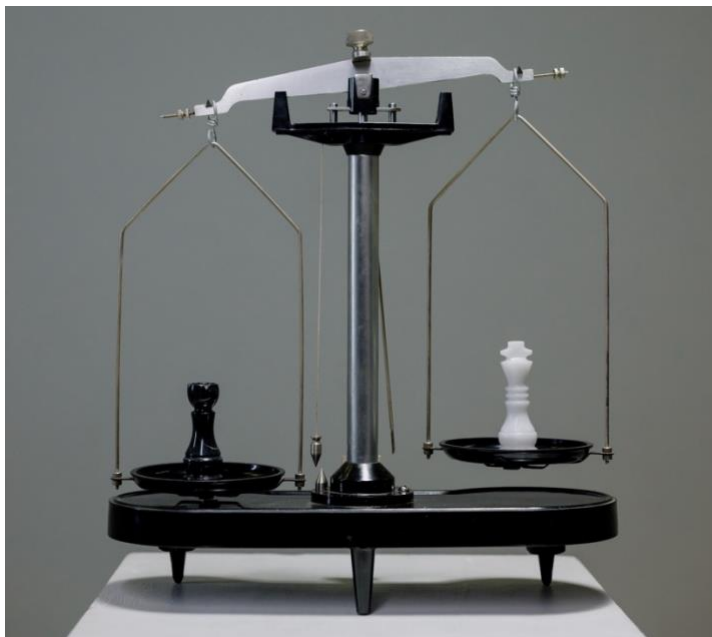


Equality and Human Rights Commission

Submission to consultation on their
strategic plan



A letter to Marcial Boo, Head of the [Equality and Human Rights Commission](#)

September 2021

Sex Matters is a human-rights organisation campaigning
for clarity about sex in laws, policies and language

sex-matters.org | info@sex-matters.org

September 23 2021

Dear Marcial Boo

Welcome to your new role as head of the Equality and Human Rights Commission.

The EHRC in its draft strategy for 2022 to 2025 has identified priorities related to major societal challenges; upheavals following COVID, changes to the world of work, the impact of artificial intelligence, and access to health and social care. Given these big challenges, there might be a temptation to try to avoid the vexed topic of sex-and-gender, which might be dismissed as toxic, divisive or niche. It gets no mention in the draft strategy.

Avoiding this topic would be a grave error. Sex matters. It is one of the nine protected characteristics the EHRC is responsible for. Fostering good relations, and promoting respect between groups and understanding of rights, are core to the EHRC's mission.

It is no exaggeration to say that there is a crisis in relations centring on the two protected characteristics of sex and gender reassignment, which is leading to women being bullied at work and in public life, creating hostile situations for both women and people who identify as transgender, and undermining trust in the integrity of public organisations and regulators.

While other challenges that you face have exogenous social and economic drivers, the problem in this case arises from the world of equality and diversity itself. It is squarely the EHRC's problem, and it is within the EHRC's competence and powers to solve it. It is urgent.

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

You must not allow this situation to continue to fester. Solving this does not depend on long and expensive test cases, but on the EHRC fulfilling its mandate with leadership and courage. The EHRC should

1. Clearly communicate what the Equality Act 2010 defines and prescribes in an area which has become muddied and confused
2. Step back from using the Act to promote childhood transition, a medically controversial treatment outside of the EHRC's competency and mandate.

The context and history to the problem you face is set out in Helen Joyce's book *Trans: When Ideology Meets Reality*, which we enclose, and urge you to read. A small but significant minority of people believe (or profess to believe) in the idea that people's declared "gender identity" should override their biological sex in every situation. They may claim not to "see" sex at all, or view it as irrelevant, even in situations such as communal undressing, intimate examinations or sporting competitions.

They argue that a person with a male body has every right to use women's single-sex services, from showers and changing rooms to women's refuges, or compete in women's sport; from rugby, to boxing to athletics, and that women and girls who object are bigots who should apologise and be re-educated, or be excluded from society. At the same time they argue that children experiencing discomfort about their sex at or before puberty should socially transition to live in an identity of the opposite sex and be fast-tracked onto a medical pathway which results in sterilisation and lack of adult sexual function. They also argue that some people are "non-binary" (neither male or female) and some fluctuate on a daily basis.

