Recent cases: implications for single-sex and separate-sex services

This briefing considers the implications of the cases of Green v Secretary of State, for Justice, AEA v EHRC, Taylor v Jaguar Land Rover, Forstater v CGD and FDJ v Secretary of State for Justice for understanding the law in relation to single-sex services.

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

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1 Introduction

The Equality and Human Rights Commission is planning to release new guidance on single-sex services. Single-sex and separate-sex services range from specialist services such as women's refuges to everyday services such as toilets and changing rooms. These services are allowed by the Equality Act 2010.

At a joint meeting of the Women and Equalities Committee and the Human Rights Committee in 2020, Joanna Cherry QC MP asked Baroness Kishwer Falkner, Chair of the EHRC:

> "Would you agree with me that all guidance issued by EHRC should be grounded in statute and case law, and that sometimes policy can be removed from statute and case law? What underpins the EHRC should be the Equality Act and the Human Rights Act?"[1]

Baroness Falkner agreed. New, clear guidance is crucial to clear up the misunderstandings and conflicts over the Equality Act 2010.

In a companion briefing to this (*Principles for clarity and respect,* January 2022) we argue that single-sex services need clear rules in order to protect everybody's privacy and treat people with respect and without hostility.[2]

The problem has been argued by trans-advocacy organisations, and it has become accepted by many employers, businesses and public bodies that the Equality Act 2010 gives people with the protected characteristic of gender reassignment the right to use opposite-sex services, making it impossible to have clear rules. For example, Stonewall told the Women and Equalities Committee:

> "Under the Equality Act 2010, the protected characteristic of 'gender reassignment' ensures most trans people can access single-sex services in line with their gender, and are not required to obtain a Gender Recognition Certificate (GRC), or have undergone any form of medical intervention, to be eligible for support in these services."[3]

[1] https://parliamentlive.tv/event/index/42d4b194-6dd7-491f-a232-98060a14c9bf?in=16:02:03&out=16:06:48

[2] https://sex-matters.org/posts/updates/principles-for-clarity-and-respect/

[3] https://committees.parliament.uk/writtenevidence/17743/pdf/

To support this, Stonewall cites not the legislation itself but the EHRC statutory Code of Practice (COP) for service providers. This contains text which suggests that trans people can only be excluded from single-sex and separate-sex services in "exceptional circumstances".

We do not think that this reading reflects the Equality Act 2010, which recognises that single-sex services are a proportionate means to a legitimate aim. They are not exceptional at all, but ordinary and crucial for the inclusion of women and girls in public life, including but not limited to religious and ethnic minorities, and those who have suffered trauma from male violence.

In 2021 the EHRC successfully defended the Code of Practice against permission for judicial review (AEA v EHRC).[4] The judgment from the one-day hearing is not precedent-setting and it did not consider any real-life examples, nor relevant case law. It does not prevent the EHRC updating the code, if Parliament agrees.

This briefing summarises relevant cases that have been heard since the Code of Practice was written ten years ago, which shed light on the principles involved in single-sex services, and which should be reflected in any new guidance.

It covers *Greene v Secretary of State for Justice*[5], *Taylor v Jaguar Land Rover*[6], *Forstater v CGD*[7] and *FDJ v Secretary of State for Justice*[8]. These cases are directly relevant to questions of sex and gender reassignment and illustrate that individual case-by-case assessment to allow people to use opposite-sex services is not practical. There is no right of people who identify as transgender to share single-sex services with members of the opposite sex.

Other important cases are *Homer v West Yorkshire Police*[9] and *Seldon v Clarkson Wright and Jakes*[10]. Both concern whether rules about retirement age can be justified discrimination. The judgment in Homer confirms that it is the fairness of **a rule or**

[4] https://www.bailii.org/ew/cases/EWHC/Admin/2021/1623.html

[5] https://www.bailii.org/ew/cases/EWHC/Admin/2013/3491.html

[6] https://www.gov.uk/employment-tribunal-decisions/ms-r-taylor-v-jaguar-land-rover-ltd-1304471-2018

[7] https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

[8] https://www.bailii.org/ew/cases/EWHC/Admin/2021/1746.html

[9] https://www.supremecourt.uk/cases/uksc-2010-0102.html

[10] https://www.supremecourt.uk/cases/docs/uksc-2010-0201-judgment.pdf

policy which must be assessed, not the fairness of its application to each individual person on a case-by-case basis.

