



The single sex and separate sex exceptions in the Equality Act 2010

May 2021

Summary: The Equality Act 2010 makes provision for single and separate sex services in a range of everyday and specialist situations. However the lack of clear, usable official guidance and the proliferation of misleading guidance (including from official sources) is making service providers uncertain about what they need to do to comply with the law. They are being pressured to remove clear rules that tell everyone which services and spaces they can use, and that protect women and girls in particular from being exposed to degrading treatment and sexual harassment. This briefing sets out our understanding of the single and separate sex exceptions and calls for clear official guidance.

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Sex Matters is a UK based not-for-profit organisation. We campaign, advocate and produce resources to promote clarity about sex in public policy, law and culture.

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Single sex spaces are being eroded

1. Many organisations are eroding their provision of single sex services, for example:

- **Schools** are adopting policies to allow male children to use female changing rooms and showers. Guidance from voluntary organisations tell schools they must allow male children who self-identify as girls to use girls toilets, showers and changing rooms.¹
- **Employers** are adopting policies that allow males who identify as women (whether on a full or a part time basis) to use women’s toilets, changing rooms and showers. Some are avoiding the question altogether by converting all facilities to “gender neutral.” They are not considering the impacts of this on female staff, including ethnic minorities, disabled women and religious women.² Women who complain (or who raise sex based rights at all) face complaints and disciplinary action.
- **NHS hospital have policies** on single sex wards are that people should be placed in a ward based on their self-declared gender, and those who are “non-binary” can choose which ward to be placed in.³ Patients requesting a GP appointment with a female doctor may be seen by a male doctor with a female “gender identity.” For example Muslim women asking to see a female GP for an intimate examination in an East London clinic are being seen by a doctor who has recently adopted a female persona after 30 years of practicing medicine as a man. They are encouraged not to request a chaperone, as this is seen as invalidating.⁴
- **Care providers** are concerned that they will not be able to offer same-sex care for elderly women if they are unable to turn down males who identify as women for employment.
- **Women’s specialist services** are increasingly pressurised to be “trans inclusive.” There are male staff at rape crisis centres, and nurses in women’s locked mental health wards, based on their self-identified gender as women. Women at their most

¹ https://fairplayforwomen.com/draft_ehrc_schools/

² <https://www.lawsociety.org.uk/en/topics/lgbt-lawyers/transition-and-change-to-gender-expression-template> ³ https://improvement.nhs.uk/documents/6005/Delivering_same_sex_accommodation_sep2019.pdf

³ https://fairplayforwomen.com/draft_ehrc_schools/

⁴ <https://a-question-of-consent.net/2020/09/16/doctors/>

vulnerable are forced to pretend they cannot perceive a person's sex.⁵

- **Police** forces have policies where officers are told that they must search people based on their self-identified gender, meaning that female officers have to search fully intact males who say that they are female. A male police officer who identifies as a woman would be allowed to intimately search female suspects.
- **Male prisoners** are housed in female prisons based on gender identity - most notoriously Stephen Wood/Karen White, a convicted paedophile on remand for grievous bodily harm, multiple rapes and other sexual offences against women. White sexually assaulted female prisoners. As a result of cases such as this, the Ministry of Justice reviewed its guidance regarding the treatment of transgender prisoners, but continues to house male prisoners in female prisons, causing trauma and risk to vulnerable women.
- **Organisations such as Girl Guides and the Women's Institute**, established for the benefit of women, allow males who identify as women to join. In the case of Girl Guides this raises serious safeguarding concerns, since parents are told that their daughters are sleeping and changing in a single sex environment, and being supervised by female adults, when in fact they may be sharing with male children and supervised by male adults. Telling children to lie or to keep secrets about sex or not to feel comfortable telling the truth is a safeguarding failure.
- **Venues, including those in the night-time economy**, are afraid of having clear sex based rules about who can access single sex areas such as toilets. The Security Industry Authority, which regulates security guards and bouncers, issues guidance to door supervisors (bouncers) that they should allow people of either sex and any appearance into women's toilets in nightclub, on the assumption that you can't judge anyone's appearance.⁶
- **Private businesses** such as Virgin Gyms have changed their communal changing rooms from single sex to single gender, because they believe (wrongly) that this is what the Equality Act requires.
- **Lesbians and gay men** are told that their sexual orientation is "exclusionary". Venues will not allow women only events.