This is a minority view. Most people recognise that there are in fact two sexes, and that while gender non-conforming people or those with a cross-sex identity should not be discriminated against or harassed, people cannot literally change sex, and that sex matters in some situations.¹ Medical evidence suggests that while a small minority of adults may experience improved mental health from "transitioning", most children grow out of gender dysphoria, and many become gay or lesbian adults.²

Most people expect that when they are told that a service for them or their children

¹ <https://docs.cdn.yougov.com/ai3h3xvf7o/Transgender%20data%202020.pdf>

² See for example <https://www.frontiersin.org/articles/10.3389/fpsy.2021.632784/full>
<https://blogs.bmj.com/bmiebm/spotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/>

is single-sex—such as showers or a communal changing room, a dormitory, a single-sex association such as Brownies, a women’s refuge or rape-crisis centre, or a lesbian dating site—they will not encounter members of the opposite sex, or be forced to pretend that they believe that male individuals are female (or vice versa), on threat of having access to the service removed from them. This can be particularly important for women with a religious faith and those who have been victims of sexual assault.³

The minority view that "transwomen are women, transmen are men, non-binary people are non-binary" (and that" trans girls are girls, trans boys are boys") has been adopted into rules and practices of public and private organisations over the past five years, promoted by Stonewall, Gendered Intelligence, Mermaids and other lobby groups (with some support from the EHRC). This has led to ambiguity and conflict over single-sex services, created intimidating, hostile, degrading, humiliating or offensive environments for those who do not share this belief, corroded safeguarding, promoted homophobia in schools and undermined good relations between people with different protected characteristics.

In advance of Sex Matters founding, a survey was carried out attracting submissions from over 700 people with concerns about this issue: you can read their stories and their concerns in the Gender Dissidents Survey.⁴ We know there are many thousands who are similarly concerned, fearful and facing intimidation at work.

The situations that they are concerned about are not hypothetical. To give a few examples:

- **Survivors of rape are required to validate a man’s gender identity as female.** Edinburgh Rape Crisis Centre advertised for a Chief Executive, describing it as a job for a woman (covered under Schedule 9 Paragraph 1 of the Equality Act). It then hired a man who identifies as a woman, forcing other staff and clients to pretend that they view a male person as female. The male CEO, Midrul Wadwa, calls women who want single-sex services “bigots” and says that their beliefs are “unacceptable” and “discriminatory in nature” and they should be “challenged on their prejudices”. Wadwa recognises that this means that women will self-exclude from the service.⁵

³ <https://shonaghdillon.co.uk/an-interview-with-dr-jagbir-jhutti-johal-obe/>

⁴ <https://gender-dissidents.net/>

⁵ Heuchen, C (2021) An Open Letter to Edinburgh Rape Crisis <https://sisteroutrider.wordpress.com/2021/09/18/open-letter-to-edinburgh-rape-crisis/>

- **A woman who asks to be seen by a female doctor can be sent to a male doctor.** It is NHS policy that patients can choose to see a male or female General Practitioner. Yet if doctors declare themselves to be the opposite sex, their sex is altered on all records and the new records are regarded as biological fact by the CQC. At the East One Practice in East London, at the age of 53, Dr Kamil Kamruddin decided to “live as a woman”. Dr Kamruddin boasts of examining Muslim female patients without a chaperone. The CQC, in considering the adequacy of chaperoning and consent procedures, views Dr Kamruddin as female.⁶
- **Teachers are told to keep secrets with students and to lie to parents.** Many lobby groups and local councils have produced guidance for schools, promoting the ideas that children can be “born in the wrong body” and that those who display gender non-conformity or experience gender issues should be affirmed and treated as the opposite sex. Parents who question whether their children’s unhappiness may resolve without body modification and sterilisation are judged to be “unsupportive” or even “abusive”. Teachers are told that if a girl believes herself to be trans (perhaps after talking to strangers on the internet), and is binding her breasts and asking to be treated as a boy, they are to keep this from her parents. If a child has “socially transitioned” in primary school, secondary school teachers are told to lie to other teachers, parents and pupils about that child’s sex. Whenever this guidance has been challenged in the courts it has been withdrawn, but many versions of it are still in use.⁷
- **Males are being allowed to play in women and girls’ sports, including full-contact sports.** Both the Gender Recognition Act 2004 and the Equality Act explicitly state that males, (even those with gender recognition certificates), can be excluded from women's sports when safety and fairness are at issue - these are gender-affected sports. World Rugby undertook a review of evidence and concluded that given size, strength, speed and other advantages acquired by males at puberty, they could not safely and fairly play women’s rugby, even after hormone treatment. England Rugby has ignored this, putting female players at high risk of serious injury, and undermining fairness in sport.⁸ The EHRC said nothing, when simply reminding everyone of the law could