The Equality Act 2010 intends and allows clear single-sex rules to protect everyone's privacy and dignity in accessing goods and services, and in employment.

This does not outlaw people putting gender-identity beliefs into practice as private citizens. The final section of this briefing considers how the Equality Act treats voluntary organisations and associations, where people may choose to associate on the basis of gender ideology and identity if they wish.

2 Equality Act Schedule 3

There are eight exceptions in the Equality Act to allow single-sex and separate-sex services in everyday facilities, specialist services, and services relating to religion, sport, charities, associations, and schools.[11] The core section is Schedule 3, part 7 which sets out situations where services can be provided on a single-sex or separate-sex basis.

The law is permissive rather than prescriptive. It says that service providers can provide single-sex services without falling foul of sex-discrimination law. Paragraphs 26 and 27 provide the exceptions to the provision against discrimination on the basis of sex and paragraph 28 provides an exception in relation to "gender reassignment".

There are two alternative readings of these paragraphs:

- **"Clear and simple"** – A service provider providing a service to members of one sex only, such as a female dormitory, is allowed to have a clear rule that it is female-only. The provider does not have to separately invoke paragraph 28 or have a different rationale in order to explain that the "no males admitted" rule applies equally to a male person who identifies as a "trans woman" (or non-binary or any other gender) as any other male.[12]
- **"Trans inclusive"** – A service provider that is providing a female-only service must allow male people with the protected characteristic of gender reassignment to access the service. The provider can only exclude particular individuals in exceptional circumstances by invoking paragraph 28.[13]

[11] The relevant sections are: Separate services for the sexes, Single-sex services, and Gender reassignment (Schedule 3, paragraphs 26, 27 and 28); Services relating to religion (Schedule 3, paragraph 29); Sport: (Section 195); Occupational requirements (Schedule 9); Communal accommodation (Schedule 23, paragraph 3); Charities (Section 193); Associations (Schedule 16); and Schools (Schedule 11).

[12] Sex Matters, 2022: *Principles for clarity and respect* https://sex-matters.org/wp-content/uploads/2022/01/Principles-for-clarity-and-respect.pdf

[13] Examples of academic expositions of the argument for this position are Cowan, S, Giles, HJ, Hewer, R, Kaufmann, B, Kenny, M, Morris, S & Nicoll Baines, K 2020, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie', *Scottish Affairs*, pp1–20: https://doi.org/10.3366/scot.2020.0347 and Sharpe, A. 2020. 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' *Modern Law Review,* volume 8, issue 3, pp539–557: https://doi.org/10.1111/1468-2230.12507

Schedule 3

26 Separate services for the sexes

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective,

(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and

(c) the limited provision is a proportionate means of achieving a legitimate aim.

(3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

27 Single-sex services

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—

(a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—

(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 a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

28 Gender reassignment

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

(a) the provision of separate services for persons of each sex;

(b) the provision of separate services differently for persons of each sex;

(c) the provision of a service only to persons of one sex.

We argue that both the history of the development of the Equality Act 2010, and the case law established since, support the "clear and simple" reading.

The Equality Act's provisions protecting against gender reassignment discrimination were never intended to make it harder to provide single-sex facilities, or to make their rules ambiguous, but rather to combat general discrimination against transsexuals in employment, and in shops, restaurants, pubs and so on.

This is clear from the history of the Sex Discrimination Act 1975 that preceded the Equality Act 2010. The SDA prohibited service providers from excluding women (or men) from services such as hotels and boarding houses, banking and insurance, education, entertainment, recreation and refreshment (that is, in situations where sex does not matter). The Equality Act 2010 provided a parallel protection for transsexual people.