⁵ For insight into how women using these services feel about this see <https://fovas.wordpress.com/>

⁶ <https://www.sia.homeoffice.gov.uk/Documents/sia-ds-trans-guide.pdf> and see Cunningham, N (2020) 'Trans customers: A guide for door supervisors' <https://legalfeminist.org.uk/2020/08/30/trans-customers-a-guide-for-door-supervisors/>

2. This is causing harm, in particular to women and girls, but also to transgender people. An online survey undertaken as part of the supporting work for setting up Sex Matters provides an insight into why many women prefer clearly female only spaces, rather than inclusion based on gender identity. Over 700 people replied to the online survey which was about sex and gender more broadly. Nine out ten of those who responded were women.⁷ Many talked about the importance of retaining single sex spaces:⁸

3. There is a clear solution for inclusion, which is the sensitive provision of alternative unisex options where possible. Trans rights campaigners and organisations that demand “acceptance without exception” object to this ever being the solution because they believe “trans women are women” and “trans men are men” and they see the integration of “trans women” into “women” as essential in every walk of life. However this is not an acceptable solution to many women. Women and girls are not there to affirm “trans women” and “trans girls” in their identity when using single sex services; their rights now urgently need to be considered.

⁷ <https://gender-dissidents.net/tag/womens-rights/>

⁸ <https://gender-dissidents.net/tag/single-sex-spaces/>

Women's voices

"I have an elderly mother, a teenage daughter & I'm in my 40s. We are all impacted by the loss of single sex protections for different, but entirely biologically female reasons... Loss of privacy, dignity, safety, recovery from trauma and the right to participate in public life – we all have reasons for the need of female only provisions across many aspects of our lives."

"I believe women have the right to single sex spaces. It is patently unsafe to allow men who self ID as women into women's toilets, prisons, hospital wards, refuges, changing rooms. If a third space is needed, it should not replace female space."

"I have a medical condition that makes my periods extremely heavy – it's not uncommon for me to faint from menstruation-induced anaemia, or to sit on a toilet, weeping and free-bleeding for half an hour, building the resolve to attempt to deal with it. When I'm on, I live in a constant state of anxiety that I'll bleed on clothes or furniture and everyone will see it. Using public toilets already carries enough embarrassment and shame, without adding the fear that the people hearing me rustle in cubicles, or seeing me wash blood from my hands, or using the toilet I've just had to makeshift clean, are male."

"as a rape victim, I don't want people with penises in my changing rooms, in my toilets, in women's prisons."

"[As a survivor of an attempted rape] I still get a terrible fright if someone approaches me from behind and I'm very cautious in lifts, car parks, the street etc. A non genuinely transitioned man accessing my safe space would totally close down so many things for me. Sports changing rooms, toilets in bars and restaurants and shops – especially if they are along long corridors / down in basements etc. The whole thing is terrifying."

"I think that it is crucial for female only spaces to exist. I was raped in a changing room and I do not wish to see a woman with a penis in a changing room or in the showers of my gym."

"As a woman I have to take a thousand different precautions to keep myself safe – but these are useless if men are free to use women's spaces. Before lockdown, I hadn't been to my nearest city, less than an hour away, for several months, because the last time I went there was a man in the public toilets in the central library. I don't know where else to go to the loo safely!"

"I have experienced gender neutral toilets done badly – having to squeeze past men at urinals and walk through their urine to get to the cubicle and it is not nice for them or for me."

"As a teacher, parent and Girlguiding leader this goes against all the safe guarding I have ever been taught. This matters to me because the safeguarding and single sex spaces exist for a reason."