For Women Scotland (2021) The Real Crisis at Rape Crisis Scotland

⁶ <https://a-question-of-consent.net/2020/09/16/doctors/>

⁷ <https://safeschoolsallianceuk.net/legal-action-against-oxfordshire-county-council/>

⁸ <https://sex-matters.org/wp-content/uploads/2021/05/Sex-Matters-RFU-trans-policy-consultation-1-copy.pdf>

have forestalled accusations of “transphobia” and given female athletes concerned about safety and fair competition cover to speak out.

- **People who raise concerns about these policies—and their detrimental impact on safeguarding and equality—face bullying and harassment at work.**

The abuse received by JK Rowling, Rosie Duffield MP and Joanna Cherry QC MP are just a few high-profile examples of the response people speaking up in this area. Many employers have adopted policies of self-ID that conflate the material reality of sex with the idea of “gender identity”. They are allowing and enabling bullying of those who question or disagree with this. There are dozens of such cases that have reached the public domain⁹ but also many others, for example women facing complaints and disciplinary measures for saying that J.K. Rowling is not transphobic, for defending a book on sex-disaggregated data promoted on International Women’s Day, for asking a question in an equality training session, for asking for female-only toilets to be maintained, and for writing an academic paper on policy capture.¹⁰ In May 2021 the University of Essex published a review by barrister Akua Reindorf concerning the “deplatforming” of two academics because of their “gender critical” views. It gives a glimpse of what is happening in workplaces across the country, as cultures of fear based on groundless charges of transphobia have been allowed to develop.¹¹

The EHRC has been on a winding journey on this issue, which we detail in an annex to this letter. We have been concerned about the inappropriately close relationship between the EHRC and gender identity lobby groups, particular Stonewall.¹² We were therefore pleased when the EHRC left the Stonewall Diversity Champions Scheme, with Baroness Faulkner saying “our impartiality and independence is non-negotiable”.¹³

We have written a report on the divergence between the EHRC Code of Practice (and the underlying Equality Act) and Stonewall guidance.¹⁴ The fact that so many institutions feel the need to turn to a third-party organisation to give them basic guidance about the Equality Act 2010, and then receive incorrect guidance is a

⁹ <https://sex-matters.org/wp-content/uploads/2021/05/gender-critical-at-work-1.pdf>

¹⁰ <https://womansplaceuk.org/2021/06/22/policing-feminist-thought/>

¹¹ <https://sex-matters.org/posts/the-workplace/the-reindorf-review-a-wake-up-call-for-universities/>

¹² <https://sex-matters.org/posts/updates/watching-the-watchdogs/>

¹³ <https://sex-matters.org/posts/updates/ehrc-letter-2/>

¹⁴ <https://sex-matters.org/wp-content/uploads/2021/07/Sex-Matters-Understanding-Stonewall-Risk-080721-FINAL.pdf>

significant problem. It demonstrates the work the EHRC has to do in this area. In response to the Women and Equality Committee's request for evidence in 2021, Melanie Field responded that the EHRC's priority in this area was to develop a litigation strategy.¹⁵

We think that there is much that the EHRC could do to provide clarity without waiting for litigation. In particular, it could communicate more clearly and loudly:

