How can the **Equal Treatment Bench Book** be made fit for purpose?

November 2022

sexmatters

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Editions and revisions of the *Equal Treatment Bench Book*

Version of *Equal Treatment Bench Book*	Type
Interim revision July 2022	Revision of February 2021 edition
Interim revision December 2021	Revision of February 2021 edition
February 2021 edition	**Fourth edition**
Interim revision March 2020	Revision of February 2018 edition
February 2018 edition	**Third edition**
Interim revision November 2015	Revision of 2013 edition
2013 edition	**Second edition**
2004 edition (Judicial Studies Board)	**First edition**

Introduction

The *Equal Treatment Bench Book* (ETBB), produced by the Judicial College, is intended to be a guide for judges in England and Wales to the needs and characteristics of the diversity of people who may come into contact with the courts.

This is a laudable aim, and the bench book contains much that is practically useful. But overall it has become sprawling, unfocused and ideologically biased. The process by which it is developed and updated lacks rigour, accountability and transparency.

This analysis focuses on its treatment of sex and gender identity. Following the initial judgment in the case of *Forstater v CGD and others*[1], which was eventually overturned, barrister Thomas Chacko wrote a report *Prejudging the Transgender Controversy?*[2] arguing that the ETBB had played a key role in the initial incorrect judgment and was not fit for purpose.

The use of the ETBB by Judge James Tayler in the Forstater case starkly demonstrated the particular issues with the chapter on transgenderism. As Chacko said in his report, this chapter:

- puts forward a concept of trans identity quite different from anything recognised in English legislation, based on self-identification
- makes statements, such as gender being "assigned at birth", without warning judges that these are claims based on a contested ideology
- makes startling legal assertions without reference to authority, such as that it may breach Article 8 of the ECHR to ask questions about someone's gender identity
- appears to be telling judges not just how they ought to approach a trans person before them but how everyone ought to approach any trans person
- warns judges against anyone who disagrees with the claims being made, saying that a party who refuses to use preferred pronouns, or to refer to a male person as a woman, might be acting in bad faith.

There has been no formal public response to this by the Judicial College, but the December 2021 interim revision of the ETBB included significant revisions to the chapter. Unfortunately, these do not fully address the issues.

This paper argues for an urgent targeted update to the ETBB, and a slower root-and-branch revision of both the text and the process by which it is developed. None of this is to discount the good faith or the hard work of those who created the *Equal Treatment Bench Book*, but it has problems that cannot be fixed by line-by-line edits.

[1] *Forstater v CGD Europe and others [2019] UKET 2200909/2019*

[2] Chacko, Thomas (2021). 'Prejudging the transgender controversy?', *Policy Exchange*.

The trouble with the *Equal Treatment Bench Book*

An unaccountable process

The ETBB is produced by the Judicial College, an administrative arms-length body of the Ministry of Justice, advised by an editorial committee of judges.

The book is presented as being a guide "by judges for judges", but is the product of a small committee. There are no published judicial directions that explain how that committee is appointed or how the *Equal Treatment Bench Book* is developed, agreed and signed off. Furthermore, as it is "by judges for judges" the Ministry of Justice argues that its production is not subject to the Freedom of Information regime.[3]

Occasional promotional articles have been published that give a little more detail. One written by Upper Tribunal Judge Paula Grey in 2018 disclosed that the committee at the time was made up of eight judges and the head of the legal team at the Judicial College.[4] She describes a collegial, self-organised process:

> "We rapidly discovered the variety and extent of the expertise within the group, and we built on that, reading around topics and learning about aspects that were new to us. Individual chapter writing was allocated, and then we each took on reading roles to check the various newly written sections. Once the raw material was written and reviewed we discussed, we argued, we edited, we consulted, we re-edited, we ran our fingers through our collective hair, and ate cakes, which helped."[5]

A new edition is released every three years, with updated versions intermittently. Judge Grey has written that the committee considers "constructive" comments that are received. However, it is not clear how and when such comments should be submitted, and they are not published.[6] The Ministry of Justice has said only that the panel draws on "various resources in addition to judicial experts, individual experts including academics, external bodies, and source materials".[7]

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[3] *Maya Forstater v Information Commissioner (Allowed) EA/2021/0129* (this question remains under legal challenge)

[4] Mrs Justice Geraldine Andrews; HHJ Jennifer Eady QC; Upper Tribunal Judge Paula Gray; Regional Tribunal Judge Hugh Howard; Employment Judge Rebecca Howard; Deputy Senior District Judge (Chief Magistrate) Tan Ikram; Employment Judge Tamara Lewis (Chair); Helen Pustam, Head of Legal Team, Judicial College; and Senior Coroner Penny Schofield. The committee was also said to be "grateful for the oversight of the Deans of Faculty of the Judicial College, Employment Judge Christa Christensen and HHJ Andrew Hatton".

