

Principles for clarity and respect



Developing guidance for single-sex and separate-sex services.

January 2022

Sex Matters is a human rights organisation campaigning
for clarity about sex in law, policy and language

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Contents

- Introduction 3**
- Ten principles for clarity and respect..... 5**
 - 1 The interpretation of words in law should be coherent 6
 - 2 Everyday circumstances require clear rules 7
 - 3 Organisations need to be able to have policies 7
 - 4 “Passing” is not a criterion that works 9
 - 5 Other people should not be forced into humiliating situations 9
 - 6 Information on a person’s sex is not sensitive 10
 - 7 In practice, policies may be enforced based on perceived sex 11
 - 8 Allowing people to access opposite-sex services exposes them to the risk of hostility..... 11
 - 9 “Trans rights” are privacy rights 12
 - 10 Organisations are obliged to consider trans people’s rights, not to fulfil their desires..... 13
- What should the EHRC do? 14**
 - Guidance for service providers and employers 14
 - Communication with advocacy organisations 14

Introduction

The Equality and Human Rights Commission (EHRC) is planning to release new guidance on single-sex services, as provided for by the Equality Act 2010.

This briefing sets out three questions and ten principles that Sex Matters thinks the EHRC should base its guidance on. Although this discussion is long, policies and guidance need not be. Rather, the discussion lays out the reasons why clear, simple rules in everyday language are justified.

Separate-sex services such as toilets and changing rooms are everyday facilities provided by a wide range of businesses, schools, employers and public services large and small. Access to separate-sex facilities such as toilets, changing rooms and halls of residence is often a critical enabler of access to wider services such as entertainment, sport, leisure and education.

Specialist single-sex services such as women's refuges and rape crisis centres provide particular support to women at their most vulnerable. But vulnerable and traumatised women must also be able to access everyday services with confidence.

In all cases service providers need simple, clear guidance.

Widespread misunderstanding and confusion about the single-sex and separate-sex exceptions in the Equality Act fuel

**DEVELOPING
GUIDANCE FOR SINGLE
& SEPARATE SEX
SERVICES**

1 Is it reasonable for people using single-sex services to expect a single-sex environment?
YES

2 Does the Equality Act 2010 give some people the right to access services for the opposite sex?
NO

3 What should service providers do?
Treat people with respect Clear policy Provide unisex option where possible

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conflict and expose women, transgender people and service providers to uncertainty, hostility and potential discrimination or liability.

Lack of clarity regarding the provision of single-sex services for women – including situations where bodily privacy or trauma resulting from male violence are at issue – fuels one of the most rancorous and divisive debates in contemporary politics.

The answer that individualised “case-by-case” assessment is needed to allow some people to access opposite-sex services is neither legally necessary nor practical. Straightforward, practical guidance that gives clarity to all involved is eminently achievable, and it is the EHRC’s mandate to provide it.

That core guidance needs to answer these three key questions:

- Is it reasonable for people using single-sex services to be able to expect that they will be single-sex? **Yes.**
- Does the Equality Act 2010 give some people the right to access single-sex services for the opposite sex? **No.**
- What should service providers do? **Treat everyone with respect; have clear single-sex policies; consider offering an additional unisex option when offering separate-sex facilities.**

Why do we talk about single-sex and separate-sex services?

The Equality Act 2010 has provisions for both *separate-sex services* (where there are separate male and female facilities, such as toilets, changing rooms and dormitories) and *single-sex services* (such as a woman’s refuge, which doesn’t offer an equivalent service for men).

In practice, separate-sex services can also be thought of as pairs of single-sex services, so when we say “single-sex services” we are also covering separate-sex services.

Ten principles for clarity and respect

Service providers (and their frontline staff) and service users need simple, clear guidance. They should not need to be familiar with complex concepts in law in order to provide or use everyday services with confidence.

The EHRC should develop guidance that makes clear that it is **routine, lawful and unexceptionable** to provide single-sex services. **This means that members of the opposite sex are not admitted.**

Ten principles underpin this approach:

- 1 The interpretation of words across the Equality Act 2010 should be coherent.
- 2 The provision of single-sex and separate-sex facilities is widespread and ordinary: it should not be made difficult or ambiguous for service providers or users.
- 3 Organisations need to be able to have policies. It is the legality of the policies that is tested against the Equality Act 2010.
- 4 “Passing” is not a criterion that works for trans people. It cannot be put in an implementable policy; it invites invidious and humiliating assessments, and it discriminates against trans people who do not pass.
- 5 People who do not believe in gender ideology (“transwomen are women”) should not be harassed, discriminated against or forced to share what they have been led to believe is a same-sex facility with members of the opposite sex.
- 6 A person’s sex is not sensitive information.
- 7 In practice, policies are often enforced on the basis of perceived sex. This does not mean that clear rules are not justified.
- 8 Allowing people to access opposite-sex services exposes them to the justified shock and embarrassment of, and a risk of hostility from, other users.
- 9 “Trans rights” (based on Article 8) can be understood as the limited right not to have to declare or answer questions about your sex when it doesn’t matter. This understanding is important in order to identify solutions which respect everyone’s rights.
- 10 Organisations are obliged to consider trans people’s rights, not their desires.

