that it is a deliberate result.

An amendment to take those kinds of discrimination out of scope of the exemption would not be difficult to draft.

11. The manner in which section 195(2) deals with gender reassignment discrimination in relation to sport is much more obscure.

12. First, I don't understand why the qualified exemption from the operation of gender reassignment discrimination provisions is limited to sections 29 (goods and services) and 33, 34 and 35 (disposal and management of premises). In particular, participation in professional sport is not dealt with.

13. The intention may be that participation in professional sport is dealt with by the "occupational requirement" provisions at Schedule 9 to the Act, but if so, I regard that as a bad policy decision that results in an unnecessarily confusing and inconsistent approach. Where there is justification for special treatment of sex-segregated sport, the factors set out in Section 195(2) (a) and (b) ought in principle be applicable to both, and a consistent approach across amateur and professional sport would be clearer and more workable.

14. More fundamentally, this raises for the first time (i.e. at the first point in the EqA) a recurrent difficulty in the interaction between the EqA and the Gender Recognition Act 2004. The GRA has the effect that a biological male person with a GRC is a woman in law, and vice versa. This means that on the basis of the EqA as it stands, excluding a trans woman with a GRC from women's sport falls to be considered not as sex discrimination, but as gender reassignment discrimination.

15. This is confusing, and a poor fit with reality. A women's sports team that refuses to accept a person whose biological sex is male is taking that decision because of the individual's biological sex, irrespective of both how they identify and whether they hold a GRC. What the team cares about is the respects in which the inclusion of a person with a male body may make competition unfair or unsafe (purposes which are recognised as legitimate in principle by the EqA in section 195).

16. That being so, I suggest that the more straightforward course would be to acknowledge that for the purposes of sport whether professional or amateur, it is not social identity but biological sex that matters; and therefore that for the purposes of this exemption, a person is to be treated as retaining their biological sex irrespective of whether they have been granted a GRC.

17. If that were done, I would see no need for a general exemption for gender reassignment discrimination at all in this context, except perhaps to the limited extent necessary to permit the exclusion from women's sports of transmen whose medically altered testosterone levels made it unfair for them to compete against women.

Schedule 3, part 7: Separate and single-sex services, etc.

18. The EqA provides for conditions in which it is permissible to offer separate services for each sex, separate services differently for each sex, or services only to persons of one sex (subject to a proportionality requirement). I consider them sufficiently clear and workable in themselves, and, although complex, no more complex than they need to be.

19. However, these provisions are not at present well understood by those to whom they apply, not assisted by the large amount of legal misinformation currently circulating. I consider that there is a need for improved guidance in this area. The legislation itself is inevitably difficult for non-lawyers to understand, and generalisations about what it means are of limited assistance: it would be best explained by way of a large number of practical examples of situations in which it is and is not permissible to offer single-sex or sex-segregated services.

20. Paragraph 28 of schedule 3 provides a qualified exemption from the prohibition of gender reassignment discrimination in these contexts for anything done that is a proportionate means of achieving a legitimate aim.

21. I consider this provision obscure in the manner explained at ¶¶13-15 above. Again, where it is justifiable to provide separate-sex or single-sex services etc., that will be because of the consequences of biological sex. Again, most of the cases that would fall under this exemption could be more simply provided for by disapplying the consequences of a GRC in relation to the affected services: if there is a legitimate reason to provide single sex or segregated services, that reason will be normally be founded on biological sex, not social or legal identity.

22. In this case I can envisage that a qualified exemption for gender reassignment discrimination would sometimes be necessary, so in contrast to

my position in relation to sport, I would not recommend deleting the exemption.

Schedule 9, part 1: occupational requirements

23. Schedule 9 allows employers to ring-fence certain jobs to individuals with one or more specified protected characteristics, where having regard to the nature or context of the work it is an occupational requirement to have that characteristic, and the application of the requirement is a proportionate means of achieving a legitimate aim.

24. I think there is an ambiguity in the drafting in that it not as clear as it should be that what an employer is required to justify as being a proportionate means of achieving a legitimate aim is their rule restricting a job to individuals with a particular protected characteristic, and not the application of that rule to any given individual. The distinction is important to enable employers to seek advice in general terms about the lawfulness of imposing an occupational requirement to a particular job: it would be expensive and onerous, and serve no useful purpose, to put employers in a position where they need to seek legal advice on every single occasion when they recruit to a job with an occupational requirement.

25. Once again, my view is that for the purposes of occupational requirements, possession of a GRC should not be taken to change the holder's sex.

Naomi Cunningham

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