Neither act sought to allow people to demand to use spaces for members of the opposite sex such as hospital wards, changing rooms and toilets, where this would be likely to cause embarrassment. The exceptions in Schedule 3 and elsewhere were included in order to enable these single-sex services to continue to operate as they always had, not to make their rules negotiable or uncertain.

There is no reason that the Code of Practice cannot be updated and improved, drawing on case law and practical lessons, including recognition of the state of confusion and conflict it has created. The following sections consider key relevant cases that should inform any revision or new guidance.[14]

[14] A notable older case is Croft v Royal Mail: an employment case that considered the issue of toilets and changing rooms. It went to the Employment Appeal Tribunal and then to the Court of Appeal in 2003. Lord Justice Pill said that "acquiring the status of a transsexual does not carry with it the right to choose which toilets to use." See https://a-question-of-consent.net/2020/08/16/croft-v-royal-mail-between-a-rock-and-a-hard-place/

3 AEA v EHRC

This case did not create a precedent, but it did set out an argument based on indirect discrimination which suggests that service providers offering separate-sex services should consider providing a unisex alternative.

It is impossible to provide a single-sex service that admits members of the opposite sex. However, the Code of Practice (COP) for service providers states that in providing single-sex or separate-sex services, service providers must consider "gender roles". At paragraph 13.57:

> "If a service provider provides single or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim."

And at 13.60 it introduces the idea of discussion with service users and individualised assessment:

> "As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances. 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. **Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available**."

In the AEA v EHRC permissions hearing the EHRC agreed that service providers **can** exclude transgender people from opposite-sex services:

> "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 service of their acquired gender irrespective of the needs of, or detriment to, others."

However, it argued that a service provider that excludes a trans person from a **separate-sex service** must provide two justifications; one on the basis of sex and the other on the basis of "gender reassignment".

> "Parliament has recognised that provision of separate services to men and women may not be unlawful sex discrimination, but can still be gender reassignment discrimination. There are thus **two separate defences and a separate requirement to justify gender reassignment discrimination."**

The EHRC's argument for having to justify gender reassignment discrimination rests on **indirect discrimination.** Indirect discrimination is when there is a practice, policy or rule that is applied to everyone, but has a worse effect on some people than others.

Mr Justice Henshaw said:

> "The exclusion is unlikely to be justified if inclusion is possible while the **'privacy and decency of all users' is respected**."

We think that if a service provider offers what purports to be a single-sex environment, then the only way to respect the privacy and dignity of users is to communicate this rule clearly to all.

To avoid indirect discrimination the Equality Act 2010 requires that service providers consider whether there are **alternative measures** that would meet the aim without too much difficulty. The obvious alternative measure that protects the privacy and decency of all users is to also provide (and clearly signpost) alternative facilities that do not apply sex-based rules (that is, unisex facilities). This should normally avoid any "particular disadvantage" to transsexual people.

4 Green v Secretary of State

This case shows that a person who identifies as the opposite sex remains legally their biological sex, unless they have obtained a Gender Recognition Certificate.

This case went to the High Court in 2013. It involved a transwoman prisoner, convicted as Craig Hudson for the torture and murder of his wife and of perverting the course of justice (he had changed his name to Kimberley Green).

The case was not about single-sex services, as Green was held in a men's prison, but the question of whether Green, who had a male appearance and genitalia, was discriminated against by being denied tights, a wig, and prosthetic breasts and vaginas (which the prison governor argued were a security risk), as well as having difficulty in obtaining other items such as concealer make-up, sanitary towels, hair-removal products and outsize women's shoes and clothing.

The judgment considered whether in a "gender reassignment" discrimination case the appropriate comparator was a person of the same sex or a person of the opposite sex. Comparators are used in discrimination cases as a means to test whether a person has been treated less favourably than a similar person without the protected characteristic. The judge found that the appropriate comparator was a man who was not transitioning or transitioned:

> "He is in a male prison and until there is a Gender Recognition Certificate, he remains male. A woman prisoner cannot conceivably be the comparator as the woman prisoner has (either by birth or election) achieved what the claimant wishes. Male to female transsexuals are not automatically entitled to the same treatment as women – until they become women."