1 The interpretation of words in law should be coherent

The Equality Act defines sex (male/female, man/woman) as a protected characteristic.

There are eight exceptions to the Equality Act prohibiting sex discrimination that allow for the provision of single-sex or separate-sex services:

- **separate-sex and single-sex services** ([Schedule 3](#) Sections 26, 27 and 28)
- **services related to religion** ([Schedule 3](#): Section 29)
- **sport** ([Section 195](#))
- **occupational requirement** ([Schedule 9](#))
- **communal accommodation** ([Schedule 23](#))
- **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 or sexual orientation).
- **associations** ([Schedule 16](#)). Associations and clubs are allowed to have membership criteria that involve a selection process based on personal characteristics, for example a group for women writers, 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.

In addition, the public-sector duty ([Section 149](#)) is relevant to assessing how policies impact on people with protected characteristics, including sex and gender reassignment.

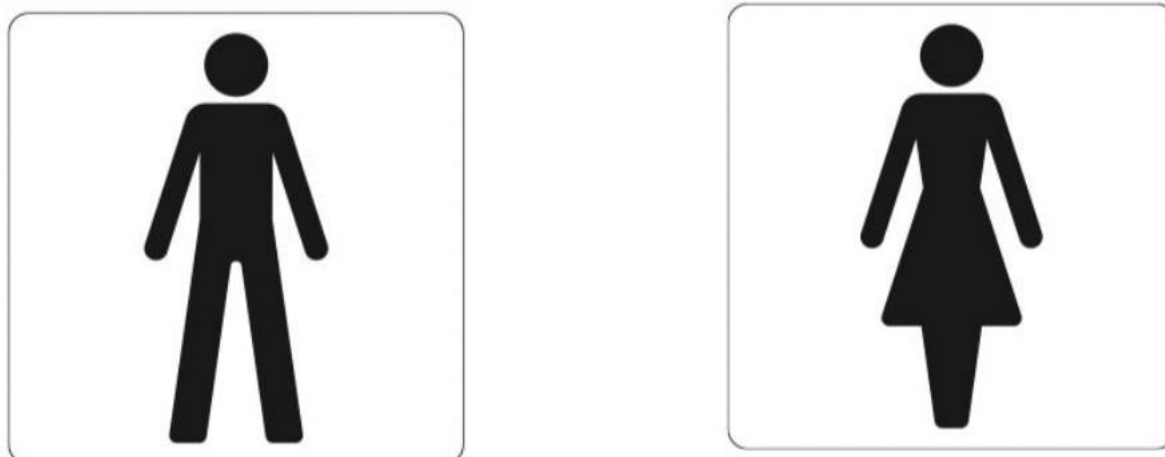
In all these settings, laws and rules concerning single-sex and separate-sex facilities have to work **coherently**.

If a service provider says a service is single-sex, everyone must be able to understand what that means. Words such as “man”, “woman”, “male”, “female”, “single-sex” and “opposite sex”, and the standard symbols for these, need to have stable meanings across different settings and between individuals sharing communal services.

2 Everyday circumstances require clear rules

No exceptional circumstance are needed to use the exceptions in Schedule 3 or other relevant parts of the act. They are in use, for example, wherever the male and female symbols are used.

British Standard/ISO symbols for male and female facilities



One everyday example is that separate-sex washing and toilet facilities are required to meet building and workplace regulations, and are essential in particular for the inclusion of women.

Given that these services are commonplace, staff and users who have no specialist knowledge, and who have not undergone any specific training, need to be able to provide and use them without conflict or ambiguity.

Individualised case-by-case assessment to allow some males into female facilities and vice-versa would require clear criteria, training, decision-making and record-keeping about those assessments. This is not practicable, and could not be applied consistently across the many situations where people want to know who is allowed to use a facility.

3 Organisations need to be able to have policies

An organisation does not need to have a written policy, but it is good practice to have one.

Policies must be capable of being operated lawfully under the Equality Act, in a manner that does not involve unjustified or disproportionate interference with the human rights of others.

The policies that relate to single-sex and separate-sex facilities need to be able to be clearly understood:

- by staff and users of the space or service
- by adults and children
- by speakers of English as a second language
- by people with low literacy
- by people with sensory or learning disabilities.