[5] Grey, Paula (2018). 'An extraordinary judicial resource', *Tribunals* edition 1 2018.

[6] Grey, Paula (2019). 'Equal Treatment Benchbook, a one year round-up', *Tribunals* edition 1 2019.

[7] Freedom of information request 'Information on the editing and review of the Equal Treatment Benchbook', WhatDoTheyKnow (2018).

There is a list of acknowledgments of current and past judiciary and Judicial College (but not external) contributors in each edition. But details of who is on the committee, the appointment process and terms, and which external bodies are consulted are not made public.

Steering judges away from the law

The ETBB's chapter on transgenderism was clearly written from a viewpoint that favours changing the law to replace sex with gender identity. The language it uses is drawn not from the law but from activist organisations such as Stonewall and the Gender Identity Research & Education Society (GIRES).

The February 2018 edition stated baldly that "UK law has not yet caught up with" people who identify as non-binary, agender and gender-fluid. This was toned down a little in the February 2021 edition, which says that "UK law presently makes express provision only for those who wish to reassign their gender".

But this edition still stated that terms used in the law were out of date and encouraged judges to adopt "rapidly changing terminology":

> "The Equality Act 2010 refers to a protected characteristic of 'gender reassignment' and uses the term 'transsexual', which is now widely considered to be out-of-date and stigmatising. Sometimes people who identify with no particular gender or who are gender-fluid may also refer to themselves as 'trans' or 'transgender'. The gender landscape is rapidly changing, as is the terminology in the field."

It remarked that: "The GRA [Gender Recognition Act] is now regarded as out of date by some people because, e.g. it does not accommodate people who have a permanent non-binary gender or are gender fluid."

There is no need for this observation: there are many laws that some people would like to change. The way to change laws is through Parliament, not through opaque extra-legal guidance written by a small group of judges with no accountability.

Misleading language

The ETBB guides judges to refer to people as men or women and as "he" or "she" based on their self-definition.

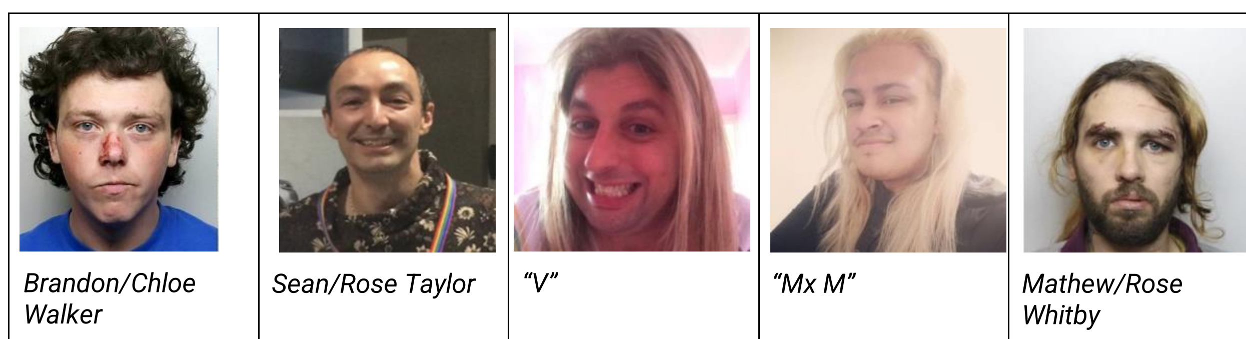
Judges are complying with this. In one case a sex offender called Brandon Walker, who was facing prosecution for using fake names online in breach of a sexual-harm prevention order,

asked to be referred to as Chloe midway through a hearing. The District Judge agreed and told the prosecutor to refer to Walker using feminine pronouns.[8]

In the case of *Taylor v Jaguar Land Rover*, the judgment uses female pronouns and the name Rose for the claimant throughout, even when quoting documents and statements from the time when the claimant (who identified as "non-binary") was using the name Sean and being referred to by colleagues as "he". This makes the whole judgment misleading and results in nonsensical statements such as:

> "The Claimant had for some years considered herself to be a gay male."[9]

Some people referred to as "she" by courts in England



Brandon/Chloe Walker	*Sean/Rose Taylor*	*"V"*	*"Mx M"*	*Mathew/Rose Whitby*

Encouraging the use of language that is misleading about a person's sex within the courtroom undermines the ability to make legal arguments clearly. This is the last place where politeness should overrule clarity.

Naomi Cunningham was junior counsel for the claimant in the application for judicial review in the case of *AEA v EHRC* (about single-sex services). She writes in the Legal Feminist blog:

> "Before that hearing, I had been willing – out of politeness, and sensitivity to the feelings of trans people generally – to write and speak of 'trans women', and use feminine pronouns, even when not referring to real individuals but exploring hypotheticals and generalities. Listening to argument in court that day was a personal tipping-point. It became vivid – to me at least – in the course of the hearing that the unreal language being used by everyone was obscuring the logic of the arguments and confusing the court. It's much easier to see at a glance that a legitimate rule excluding men will legitimately exclude all men if your language acknowledges that all the people whom it excludes are indeed men."[10]

[8] 'Northants transgender sex offender used fake identity to speak to woman on Facebook', *Northamptonshire Telegraph* (March 2019).