Professor Alex Sharpe concedes that this case does not support Sharpe's favoured "trans inclusive" interpretation of the single-sex exceptions):

> "Thus, if a trans woman brought a discrimination claim on the basis of exclusion from a women-only bathroom or domestic violence refuge, her experience would be compared to that of a non-trans man. Obviously, and even applying the 'proportionality' test, a non-trans man would have been

excluded. The conclusion that must follow is that there has been no discrimination."[15]

[15] Sharpe, A. 2020. 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' *Modern Law Review,* volume 8, issue 3, pp539–557: https://doi.org/10.1111/1468-2230.12507

5 Taylor v Jaguar Land Rover

This case did not create a precedent, but the facts of the case illustrate how by allowing someone to use opposite-sex services, an employer or service provider can create a hostile environment, and risk of harassment liability.

This was a first-instance case and does not create a legal precedent. However, it has been widely publicised and the EHRC recently signed a legal agreement with Jaguar Land Rover following the case, which concerned harassment at work.

This employment tribunal case concerned Sean or Rose Taylor, who at the time of working for Jaguar Land Rover started to identify as “non-binary” and demanded to use the women’s toilets at work. Jaguar Land Rover agreed to let Taylor use any toilets. Taylor won a claim for harassment after colleagues made unkind comments.

The Tribunal said that allowing Taylor the choice of which facilities to use “put the onus on the Claimant to decide which toilets to use and to deal with any challenges made by colleagues unhappy with the choice”. It said that Jaguar Land Rover should have put in place measures to “prevent her having to deal with challenges over the toilets she was using”.

Rose Taylor now identifies as a woman. Below are recent photographs of Taylor.

[Source: Twitter]

While Taylor should not (of course) be harassed for identifying as trans or for any aspect of appearance, many women will feel as humiliated if forced to share facilities

with Taylor as they would if forced to share them with any other male person. This reality is no different on the days when Taylor wears a wig and make-up to work.

The tribunal suggested “putting out a message to inform relevant staff which toilets the Claimant would be using”. This does not seem practical in a large workplace. And what if women objected when told that a man would be using the women’s toilets?

6 Forstater v CGD

This case confirmed that the common-law definition of sex based on biology remains good law, and that the belief that sex is real, immutable and important is covered by protection against belief discrimination and harassment.

In 2020, the EHRC intervened in the Employment Appeal Tribunal (EAT) case *Forstater v CGD*. The EAT agreed with the appellant, and with the EHRC, that the belief that sex is binary, immutable and important is covered by the protected characteristic of belief, and noted that it is "widely shared, including amongst respected academics".[16]

The EAT's judgment disagrees with academics such as Cowan et al (2020) [17] who have argued against clear sex-based rules by saying that "nowhere in law is there a single definition of either sex or gender". Cowan et al argued that:

> "The test for sex in Corbett [*Corbett v Corbett* – the case of April Ashley[18]] is not a legally generalisable test, since it was made 50 years ago in the narrow context of 20th-century English marriage law. As Mr Justice Ormrod himself stated in that judgment: 'The question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large.' ([1970] All E.R., at 48). As such, it is surprising to see anyone propose that this way of thinking about the definition of sex in marriage half a century ago would be an appropriate source for defining sex per se in contemporary times."

Mr Justice Choudhury in the EAT confirmed that "The leading case is still *Corbett v Corbett [1971]*" and that its effect was considered by the House of Lords in *Chief Constable of West Yorkshire Police v A (No.2) [2005]*.

The EAT found that the Gender Recognition Act "does not negate a person's right to believe, like the Claimant, that as a matter of biology a trans person is still their natal sex". This belief may be "profoundly offensive and even distressing to many others", but it "must be tolerated in a pluralist society".