1. The clarifications made in the EHRC's 2018 statement about the meaning of "sex" in the law;¹⁶
2. That S10 of the Equality Act, as demonstrated by the Forstater judgment, means that people should not be discriminated against or harassed for believing that male people are not female (and vice versa);
3. That service providers should have clearly expressed rules and policies about which services are **single sex** and which are open to members of **both sexes**, in order to have clear expectations and treat everyone with respect;
4. That service providers that **only provide mixed-sex facilities and accommodation where bodily privacy is concerned** should consider whether this discriminates against groups of users with protected characteristics - in particular women and girls, and those with religious or other beliefs which preclude sharing such spaces with members of the opposite sex;
5. That service providers that **only provide separate-sex facilities** should consider whether this results in discrimination against people with the protected characteristic of gender reassignment, who feel uncomfortable acknowledging their sex;
6. That service providers that provide specialist **single-sex facilities or services**, including for example cervical smear test clinics, menopause counselling or rape crisis centre are allowed to provide services on the basis of biological sex and not self-identified gender or legal sex;
7. That **"gender-affected" sporting activities** are allowed by law to be single-sex for reasons of fair competition and safety.

The EHRC's position to date has been that service providers can lawfully exclude males (including with a GRC) from female only services, but it adds to this that they may need to do this using a "case-by-case" determination about whether a particular

¹⁵ <https://sex-matters.org/posts/updates/watching-the-watchdogs/>

¹⁶ <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

individual should be excluded from using opposite-sex facilities or not.

It recently responded to pressure from trans rights organisations by saying that: “trans people should be able to access services for the gender with which they identify, unless there is legal justification to exclude them”, and that the EHRC has “defended the rights of trans people to access services which match their gender identity.”¹⁷

This mixed message that people with male bodies have the right to access services that are designated as female-only on the basis of “matched gender identity” will continue to lead to conflict. The EHRC has not published any guidance on how its proposal for individualised case-by-case assessment could happen in practice, fairly and without undermining privacy.

The best hypothetical example of a “case-by-case” assessment that the EHRC could come up with for the AEA v EHRC case was a women’s refuge where no other service users were present (an empty building), we think it should reconsider whether its advice for individual assessment based on “discussion with service users...” is really practical, or compatible with anybody’s privacy.¹⁸

The Equality Act 2010 legally protects people from discrimination in the workplace and in wider society. Yet misinterpretation of the Act is being used to harass and discriminate against women. This could be largely solved with sound technical guidance which recognises that it is simply impossible to provide a “single sex service” which includes both male and female people at the same time. We ask you to:

- **Meet with us, and with groups such as Fair Play for Women, Women’s Place UK, Transgender Trend and the LGB Alliance** that are articulating the case for clarity about sex and gender identity;
- **Commission research and a review of guidance and practice** on single-sex services, recognising all the relevant protected characteristics, and not only the demand for “trans inclusion”;
- **Commit with a clear timeframe** to publishing guidance which is workable, in line with the Equality Act and which reflects the rights of all.

¹⁷ <https://www.equalityhumanrights.com/en/our-response-lgbt-consortiums-open-letter>

¹⁸ <https://sex-matters.org/posts/single-sex-services/are-single-sex-services-legal/>

Yours sincerely

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

Cc: Baroness Kishwer Falkner, Chair EHRC

Annex: EHRC and Gender Ideology: a chronology

- In 2010 the EHRC funded the newly formed Gendered Intelligence Youth Group to carry out a “Trans Youth Support Work Project.” It set up a fortnightly youth group for young “trans and questioning people to socialise and gain access to information, peer support and guidance in order to make choices over their own lives.¹⁹ Gendered Intelligence went on to become one of the most influential trans rights activist organisations in the country, in 2015 co-authoring guidance for service providers with the Government Equalities Office which stated that it would be unlawful direct discrimination for a service provider to refuse to someone to use female facilities because they are perceived to be male. A FOI response shows that the EHRC was not consulted about this guide.²⁰
- In 2016 the EHRC was working closely with the charity Mermaids which promotes childhood transition. According to a FOI response, Commission solicitors met with representatives of Mermaids 4 times between January 2016 and 2019 and attended 2 conferences involving Mermaids. Commission solicitors wrote letters to 4 schools at the behest of Mermaids to “facilitate the transition of transgender pupils”. The letters promoted guidance developed by Allsorts together with Brighton and Hove Council and guidance developed by the InterCom Trust and Cornwall Council. A message from Mermaids CEO Susie Green to parents, revealed in a data breach by the charity²¹ said “I met with Natalie Johnstone²¹ of the Equality and Human Rights Commission, and they are very interested in any issues that parents and schools are having around schools and colleges. She was very keen to get reports of issues directly in to her, and also said that even if a case was not of strategic value in terms of litigation to make permanent change, that she is