<https://gender-dissidents.net/tag/single-sex-spaces/>

There is a lack of clear official guidance

4. **The Equality and Human Rights Commission is the official body whose job it is to provide guidance and expertise on equality law.** It states that “trans-persons can be excluded from a service where that is justified”.
5. The EHRC has distanced itself from guidance produced by other organisations that state that people must be treated as if they have changed sex when they self-identify.⁹ However they continue to recommend individual “case by case” assessment for access to single and separate sex services.¹⁰

The EHRC have been asked several times to provide clear guidance on how this might work:

- In 2019 the Women and Equality Committee paper *Enforcing the Equality Act* recommended that the Commission prepare a statutory code of practice on the single-sex exceptions. The EHRC rejected this recommendation but said it was working on guidance for service providers. This has still not been produced.
- In 2017 it had started working on guidance for schools. Although a draft version of this guidance was leaked onto the internet¹¹ the final version was never published, and is now cancelled.¹²
- Another previous Inquiry by the Women and Equality Select Committee, the 2018 Inquiry *Making public places safe for all women and girls* recommended the EHRC must set out a plan of action. This would need to consider the clarity of rules on separate sex services (such as toilets and changing rooms).
- The EHRC declined to provide a submission to the current Women and Equality Select Committee inquiry into reform of the Gender Recognition Act, which includes questions about single sex services and the Equality Act. They have argued that “clarity from the courts will help to inform the wider debate in society.”

⁹ <https://legalfeminist.org.uk/2021/05/10/aea-v-ehrc-an-explanation/>

¹⁰ AEA v EHRC DEFENDANT’S SKELETON ARGUMENT FOR PERMISSION HEARING 6 MAY 2021

<https://docs.google.com/document/d/1tKTCAQTRV-HBOIKD0MuDB3ODxISgI9mbCk5PxSOdkgQ/edit?usp=sharing>

¹¹ https://fairplayforwomen.com/draft_ehrc_schools/

¹² <https://www.telegraph.co.uk/news/2021/05/09/transgender-guidelines-girls-schools-quietly-scrapped-equalities/>

What does the Equality Act say?

Definitions and concepts

6. The Equality Act 2010 defines two separate protected characteristics which are relevant to the confusion over who can use single sex services:

Sex: S.11(a): “In relation to the protected characteristic of sex... a reference to a person who has a particular protected characteristic is a reference to a man or to a woman” (s.11). “Man” and “woman” mean respectively a “male” or “female” of any age (s.212(1)).

Gender reassignment: (S.7). This covers anyone who has proposed, started or completed a process “for the purpose of reassigning the person's sex by changing physiological or other attributes of sex”. It does not have to involve medical treatment. The number of people who identify as transgender in the UK has increased from some 5,000 in 2004 to an estimated 500,000 today. It is estimated that at least 80% of people who identify as transgender do not have genital surgery.¹³

7. The Equality Act establishes that a person must not be discriminated against or harassed because of gender reassignment (such as being excluded from employment, housing or services); it does not state that a person should be allowed to use services provided for the opposite sex.
8. The Equality Act does not use the terms “transgender woman” “trans woman” or “transwoman.” A male person who identifies as a woman remains legally male (unless they have a gender recognition certificate) and thus a man in the terms of the Equality Act. They have the additional characteristic of gender reassignment. It is clear that having the protected characteristic “gender reassignment” does not mean a person’s legal sex has changed. The EHRC confirmed that this was its view in 2018.¹⁴

¹³ The vast majority of male-born transwomen still have a penis <https://fairplayforwomen.com/penis/>

¹⁴ EHRC, July 2018,

<https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

9. Ambiguity about the meaning of “sex” in the Equality Act has been introduced: firstly by the interaction with the Gender Recognition Act; secondly by guidance produced by the Government Equalities Office and the Equality and Human Rights Commission; and finally by private organisations such as Stonewall, whose recommendations are adopted by government departments and public bodies as well as many in the private sector. Many male people covered by the broad protected characteristic “gender reassignment” consider themselves to be women (even without having any surgery or treatment) as expressed by the slogan “trans women are women.” And they consider that this self-identity means that they should be treated as women, including being allowed to use single sex spaces and services provided for the privacy, dignity and security of women and girls.