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[16] https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

[17] Cowan, S, Giles, HJ, Hewer, R, Kaufmann, B, Kenny, M, Morris, S & Nicoll Baines, K 2020, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie', *Scottish Affairs,* pp1–20. https://doi.org/10.3366/scot.2020.0347

[18] https://sex-matters.org/posts/case-law/corbett-v-corbett/

Mr Justice Choudhury notes that:

> "The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and **ensuring that groups opposed to one another tolerate each other**: *Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 13* at paras 115 and 116."

He states that:

> "The judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment."

Encouraging a trans person to occupy a "single-sex space" with a person of the opposite sex who feels upset and hostile does not create a safe or welcoming environment for a trans person (as was seen in the *Taylor v JLR* case).

Being forced, tricked or surprised into sharing a nominally single-sex space with a member of the opposite sex does not create a safe or welcoming environment for the people of the stated sex either, especially for women.

The judgment in Forstater underlines that the service provider cannot resolve this issue by forcing people who recognise that sex is immutable (and usually readily perceptible) into submission.

The way to avoid such confrontations is by communicating clearly which spaces are single-sex and which are mixed-sex (or unisex/single-user). This does not infringe a trans person's Article 8 rights. As Choudhury J noted, the case of *Christine Goodwin v UK* (which led to the Gender Recognition Act) rested on Article 8; the European Court of Human Rights found that it was an infringement of a post-operative transsexual's rights to reveal information on their sex during routine administrative processes. Thus the law allowed people to have the sex recorded on their birth certificate changed "for all legal purposes" in the Gender Recognition Act 2004.

Choudhury set out the limitations of this:

> "Although s.9, GRA refers to a person becoming 'for all purposes' the acquired gender, it is clear from these references in decisions of the House of Lords and the Court of Appeal, that this means for all 'legal purposes'. That the effect of s.9, GRA is not to erase memories of a person's gender [i.e. sex] before the acquired gender **or to impose recognition of the acquired gender in private,** non-legal contexts is confirmed by the comments of Baroness Hale in *R (C) v Secretary of State for Work and Pensions [2017] 1 WLR 4127 (SC)*."

Being inside a communal single-sex space is a private, non-legal context where a woman is likely to feel shocked, humiliated, frightened or embarrassed by the unexpected presence of a male person, whatever his "acquired gender" or legal status. The GRA 2004 does not require her to suppress this.

7 FDJ v Secretary of State for Justice

This case found that a policy of placing male prisoners in women's prisons was not unlawful, based on an extensive risk assessment process. It illustrates that the kind of risk assessment that might be used for "case by case" assessment is highly invasive and not practical outside a long-term custody situation.

In this case, the lawfulness of the policy of housing some transgender males in prisons with women was challenged. The policy was found not to be unlawful. The court did not comment on the wisdom or desirability of the policy.

While the policy of putting male prisoners in women's prisons may be challenged in other ways, it is important to note that this challenge was not rejected on the basis that "transwomen are women" or that the Equality Act allows self-identification into opposite-sex spaces.

The Secretary of State for Justice submitted that it was **not using the single-sex exception in the Equality Act** but applying a different policy. This was accepted by the court.

The question that the court considered was whether the policy was an unlawful breach of the Article 3 (concerning humiliating treatment) and Article 8 (concerning privacy and autonomy) rights of the female prisoner bringing the case FDJ.

The court found that HM Prisons and Probation Services (HMPPS) policies were:

> "capable of being operated lawfully, and in a manner which does not involve unjustified or disproportionate interference with the Convention rights of women prisoners."

This was based on the existence of a long set of risk-assessment criteria, an in-depth assessment process and panel, and a highly controlled and supervised environment within the prison.

The list of criteria considered in determining whether a male prisoner can be held with women prisoners demonstrates that the process of determination is highly invasive of an individual's personal information. This is unlikely to be applicable outside a long-term custody situation.

Furthermore, in the HMPPS policy, being admitted to share a prison with female prisoners does not erase a male prisoner's sex. Female prisoners and male (trans-identified) prisoners held in the "female estate" may be subject to different accommodation arrangements and behavioural compacts.