¹⁹ <https://genderedintelligence.co.uk/static/images/2012/11/26/12-58-15-TYSW-GI-Report.pdf>

²⁰ <https://www.whatdotheyknow.com/request/741987/response/1845333/attach/html/3/FOI%2020201%2007257%20REPLY.pdf.html>

²¹ <https://www.zdnet.com/article/mermaids-transgender-charity-apologizes-for-data-breach/>

happy to write to schools when they are being obstructive about toilets etc..”. Susie Green wrote that the EHRC were particularly keen on stepping in where parents disagree with their younger child transitioning.

- In 2017, the EHRC launched a project to produce trans guidance for schools. This project was launched by then EHRC Chair (and ex Stonewall Chair David Isaacs) together with the pressure groups Mermaids and Gendered Intelligence. Isaacs welcomed the rise in children presenting with gender dysphoria as an unequivocal good thing and said that children are being failed by “rigid views about what it means to be male or female”²² The development of the guidance was much delayed, and when a draft was leaked in 2019 it attracted strong criticism for undermining safeguarding and children’s rights. It recommended keeping a child’s sex secret, allowing male children to use girls’ changing rooms and toilets and to play in girls sports.²³ The guidance was never completed, and in 2021 it was announced that it had been shelved.²⁴
- In July 2018, during the consultation on reform of the Gender Recognition Act 2004, the EHRC published a clarifying “statement on sex and gender reassignment: legal protections and language” which set out that in UK law sex is understood as binary, with a person’s legal sex being determined by what is recorded on their birth certificate. A trans person can change their legal sex by obtaining a GRC. A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes. To our knowledge, the EHRC has never promoted this statement on social media.²⁵
- In October 2018 in response to the government’s consultation on reform of the Gender Recognition Act, the EHRC said: “There is evidence that practical guidance and other forms of assistance is required to help trans people, single-sex and separate-sex service providers understand and navigate the complexities of sex-based exceptions in the Equality Act 2010, without compromising the service provided to women in difficult and vulnerable

²² <https://www.equalityhumanrights.com/en/our-work/news/transgender-children-failed-system-warns-equality-chair>

²³ https://fairplayforwomen.com/draft_ehrc_schools

²⁴ <https://www.telegraph.co.uk/news/2021/05/09/transgender-guidelines-girls-schools-quietly-scrapped-equalities/>

²⁵ <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

situations.”²⁶ It did not volunteer to provide such practical guidance.

- Following questions about whether Girl Guides was right in its new policy of admitting boys who identify as girls as if they were female, EHRC issued a statement ““We have written to @girlguiding about their website but not to say they are a mixed sex organisation. Like any membership organisation, the Equality Act allows Girl Guides UK to restrict membership on the basis of sex. We support their choice to have a trans inclusive policy.”²⁷ EHRC has argued that it is not in the public interest to release any further information on this.
- In January 2019 the EHRC published a “Transgender Reading List”, which was dominated by trans rights activists, and relied on just three authors for a full third of its resources (Sally Hines, Stephen Whittle of Press for Change and James Morton of Equality Network)²⁸ This has since been withdrawn. In 2019, in response to the Women and Equality Committee’s inquiry into “Enforcing the Equality Act”, which recommended that the Commission and Government prepare a statutory code of practice on the single-sex exceptions, the EHRC said it would do so, but it was working on guidance for service providers. We understand that this has not been shelved.
- In May 2019, in response to another Inquiry by the Women and Equality Select Committee on “Making Public Places Safe for Women and Girls”, the EHRC said it would not be doing anything directly to address sexual harassment of women and girls in public places.²⁹
- In September 2019, the EHRC submitted a statement to the Scottish government’s Sex and Gender in Data Working Group. It stated that “Forcing trans employees or service users to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8. In addition, forcing a trans person without a Gender Recognition Certificate (GRC) to disclose their legal sex would result in that person being ‘outed’ as a trans person...In some instances, forcing people to ‘out’ themselves will also breach the Equality Act 2010.” A legal opinion obtained by Women’s Place UK from Aidan O’Neill QC refutes this,