Single and separate sex exceptions

10. Under the Equality Act, employers and service providers must not treat people less favourably because of a protected characteristic (direct discrimination). Nor must they apply a provision, criterion or practice (often referred to as a PCP) which puts a group defined by a protected characteristic at a particular disadvantage unless it is justified as a proportionate means of achieving a legitimate aim.
11. While most parts of public life are open to both men and women equally, the Equality Act allows for single sex services where they are justified. It establishes a broad range of situations where discrimination on the grounds of sex (i.e. the use of sex-based rules such as “female only”) can be justified.¹² There are nine specific provisions allowing direct sex discrimination in the Equality Act:¹⁵
- **Separate and single sex services** ([Schedule 3](#) Sections 26, 27 and 28): Organisations can provide single sex services where they have a good reason, such as where only one sex needs the service (e.g. cervical smear tests); it is a more effective way of providing the service (e.g. enabling women with particular religions to access the swimming pool by providing women-only swimming sessions); where the service is at a hospital or other care setting; where a person of one sex might reasonably object to the presence of a person of the opposite sex (e.g. changing rooms, any service

¹⁵ Separate and single sex services ([Schedule 3](#) Sections 26, 27 and 28), Occupational requirement ([Schedule 9](#)), Communal accommodation ([Schedule 23](#)), Charities ([Section 193](#)), Associations ([Schedule 16](#)) and Single sex schools ([Schedule 11](#)). In addition there is provision for sport ([Section 195](#)).

involving intimate personal health or hygiene, or a women's refuge); or where there is a high degree of physical contact involved (e.g. a self-defence class, massage service).

- **Religion** (Schedule 3, Section 29): Ministers of religion can provide separate and single-sex service in order to comply with the tenets of the religion or avoid conflict with the strongly held religious views of a significant number of the religion's followers.
- **Sport** ([Section 195](#)): separate sporting competitions can be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other.
- **Occupational requirement** ([Schedule 9](#)): Employers can restrict particular jobs if they can show it is necessary for someone to have a protected characteristic.
- **Communal accommodation** ([Schedule 23](#)): Dormitories, halls of residence and other shared accommodation can be provided for each sex separately for reasons of privacy.
- **Charities** ([Section 193](#)): Charities must act in pursuit of their objects (as set out in their governance document) which may be restricted to providing benefits to people with a particular protected characteristic (such as sex, religion, disability, sexual orientation etc.)
- **Associations** ([Schedule 16](#)): Associations and clubs are allowed to have membership which involves a selection process based on personal criteria, for example a women writers' group or a group for transgender people.
- **Schools** ([Schedule 11](#)): Schools are allowed to admit pupils of only one sex. Single sex schools can admit a few children of the opposite sex under exceptional circumstances, or to undertake a limited range of courses.
- **Political parties** ([Part 7](#)): Political parties may make arrangements to address the under-representation of people with particular protected characteristics – this can include single-sex shortlists for election candidates.

12. In addition the public sector duty ([Section 149](#)) makes it a [legal obligation for local authorities, NHS Trusts and other public bodies](#) to assess how their policies impact on people with protected characteristics, including women and girls.

13. These exceptions tend to apply to both women-only and men-only services, but they are particularly important to the inclusion of women and girls in public life, and to the avoidance of situations enabling sexual harassment. These protections and rules cannot operate without a clear notion of sex.
14. In practice the exceptions cover situations which may occur in the same institution. For example, a single sex service such as a women's refuge or spa might also use an exception in hiring female staff. A sports club can also be an association. A single sex school will have single sex teams that participate in single sex sports competitions and use communal accommodation on a school trip for one sex.
15. The Equality Act provides that it is unlawful to refuse a service, or provide a worse standard of service, because of a protected characteristic, including gender reassignment (i.e. meaning a person is intending to undergo, is undergoing, or has undergone gender reassignment). However *this does not mean that people with this characteristic have the right to use single sex spaces for the opposite sex.*
16. Wherever an organisation provides services separately for men and women, without a unisex option, this may be indirect discrimination towards people with the protected characteristic of gender reassignment, since they may not be able to use either option comfortably and without being challenged. Therefore the organisation should consider whether *additional* (i.e. private or unisex) provision is needed and possible, to accommodate people who may be disadvantaged by spaces with sex-based rules. While organisations should consider whether they are able to offer this accommodation, it may not be proportionate (for example in a small building). It would not be proportionate to allow anyone who wants to break the rules to do so, or to remove sex-based rules altogether if they meet a legitimate aim.