It is also important to note that the reason it was determined that transgender male prisoners had any right to be housed with women in this way was because of a specific judgment: *AB v Secretary of State for Justice*. This concerned the refusal of the NHS Gender Identity Clinic to provide gender reassignment surgery to a long-term male prisoner until the prisoner had spent a period living "in role" with female prisoners, and concluded that the prison must accommodate this requirement.

Thus the judgment in *FDJ v SSJ* stated:

> "It is not possible to argue that the Defendant should have excluded from women's prisons all transgender women. **To do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender**."

This reasoning, whatever you think of it, does not apply to situations outside prison, since in other situations people are free to associate with both men and women in most areas of life.

The NHS Gender Identity Clinic cannot require that a person avoids using unisex services or breaks rules which have the legitimate aim of protecting the privacy and dignity of others in order to be diagnosed.

There are objections to housing male prisoners with female prisoners, which will need to be addressed through further cases or political debate and policy-making. But in any case, the controlled situation of trans-identifying males in prisons is entirely different from that outside prison in relation to the practicality of case-by-case assessment.

8 Voluntary associations

This analysis suggests that males who identify as women do not have the right to access women's spaces and vice versa. But this does not preclude individuals from making choices to associate based on the idea of gender identity.

The exceptions in the Equality Act 2010 in relation to voluntary associations (covered by Schedule 16) respect the right of freedom of association.

The Equality Act 2010 does not seek to prohibit people from associating in organisations based on all kinds of characteristics (whether protected or non-protected). As the EHRC explained to Fair Play for Women in a letter in 2018, Schedule 16 allows associations based on many combinations of protected characteristics (for example, "LGBT").

Thus a "trans-inclusive" women's organisation or charity is allowed. If a group wanted to set up a trans-inclusive "women's organisation" for people (of either sex) who believe in gender identity and who identify as women, the government should not stop it. A group of women and "transwomen" might form a "trans-inclusive women's" book club, political association, or mutual-aid society, just as they might form any other freely chosen group.

9 Revisiting the Code of Practice

Whether or not the EHRC was right that indirect discrimination requiring separate justification could arise in relation to separate-sex facilities, our view is clear that this will never justify a policy of allowing some people to use opposite-sex facilities. This is for the simple reason that if a service provider allows people of both sexes to use a facility, it is not providing a single-sex facility.

This is consistent with understanding and embracing the need to balance everyone's rights and needs. But it recognises that the balance must be undertaken at the level of policy setting rather than individual implementation, so that everyone knows in advance which spaces and services they can use and whether they are single-sex or mixed-sex.

The permission judgment in *AEA v EHRC* also highlighted how easy it is to misunderstand the Equality Act in relation to single-sex services, and the need for clearer guidance. The judge seemed to assume that Schedule 3 paragraph 28 is designed to make it harder for a service provider to meet the test of objective justification if there is an indirect discrimination claim. But in fact it is there to make it easier (by pointing to the provision of single-sex and separate-sex services as a legitimate aim).

Mr Justice Henshaw rightly said:

> "The fact is that paras. 26 and 27 of Schedule 3 relate expressly and solely to sex discrimination and, conversely, para. 28 applies to gender reassignment discrimination in general."

But he was wrong in saying:

> "The claimant submits that if a difference of treatment can be justified vis-à-vis birth men in general, then it is inconceivable that it cannot equally be justified vis-à-vis birth men who are transsexual women. **On that approach, though, the Equality Act's gender reassignment provisions would in substance provide no protection at all, in the context of an SSS [single-sex service], to transexual persons without a GRC.**
>
> "Thus, the claimant's approach would place transsexual women without a GRC in the same position for these purposes as all other birth males. **That is clearly incompatible with the tenor of the Act, which plainly sets out distinct provisions in s.19 (as applied to gender reassignment) and in**

> **Schedule 3 para. 29** [we think he meant para. 28] **which apply to the protected characteristic of gender reassignment: over and above, and separately from, those in paras. 26 and 27 of Schedule 3 relating to sex discrimination**."

This is a misunderstanding of the purpose of the statute, which was never intended to make it harder to provide clear single-sex services for privacy and dignity, or to force women to undress in front of "transsexual" males (who may or may not have any surgery). Rather it was intended to prevent transsexuals being excluded from general services such as restaurants and cinemas.