Examples of clear policies

- These changing rooms are female-only.
- These changing rooms are female-only and are staffed by female staff (for example for a room for bra fittings, or a communal changing room in a gym).
- Changing rooms are provided separately for men and women and are staffed by employees of both sexes (for example, cubicled rooms in clothing stores where the staff generally stay at the entrance).
- Changing rooms are provided separately for men and women. Accompanied children under the age of eight can use either changing room. (For example at a swimming pool).
- This changing village is mixed-sex. The toilets and showers within it are separate-sex.
- Toilets and washrooms are provided separately for men and women. There is also a unisex toilet which is clearly signposted. When staff of the opposite sex enter the washrooms for routine cleaning they put a sign up outside in advance.

Using clear language will cause offence to some people. But not using clear language creates ambiguity, conflict, harm and liability.

- Policies must be able to be communicated clearly and in advance, for example on a website or over the phone.
- Policies must be able to be applied consistently (by different staff members and in different branches, for instance).
- Policies must not create ambiguity that enables opportunistic harassment, voyeurism or indecent exposure.

4 “Passing” is not a criterion that works

Previous guidance has said that people should be admitted into single-sex services based on “the gender they present as”.

This criterion is unworkable. It does not meet the requirement of coherence, simplicity or implementability; it invites invidious and humiliating assessments and promotes sexist ideas such as that having long hair, wearing makeup, high-heels and dresses is intrinsic to being a woman, and that wearing practical clothing and having short hair are characteristics of a man.

If the bar is set at “passing” (being credibly perceived as the opposite sex), it will not be reached by everyone (or even by the majority of people) covered by the definition of “gender reassignment” in the Equality Act.

“A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.”

This criterion will therefore be discriminatory towards those who are covered by the definition of “gender reassignment” but do not pass.

Even though some people who pass in some situations may be able to get away with breaking sex-based rules, which are enforced through self-regulation this does not mean that clear rules can be replaced with rules based on passing.

5 Other people should not be forced into humiliating situations

While some people believe that “trans women are women”, or might be willing to accommodate a member of the opposite sex, many people do not share this belief.

Even people willing to say that they agree to this in a survey may be thinking of an unrepresentative subset of transwomen, such as those who have had genital surgery. A YouGov survey in 2020 found that 46% of respondents said that a “transgender woman” should be allowed to use women’s toilets. But when it was clarified that this could mean someone who “had not had gender reassignment surgery”, the figure dropped to 31% (in both cases over 25% of people said “I don’t know”).¹

It has been found that the belief that human beings cannot change sex and that sex is important is “worthy of respect in a democratic society”, and meets the criteria for a belief covered by the Equality Act.² People who hold this belief are likely to be the majority in most communities, and a particularly large majority in some demographics and faith communities. They can be expected to treat transgender people with professional courtesy in situations covered by the Equality Act, but this does not mean that they are compelled to pretend to share a belief in gender identity. Nor does it mean they should be forced to share intimate spaces with members of the opposite sex.

6 Information on a person’s sex is not sensitive

A single-sex space is essentially one that asks people to declare their sex (explicitly or implicitly) in order to gain access.

For most people this is trivial. Everyone knows which biological sex they are and can be expected to follow clearly articulated rules without any detriment.

Information about medical conditions, treatment, surgery or the holding of a gender recognition certificate is sensitive information, and should not be routinely inquired about or recorded. The same goes for beliefs about gender.

For people who have taken steps to look like the opposite sex, being asked to declare their sex may make them uncomfortable or unhappy. In order to avoid this it is often possible to offer alternative spaces that do not require this information.

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

² https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

7 In practice, policies may be enforced based on perceived sex

In low-information environments (such as pubs, train stations and shopping centres) where users come and go with relative anonymity and lack of supervision, sex-based rules will often be enforced based on perceived sex (by other users or staff). This judgment will almost always be accurate.

Brief misunderstandings, such as a short-haired woman being mistaken for a young man, can usually be cleared up with a few words.

The fact that some people who wish to use opposite-sex facilities are sometimes able to evade detection or flout the rules in these situations does not make single-sex rules unworkable.

Nor does it mean that in high-information environments, such as workplaces, schools, hospitals and gyms, where individuals' identity and their sex are known, and their compliance with rules *can* be secured, that some people must be treated as exceptions to the rule.

8 Allowing people to access opposite-sex services exposes them to the risk of hostility

Allowing people to access services provided for members of the opposite sex exposes them to hostile and humiliating experiences and conflict, since people who do not share the belief that male people can be women (or that female people can be men) may challenge them or make comments.

This was illustrated by the case of *Taylor v Jaguar Land Rover*, where the employer allowed a "non-binary" (male) employee to use the female toilets, leading to questions and comments which the employee experienced as hostile.