Myths and misunderstandings

“They are rarely used”

17. The single sex exceptions in the Equality Act are generally permissive: organisations are allowed but not required to provide single or separate sex services.¹⁶ Some advocates of “trans inclusion” in opposite sex spaces make the argument that *they are rarely used*, or that there is a *high bar* for using them. This is not true.
18. One common reason for single sex services is ordinary bodily privacy, covered by schedule 3, paragraph 27(6) Equality Act:
 - (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
 - (b) the circumstances are such that **it would be reasonable for a person of one sex to object to the presence of a person of the opposite sex.**
19. Single sex spaces are common, ranging from everyday privacy, such as in toilets, changing rooms, showers, dormitories and hospital wards, to specialist women’s services, such as rape crisis and refuges. Furthermore workplace regulations, school building and licensing regulations make requirements for male and female toilets and changing rooms.
20. Whenever an organisation provides a facility which excludes one or other sex (for example by putting a male or female sign on the door) they are relying on one or more of the exceptions in the Equality Act.¹⁷
21. In relation to the most everyday of separate sex services - toilets - it is recognised that users should be protected from encountering a member of the opposite sex by surprise. British

¹⁶ Note however that employers are obliged by the Workplace (Health Safety and Welfare) Regulations 1992 to provide separate male and female toilets wherever the toilets are grouped in two or more cubicles. This does not apply to toilets which are separate lockable rooms.

¹⁷ See for example Lucy Hunter Blackburn, Kath Murray and Lisa Mackenzie (2020) Losing Sight of Women's Rights (again): A Response to Cowan et al, Scottish Affairs, Vol 28, Issue 1
<https://eupublishing.com/doi/abs/10.3366/scot.2020.0348>

Standard 6465-4:2010 states:

Wherever possible, and budgets are available, toilet attendants and cleaners should be employed who are of the same sex as the users of the facility for which they are responsible. Where this is not possible, a sign should be displayed at the entrance to the toilets advising users that an opposite sex attendant might be present within the toilets. Staff should be advised to announce that they are intending to enter an opposite sex toilet to perform their duties before entering, to alert occupiers and to give them time to leave if they wish.¹⁸

“The Equality Act gives people the right to use facilities according to their gender identity”

22. This assertion - often made - is not supported by the Equality Act. The exceptions in the Act that make it lawful in many common everyday circumstances to discriminate on grounds of sex (such as where necessary for propriety and bodily privacy). Where these exceptions apply, it is *always* lawful to discriminate on grounds of sex. A trans-identifying male who is excluded from a single-sex space or service is excluded on grounds of sex: that is the very thing that the exception permits.

23. There is little case law about transgender people and single sex services, but - unsurprisingly - in what there is, there is no support for the view that either S.7 of the Equality Act (which defines gender reassignment), or the Gender Recognition Act 2004, gives people the right to access spaces or services provided for members of the opposite sex. In the case of Croft v Royal Mail [2003] it was noted that

“acquiring the status of a transsexual does not carry with it the right to choose which toilets to use”.¹⁹

24. Legal scholar (now judge) Julius Komorowski argues:

“If persons of the other sex are admitted, they cease to be services segregated or

¹⁸Forstater (2020) Croft v Royal Mail: between a Rock and a Hard Place

<https://a-question-of-consent.net/2020/08/16/croft-v-royal-mail-between-a-rock-and-a-hard-place/>

¹⁹ Julius Komorowski (2020) ‘Sex and the Equality Act’ (2020) 65(1) Law Society of Scotland Journal

<https://www.lawscof.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act>

exclusive on the basis of sex, and thus lose their exception from the obligations not to discriminate because of sex. ... the exclusion of trans persons legally of the opposite sex is not simply permissible but a necessary part of the statutory scheme.”¹⁷

25. Writing in the *Modern Law Review*, Rebecca Bull and Alesandra Asteriti note

“We have seen no evidence in Hansard to show that Parliament addressed the issue of women-only spaces in relation to whether males with the protected characteristic of gender reassignment should be granted access to female-only spaces. There is in short, no evidence, neither as a matter of statutory interpretation, nor of parliamentary record, that the EA was designed to give as the ‘default position’ transwomen [a] right to access to female only spaces.”²⁰