Henshaw J also appears to have become confused about comparators for a discrimination claim by the phrase "transsexual woman". He says:

> "In my view, the claimant's argument is an obvious absurdity because it would construe s.19 in such a way that Schedule 3 para. 28 could never apply to a transexual woman lacking a GRC who complained of indirect discrimination vis-à-vis birth women."

This is a contradiction to his correct statement that paragraph 28 refers to gender reassignment discrimination (transsexual/not transsexual), not sex discrimination (man/woman), and the precedent from Green that a "transsexual woman" without a GRC legally remains a man.

If a male person (a "transsexual woman" in Henshaw J's terms) wants to claim discrimination vis-à-vis a woman (or "birth woman" as Henshaw J says), the relevant protected characteristic is sex (covered by paragraphs 26 and 27). If they want to make a gender-reassignment claim (covered by paragraph 28), the relevant comparator is a non-transsexual person of either sex.

Thus the Equality Act recognises that a "transsexual woman without a GRC" (a trans-identifying man) **is** in the same position as all other birth males in relation to accessing spaces where women are undressing and require privacy, but is **not** in the same position in relation to the overall service, as available separate-sex facilities may not be suitable.

While recognising the ways in which indirect discrimination may arise, we think some of the arguments put forward by the EHRC in the case do not stand up to real-world scrutiny. For example (as argued in their skeleton, based on the Code of Practice):

> "The EHRC considers that where someone is 'indistinguishable from a non-transsexual person of that gender' they should 'normally' be treated according to their acquired gender, and that, in order to establish it is proportionate to exclude them from a service, 'strong reasons' will be required. The EHRC considers that to be correct and helpful advice to service-users as to how a court is likely to decide a case. The EHRC considers, for example, that if a shop has separate cubicles for changing, 'strong reasons' would be required for insisting that a trans-woman who is 'for all practical purposes indistinguishable from a non-transsexual person of that gender' use the men's changing area."

This seems to be based on the idea of "passing". People are able to "pass" as the opposite sex to different extents, and some individuals are better than others at detecting biological sex even in those who have made strenuous efforts to pass.

It is not possible to set a clear or inclusive policy based on someone being "indistinguishable" – and most transgender people are not. And "strong reasons" are not needed to exclude any particular male from using a room signposted "female-only". A sufficient reason in all cases is that the women sharing that room have not consented to share it with **any** members of the opposite sex. Labelling a changing room "women-only" but admitting any man who is able to pass convincingly as female is tantamount to using deception to obtain the consent of the women who use that facility. It should not need emphasising that, if this is seen as acceptable, some women – in particular traumatised women and some religious women– will self-exclude from such facilities.

The other error that the EHRC fell into was suggesting that by having male and female changing rooms, a store is *insisting* that transsexual males use the men's changing room. It is not. It is offering a facility (the opportunity to try on clothes in the store) that customers may choose to use, but which may not be suitable for everyone. If a transsexual male ("transwoman") customer does not wish to use male changing rooms, that customer may buy the clothes and try them on at home. This exclusion might be experienced as a disappointment by the transsexual male who wishes to be treated by others as if he is female. But preventing a male person from sharing a space where women are undressing without their consent is not a breach of human rights.

The idea that cubicles solve this issue in toilets or changing rooms is not supported. Many people still want to know whether the room in which the cubicles are situated is single-sex or mixed-sex. Knowing that there is a man in the next cubicle who can hear

women going to the toilet, or a girl being fitted for a bra, will make many women and girls uncomfortable enough to self-exclude. Providing single-sex, cubicled facilities within a larger single-sex room is covered by Schedule 3 paragraphs 26, 27 and 28.

We look forward to seeing the EHRC's new guidance and hope that it will provide the necessary clarity for service providers and users.

More resources

Sex Matters has also produced this related document:

Principles for clarity and respect
Developing guidance for single-sex and separate-sex services

You'll find this plus updates and other resources in the Single sex services section of our website.

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