In order to avoid this hostility, service providers should have clearly articulated policies and signage. If a service is provided for both sexes separately by the service provider, it is good practice to consider, where possible, offering unisex alternatives (spaces that do not require people to declare their sex). This avoids forcing anyone who feels uncomfortable declaring their sex, or sharing with members of the same sex, to do so.

The provision of a unisex alternative is a practical and often proportionate means of addressing the risk of indirect discrimination caused by the clear sex-based rules, which

was raised by the Equality and Human Rights Commission in its defence against a judicial review of the Code of Practice for service providers (the AEA v EHRC case).

9 “Trans rights” are privacy rights

To identify solutions that respect everyone’s rights, it is helpful to consider information privacy.

Article 8 of the European Convention on Human Rights recognises the right to respect for private and family life, home and correspondence. Thus individuals have the right not to be forced to routinely declare or have recorded personal information about them (including name, sex, date of birth and so on), apart from where this is justified – for example by national security, public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

It was a legal case based on this right to information privacy that gave rise to the Gender Recognition Act 2004.

Thus, transgender people are people who wish to exercise this right – they are people who do not wish to disclose their sex or have it acknowledged or discussed.

Considering the right in this way frames the human rights of people who identify as transgender without recourse to sex stereotypes (such as clothing and make-up).

In practice, there are many situations where information about a person’s sex is required: in healthcare, interactions with the state, employment and access to a private service where sex matters. When information is recorded, it is covered by UK General Data Protection Regulation (GDPR).

Single-sex services are a situation where sex matters: they are rules-based spaces based on **information** about people’s sex.

It is not logically possible to access a space governed by sex-based rules while also demanding that information about your sex remain undisclosed.

Introducing detailed case-by-case assessment criteria increases, rather than decreases, the intrusion into a person’s private life and information.

Having clear rules, policies and signage protects the rights of people who identify as transgender not to have to talk about their gender identity, diagnosis, or treatment, or to

be questioned on it, since it is made clear which spaces are single and which are mixed-sex or unisex.

10 Organisations are obliged to consider trans people's rights, not to fulfil their desires

The desire to use opposite-sex services has been widely misunderstood as a “trans right”. The EHRC should clarify that it is not.

This requires the EHRC to revisit its own understanding. In its skeleton argument in *AEA v EHRC*, the EHRC stated:

“The EHRC’s position has consistently been that there are rights and interests which require balancing. The EHRC recognises that trans-persons (with and without GRCs) have rights and interests in being able to access services of their acquired gender.”

This is a misunderstanding of rights.

People who identify as transgender, like everyone else, have the right to wear what they want, describe themselves in the way they want and so on, and the right to privacy over their information, protected by Article 8.

The Equality Act 2010 protects “transsexual” persons against discrimination in accessing services in general. Most services (restaurants, public transport and cinemas, for instance) are provided equally and jointly to men and women, and people should not be excluded because of they are or are perceived as transsexuals (as defined by the Act).

However, having the status of being a transsexual person under Section 7 of the Equality Act does not give someone the right to access single-sex spaces that are provided for use by members of the opposite sex.

Where separate-sex facilities (such as toilets at the cinema) make it difficult for trans people to access the service overall, the service provider should consider an alternative if practical.

What should the EHRC do?

Given these principles, the conclusion must be that **it is reasonable for people to expect clarity about single-sex facilities, and the EHRC should give guidance to service providers and employers to communicate this.**

Guidance for service providers and employers

The EHRC should issue guidance to service providers and employers that makes it clear that they can and should have clear policies in everyday language which specify whether a service or space is single-sex or mixed-sex. There is only one coherent meaning of a single-sex service or facility: that it is open only to people of one sex.

In order to provide such a facility, it is proportionate to have a clear single-sex admission policy and:

- communicate it
- expect people to comply with it
- enforce it where necessary

This clarity protects everyone's rights. Unambiguous rules protect everybody's bodily privacy and information privacy, and avoid the possibility of harassment and hostility.

Service providers offering pairs of separate-sex facilities to cater for both men and women should consider whether they can also provide or signpost a unisex option, as this ensures the inclusion of all. Where this is not possible, they can use the exception in Schedule 3 Paragraph 28.

Communication with advocacy organisations

Creating clarity and tolerance is a cultural as well as a legal task. The EHRC will need to engage with stakeholders, including trans-rights advocacy organisations and the NHS to make it clear that:

- "acquiring a gender" (such as through change of pronouns, clothing or other aspects of appearance or identity documents) does not give someone the right to use services that are provided for members of the opposite sex
- it is inappropriate, and may be unlawful, to access spaces that people have not consented to share with members of the opposite sex

- service providers have the right (and obligation) to have clear rules
- communicating clear sex-based rules is not unlawful discrimination, harassment or transphobia.

Advocacy and professional organisation and that advise employers, schools and service providers, and individuals must recognise this.

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