26. From the point of view of a woman using a single sex space, it is reasonable to expect that she won’t be forced or surprised into sharing with a member of the opposite sex, nor that she should have to worry, wonder or guess whether a person she can identify as male has the right to be there. Clear rules are needed so that everyone understands who can use particular spaces or services, and no one is humiliated or forced into conflict. Providing some unisex facilities as well helps to ensure that people experiencing gender dysphoria, or who don’t wish to use single sex facilities, are also accommodated.

“Transgender people are already using single sex services without issue”

27. Where there are not clear rules, single sex services can become sites of ambiguity and conflict; between people who expect not to encounter adults of the opposite sex and members of the opposite sex who wish to use them to validate their gender identity.

28. This appears to be increasingly happening, encouraged by guidance telling people they have a right to use opposite sex facilities. In our extensive briefing on toilets we document several incidents that reached the press of people being asked to leave single sex toilets for the opposite sex and being offended.²¹ Such conflicts and challenges appear to be commonplace.

²⁰ Rebecca Bull and Alesandra Asteriti (2020) Gender Self-Declaration and Women’s Rights: How Self Identification Undermines Women’s Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, *Modern Law Review*, <https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>

²¹ Sex Matters (2021)

Stonewall report that almost half (48 per cent) of trans people who answered their survey don't feel comfortable using public toilets, and a third have (34 per cent) have "been discriminated against" because in a café, restaurant, bar or nightclub in the last year.²² A survey by the LGBT organisation GALOP found that 44% of trans people who answered used public toilets less because of the attitudes of other users.²³

29. A YouGov survey asked a representative sample of the public about their views on the use of opposite sex toilets by transgender people:

46% said that a "transgender woman" (defined in the survey as someone who was biologically male at birth, but now identifies as a woman) should be allowed to use women's toilets, 30% said they should not and 23% said they didn't know. The results were similar for "transgender men" and men's toilets.

When asked whether a "transgender woman" who has not had surgery should be allowed to use women's toilets the figures dropped to **only 31% saying they should be allowed**, 41% say they should not and 27% don't know.

Attitudes differ in particular by age 46% of 18-25 year olds say that a male person who has not had surgery should be allowed to use the women's toilets, but only 17% of those 65+, 30% of women say they should be allowed and 22% of men.²⁴

30. In relation to women's refuges and rape crisis centres in particular, the ability to provide an unambiguously female-only service is critical. As Karen Ingala Smith, CEO of the charity NIA explains:

"A trauma-informed safe space creates space for action and recovery from violence and abuse and places the woman victim-survivor in control and in the centre. The trauma response described earlier is the antithesis of a space for action and recovery, so a trauma informed approach is based on understanding the physical, social, and emotional impact of trauma caused by experiencing violence and abuse. For many women this means excluding men from their recovery space, it does not

<https://sex-matters.org/wp-content/uploads/2021/01/Toilet-provision-for-men-and-women-Sex-Matters-260121.pdf>

²² <https://www.stonewall.org.uk/lgbt-britain-trans-report>

²³ <http://www.galop.org.uk/wp-content/uploads/Trans-Hate-Crime-Report-2020.pdf>

²⁴ <https://docs.cdn.yougov.com/ai3h3xvf7o/Transgender%20data%202020.pdf>

matter whether or not these males identify as transgender, nor does it matter whether they themselves are or have been abusive. Women experiencing trauma after violence and abuse will, like most of us – almost always instantly read someone who might be the most kind and gentle trans identified male in the world – as male; and they may experience a debilitating trauma response as a result. This [is] neither hate, bigotry or transphobia, but a biological impact of abuse. Specialist women-led women-only organisations supporting victim-survivors of men’s violence are rarely funded to the extent that we can meet the levels of need that exist. All too [many] commissioners do not understand the critical importance of women only space.”²⁵

“They need to be applied on an individualised case by case basis”

31. The EHRC position as set out in the Statutory Code of Practice for Service Providers is “A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances”. However the EHRC has not been able to give any explanation of what factors in the individual circumstances should be considered.

