

7 July 2021

Open letter to:

Baroness Kishwer Faulkner, Chair and
Alistair Pringle, Acting Chief Executive

Equality and Human Rights Commission
Fleetbank House,
2-6 Salisbury Square
London EC4Y 8JX

Dear Baroness Faulkner and Mr Pringle

The EHRC recently defended the legality of its guidance in the **Services, Public functions and Associations: Statutory Code of Practice** in relation to the protected characteristic of gender reassignment and single-sex services, and sought to distinguish it from misleading advice by third parties.

In *AEA v EHRC*, EHRC's counsel stated that guidance issued by other organisations, claiming that people who identify as transgender **must** be allowed to use opposite sex facilities, **is directly inconsistent with the Code of Practice**, and that the EHRC had taken steps to prevent such erroneous guidance being promulgated:

"A striking feature of the guidance said to have adopted the EHRC's COP 'unlawful approach', is that not a single one refers to the COP or quotes from it, and it is not explained why it is asserted the guidance is based on the COP. Indeed, insofar as the AEA's primary objection is to guidance suggesting trans-persons must be allowed to access the single sex services of their acquired gender, **that is directly inconsistent with the COP**. As set out below, the COP makes clear, in terms, that trans-persons can be excluded from a service where that is justified, and, indeed, **the EHRC has taken steps to bring that to the attention of service-providers whose guidance erroneously suggests trans-persons must always be permitted to use the single sex services of their acquired gender** irrespective of the needs of, or detriment to, others."¹

¹ *AEA v EHRC* - Defendants Skeleton Argument for the Permissions Hearing. 6 MAY 2021 (Emphasis added)

Stonewall's Diversity Champions scheme covers 25% of the UK workforce, including many Whitehall departments, universities, NHS trusts, police forces and other public bodies (and until recently the EHRC itself).

On 24 May 2021 Stonewall issued a statement defending its Diversity Champions and Workplace Equality Index programmes against criticism, saying that **"Our advice is based on the Equality and Human Rights Commission's Equality Act Code of Practice, which was recently reaffirmed in the High Court."**²

In fact Stonewall is referring to the wrong Code here, since its scheme nominally concerns employment. It is clear that the Stonewall Scheme's advice is not in line with the Employers Statutory Code or the service providers code. We are attaching a review carried out by Sex Matters comparing Stonewall advice to the employers statutory code. It is clear that they are not consistent.

In particular, Stonewall's advice:

- **Replaces the Equality Act protected characteristics** - offering "gender identity" as a replacement for both sex and gender reassignment, and merging gender reassignment with sexual orientation into "LGBT", in both cases expanding the "umbrella" of coverage beyond the definition in the Act;
- **States that employers must allow people to choose which toilets and other facilities to use based on their gender identity;**
- **States that challenging or denying them access amounts to harassment.**

More broadly, Stonewall **denies that there is a conflict of rights** or a need for balancing of rights. In 2018, in response to a public petition asking them to commit to fostering an atmosphere of respectful debate,³ it responded:

"The petition also asks us to acknowledge that there is a conflict between trans rights and 'sex based women's rights'. We do not and will not acknowledge this. Doing so would imply that we do not believe that trans people deserve the same rights as others. However, we are unequivocal in our support of trans people's – and everyone's – right to equality and will remain so. Our motto is 'acceptance without exception'."⁴

Stonewall tells employers that the Equality Act is out of date. Meanwhile it has defended its approach, saying:

"In most contexts, gender identity is an appropriate, inclusive, and well-understood term, so – in line with the UK Government and with international standards – we talk about gender identity in our everyday communications. Similarly, when we describe the Equality Act's protected characteristic of 'gender reassignment', we refer to

² <https://www.stonewall.org.uk/about-us/stonewall-statement-diversity-champions-programme>

³ <https://www.ipetitions.com/petition/dear-stonewall-please-reconsider-your-approach>

⁴ <https://www.stonewall.org.uk/node/100426>

'gender identity' to explain who is covered by the law and how they are protected, as the EHRC does in their Code of Practice."

In fact, the Employers: Statutory Code of Practice uses the term "gender identity" just four times over 326 pages: twice in the phrases "gender identity clinic" and "gender identity disorder", and twice in explaining the difference between a recreational cross-dresser and someone transitioning. The Code of Practice makes clear that sex is a protected characteristic and is separate from gender reassignment. This is something that Stonewall fundamentally disagrees with. In different places, Stonewall seeks to replace "sex" with "gender identity"; and to equate "gender reassignment" with "gender identity."

Given the widespread uptake of the Stonewall scheme and its influence on public, private and voluntary sector employers, the EHRC should say publicly whether it supports Stonewall's assertion that its scheme is consistent with the Statutory Code of Practice.

Stonewall should be allowed to lobby to change the law, but not to mislead organisations about what the current law is.

Please say which, if any, of these aspects of the Stonewall approach are in line with the Code of Practice:

1. The replacement of the protected characteristics of sex and gender reassignment with "gender identity";
2. The statement that people must be able to access single-sex services for the opposite sex based on gender identity/ their "acquired gender";
3. The statement that it is harassment to challenge or refuse entry;
4. The statement that conflicts of rights cannot be considered.

We also ask you to remove the advice on the EHRC page on gender reassignment for employers and service providers to "consider the recommendations [of the 2016 Women and Equality Select Committee] when setting their trans policies. Instead it should direct them to the relevant Codes of Practice.⁵

The EHRC's mandate is to promote and uphold the law. It should make clear that the Equality Act 2010 and associated case law determine what is lawful, with the Statutory Code as the most useful guidance.

Yours sincerely

Michael Biggs, Rebecca Bull, Naomi Cunningham, Maya Forstater, Emma Hilton
Directors, Sex Matters

⁵ <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>