²⁶ <https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>

²⁷ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2616919/fs50822568.pdf>

²⁸ <https://mforstater.medium.com/dear-rebecca-hilsenrath-8bee857068f5>

²⁹ <https://committees.parliament.uk/publications/5260/documents/52596/default/>

pointing out that “these privacy rights are not absolute and individuals do not have a universal veto on what can and cannot be asked of them” and that “it will not constitute (unlawful) interference with those rights provided that the collation and/or disclosure is done in accordance with the law and separately may be said to be ‘necessary’ within the context of the proportionality test”. Mr O’Neill also advised that “there is nothing in the GRA to require the expunging or re-writing of past history, or to require that the previous state of affairs be expunged from the records of officialdom, or the eliminating or denial of the memories of individual who knew the person in a non-official capacity in their original birth sex.”³⁰

- In June 2020, at a roundtable discussion held to support the ONS in developing guidance for the census, the representative from the EHRC said that “the guidance accompanying the sex question should allow people to self-identify their gender and should not be based on someone’s legal sex status”. This was later confirmed in writing.³¹ When the ONS was challenged in a Judicial Review, the judgment was that the Claimant (Fair Play for Women) had a strongly arguable case that the Census Act 1920 as the source of legal authority for the Census did not anticipate sex to be a self-identified characteristic unrelated to biology. The ONS conceded and used legal sex in the census.³²
- In November 2020 the EHRC declined an invitation by the Women and Equalities Select Committee to give evidence concerning the interaction between the Gender Recognition Act and the Equality Act 2010 in relation to single-sex services.³³
- In April 2021 the EHRC intervened in the case of *Maya Forstater v CGD*. Karon Monaghan QC argued for the EHRC that neither the Equality Act 2010 nor the Gender Recognition Act 2004 erased the material reality of sex, noting “that it is not unlawful gender reassignment discrimination for a person approving or solemnising a marriage under religious rites to refuse to do so if they believe that a person’s gender has been acquired under a Gender Recognition

³⁰ <https://www.scottishlegal.com/article/ehrc-sex-data-advice-misrepresents-the-law>

³¹ <https://fairplayforwomen.com/whos-behind-the-government-losing-sight-of-reality/>

³² https://docs.google.com/document/d/1_DaGtT4HOd5u910-3RmKftxzE0GqSoX6/edit?usp=sharing&ouid=108526049245781107140&rtpof=true&sd=true

³³ <https://sex-matters.org/posts/updates/watching-the-watchdogs/>

Certificate...that is, because they hold a religious belief that sex is immutable. There can be no justifiable basis in law for distinguishing between religious or philosophical belief (that is, to suggest one is more worthy than another), as s.10 makes clear.”³⁴ This intervention attracted a letter of condemnation coordinated by the LGBT Forum, Trans Media Watch, Diversity Role Models, GIRES and several other groups.³⁵

- In May 2021 the EHRC successfully defended a permissions hearing against its *Service Providers Code of Practice* being subject to a Judicial Review. In its defence, the EHRC argued that the problem was other guidance, not from the EHRC which was “directly inconsistent with the COP” and was wrong in stating that trans people *must always* be allowed to use the facilities of their choice. The EHRC said it “has taken steps to bring that to the attention of service-providers”.³⁶ Nevertheless such guidance is still widely used, in particular by the 850 organisations that belong to the Stonewall Diversity Champions Scheme.³⁷

³⁴ <https://hiyamaya.files.wordpress.com/2021/04/forstater-submissions-ehrc-final-amended.pdf>

³⁵ <https://www.consortium.lgbt/ehrc-open-letter>

³⁶ https://drive.google.com/file/d/13BWOcPPeLpPR1_zREz2WVhNxFRgHF181/view?usp=sharing

³⁷ <https://sex-matters.org/posts/updates/stonewall-risk/>