32. The charity Mermaids claims:

“The term “a proportionate means of achieving a legitimate aim” is not a blanket rule and cannot be applied as a matter of policy. It is intended solely in respect to the impact of one individual by another individual in that specific situation at any given moment in time.”²⁶

This is wrong: clear rules and policies are often needed. Assessing the impact of one individual on another individual would require some particular knowledge about those individuals, but there is no specific information that a service provider can use.

33. We believe that the recommendation of case by case individualised assessment allowing some people to access services for the opposite sex is a misinterpretation of the Equality Act.
The Equality Act does not require that individuals be assessed on a case by case basis as to

²⁵ <https://committees.parliament.uk/writtenevidence/17620/pdf/>

²⁶ <https://archive.is/RfH8i>

whether a rule should be waived. Rather the particular circumstances in which a separate sex service is offered should be considered, such as whether it would be proportionate to offer a unisex alternative.

34. The case of *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 is relevant. It is an employment case concerning indirect discrimination on the ground of age, but the principle can be applied more broadly. The Supreme Court confirmed that it is the rule that must be justified, not its discriminatory effects on any single individual.

35. The Equality and Human Rights Commission says that to prove objective justification:²⁷

- The aim must be a real, objective consideration, and not in itself discriminatory (for example, ensuring the health and safety of others would be a legitimate aim).
- The importance of the aim must outweigh any indirect discriminatory effects.
- There must be no alternative measures available that would meet the aim without too much difficulty and would avoid such a discriminatory effect: if proportionate alternative steps could have been taken, there is unlikely to be a good reason for the policy.

36. It is unworkable and inhumane to allow some members of a single sex service to have access, with access judged on a case-by-case basis. There are no criteria that can fairly and consistently be used to make this judgement. Any questions that would be asked to make that judgement (such as about surgery or diagnosis) would be an invasion of the trans person's privacy. Offering a unisex alternative, where possible, where no questions are asked enables inclusion of all.

²⁷ EHRC. 2018. Words and terms used in the Equality Act.

<https://www.equalityhumanrights.com/en/advice-and-guidance/commonly-used-terms-equal-rights>

Misleading guidance and unworkable policies

37. Guidance produced by EHRC and GEO is not in line with the Equality Act²⁸. It tells service providers to allow people to use single sex services on the basis of, variously, “the gender role in which they present” (EHRC Code of Practice (2011) “acquired gender”, (EHRC online guidance, 2019) or “the sex in which the transsexual person presents” (EHRC, 2018). All of these formulations mean that organisations following the guidance cannot have unambiguous rules, and have no basis for turning any male away from women’s facilities.²⁹
38. Organisations such as Stonewall, GIRES, Galop and Gendered Intelligence promote the idea that service providers and employers should allow the use of single sex services on the basis of gender self ID. These unlawful policies are also being adopted by other organisations and regulators. For example:
- **The Crown Prosecution Service**, working with the trans advocacy organisations Gendered Intelligence and Stonewall, developed an education pack for schools. The pack, which has now been withdrawn following a legal challenge, encouraged schools to tell girls not to object to males entering single sex spaces such as toilets and changing rooms.³⁰ One of its teaching exercises features a video scenario where an adult male presenting in a feminine style enters the women’s toilets. Two young women at the sinks whisper their discomfort: “What’s he doing in here? This is the Ladies.” The next time the person uses the Gents’ where two middle-aged men shout abuse and bang on the door. The class discussion guidance says “Thinking about how the girl in the clip was treated, can the class understand why she might have felt hesitant about going into the toilets?” (by ‘girl’ here they mean the adult male).
 - **Galop** recently published guidance saying: “The right to use the toilet most appropriate for one’s gender has been protected under the Equality Act in the UK since 2010... Under UK law, trans people have a default right to use whichever single-sex area they choose, and can only be turned away if doing so can be legally

²⁸ This was the subject of the Authentic Equity Alliance’s recent application for judicial review of the EHRC Code of Practice, which was refused permission in an extempore judgment on 6 May 2021. A permission judgment does not provide a precedent, and it remains our clear view that these guidance documents are legally erroneous.

²⁹ <https://a-question-of-consent.net/2020/05/25/the-incoherence-of-government-guidance/>

³⁰ <https://a-question-of-consent.net/2020/04/30/cps-guidance-undermining-consent-withdrawn>

justified as proportionate. Under the Equality Act 2010, gender reassignment is currently a protected characteristic and there are legal consequences if your business is found to discriminate against someone because of their gender. This is regardless of where someone is on their transition journey, or if someone is non-binary.”³¹

- **The Security Industry Authority (SIA)**, the organisation responsible for regulating the private security industry: security guards, and door staff. published a guidance document “Trans customers: A guide for door supervisors”. The guidance says that security staff should allow customers of either sex, whatever they look like, to choose which toilets to use. It suggests that telling a male person that they cannot use the ladies is harassment, saying workers themselves may be held personally liable for it, and suggesting that such actions may even be a hate crime.³²
- **The Law Society** in its “Transition and Change to Gender Expression Template” published in August 2020 advises firms to allow individuals to “use the facilities that make you feel most comfortable”, including changing from day to day based on whether they are presenting in masculine or feminine attire. A group of female lawyers complained.²⁹
- **Sainsbury’s** policy for staff states that as soon as someone begins a transition process they must be allowed to use any toilets they wish. It states “It is a contravention of the Equality Act to force a trans person to use separate facilities.”
- **UKActive** the industry body for sports centres gives guidance to staff to judge whether people can use a changing or toilet facility based on consistency “with their gender appearance”. It states that even where unisex facilities are available, staff cannot simply direct people to them, but must negotiate, saying that using opposite sex facilities “may not be appropriate, and may need further discussion with other facility users before this can happen.”³³
- **The Houses of Parliament transgender policy** states “Use the facilities that match your gender identity or that most closely align with it. It is your choice and we will support you to access the toilets, showers and changing rooms that feel right for you at that time. It may be that you access both male and female facilities, which we support.”

³¹ <https://www.goodnightoutcampaign.org/wp-content/uploads/2021/03/toilets.pdf>

³²

<https://legalfeminist.org.uk/2020/10/07/sex-and-the-law-society-open-letter-to-the-simon-davies-president-of-the-law-society/>

³³ <https://www.ukactive.com/wp-content/uploads/2018/11/ukactive-Transgender-Guide.pdf>

Does having a GRC make a difference?

39. Around 5,000 people in the UK hold a Gender Recognition Certificate (GRC), which means that they have changed the sex recorded on their birth certificate and are regarded as belonging to that sex for most legal purposes. That is around 1% of the people who identify as transgender. The certificate is awarded on the basis of a medical diagnosis (but not necessarily any surgery), a change of other paperwork and a statutory declaration. There is no requirement to “pass” as a member of the opposite sex. A GRC changes an individual’s legal status. Legal scholars remain uncertain as to whether the Gender Recognition Act changes a person’s sex for the purposes of the Equality Act.³⁴
40. What is clear is that s.22 of the Gender Recognition Act provides for privacy of information. This means that if a person obtains information about someone having a GRC as part of their official duties they are not allowed to share that information except with the holder’s consent, or in narrowly defined circumstances. They could not, for example, tell other users. This suggests that having a GRC is not relevant to accessing single sex services.
41. The material situation of someone whose sex is relevant to other people does not change because they have a certificate - the level of fear and discomfort that a woman feels on being forced to be searched by a male person, to change with a male colleague or share a women’s refuge with someone they understand and perceive to be male does not change because that person has changed their birth certificate to indicate that they are female. Nor does it make a sports competition fairer.
42. People do not carry their birth certificate around with them. Trans rights organisations agree that having a GRC has no practical relevance to access to single sex services. Where possible, the provision of unisex options enables people who identify as transgender to access a service without being subject to intrusive questions from staff or other users, or from causing them alarm or distress. This solution secures inclusion for people with or without a GRC.

³⁴ Julius Komorowski (2020) ‘Sex and the Equality Act’(2020) 65(1) Law Society of Scotland Journal <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act>