[9] *Ms R Taylor v Jaguar Land Rover Ltd [2020] UKET 1304471/2018.*

[10] Cunningham, Naomi (2021). 'Schrödinger's PCP', *Legal Feminist*.

Misleading language can lead to critical errors about correct comparators in cases of gender-reassignment discrimination. This was seen recently in the case of *V v Sheffield Teaching Hospitals NHS Foundation Trust*. The Leeds employment tribunal concluded that an employer discriminated against a male claimant ("V") by asking questions after the claimant was reported to have been seen without underwear in the women's changing room. The judgment stated:

> "It did not seem to the Tribunal likely that there would have been a concern about a cisgender woman in a state of undress while changing in such a changing room."[11]

Barrister Anya Palmer writes on the Legal Feminist blog:

> "I suspect the tribunal in this case did as it was told by the ETBB (and/or any diversity training the judge may have had) and referred to the claimant throughout as 'a transgender woman' and using the pronouns 'she' and 'her'. And in doing so it forgot that this polite fiction did not mean the claimant was in fact a woman."[12]

Going beyond its intended use

In some cases judges explicitly refer to the ETBB as a reference on substantive matters.

In most cases where the book is cited in judgments, it is used properly. Judges note that they have taken heed of its guidance in relation to the conduct of cases (such as supporting litigants in person[13], making reasonable adjustments for disability in court[14], or taking into account the needs of pregnant or breastfeeding women involved in a case[15]).

However, judges sometimes go beyond this and refer to the ETBB in considering substantive matters, effectively writing the committee's views straight into law. Examples include:

- An employment tribunal judgment referring to the ETBB definition of dyslexia in determining a disability case: *Ms R McSherry v Mr P Gupta and Mrs R Gupta [2022] UKET 3305266/2020*.
- An immigration appeal case using guidance from the ETBB that the appellant should be referred to as "non-binary" and that this makes them part of a particular social group: *Mx M (gender identity – HJ (Iran) – terminology) El Salvador [2020] UKUT 313 (IAC)*.
- The employment tribunal which set out passages from the ETBB as a "useful summary" of the "serious discrimination and violence" faced by transgender people in a case concerning

[11] *V v Sheffield Teaching Hospitals NHS Foundation Trust and others [2022] UKET 1806836/2020 and others*

[12] Palmer, Anya (2022). 'Sex matters in drawing comparisons', *Legal Feminist*.

[13] *Mr I Laing v Bury & Bolton Citizens Advice: [2022] EAT85.*

[14] *Ms K Skeavington v The Senad Group Ltd [2022] UKET 2604240/2020.*

[15] *F (A Child : Adjournment) [2021] EWCA Civ 469.*

freedom of belief about transgenderism: *[Forstater v CGD Europe and others [2019] UKET 2200909/2019]*.

The problem here is not only that judges are pressing the ETBB into a service it is not intended for, but also that they are doing it without putting the book before the parties and their representatives in open court. This short-circuits the rules of evidence and argument. As Anya Palmer, counsel for the claimant in the case of *Forstater v CGD Europe*, wrote:

> "I was not aware that the employment judge [in the preliminary hearing] had consulted the ETBB until I read about that in the judgment. I had no opportunity to address the judge on that."[16]

In this way the personal opinions of a few judges can be transformed into law, through a route which is outside both political and judicial accountability.

There is no warning given in the ETBB to tell judges only to use it as guidance for engaging with individuals in court, and not as additional submission to influence their judgments. Parties may encourage this overreach. In the (currently ongoing) case of *Mermaids v Charity Commission and LGB Alliance*, where witnesses from each side have disagreed over whether the category "lesbian" can include a male person, the submission on behalf of Mermaids (which says that it can) encouraged the tribunal to "review Chapter 12 of the Equal Treatment Bench Book" regarding "nuance in language".[17]

The short route from the bench book to law can be seen in the 2021 annual report of the Senior President of Tribunals, which cites the case of Mx M in its section on important cases, with the commentary:

> "Decision-makers should where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of claimants before them. The principles in HJ (Iran) are concerned with the protection of innate characteristics. As such they are to be applied in claims relating to gender identity."[18]

This is despite the fact that Parliament has neither debated nor declared the proposition that "gender identity" or "being non-binary" is an innate characteristic.

[16] Palmer, Anya (2022). 'Sex matters in drawing comparisons', *Legal Feminist*.

[17] LGB Alliance (2022). *Submissions in the case of Mermaids (Appellant) and the Charity Commission for England and Wales (Respondent) and LGB Alliance (Second Respondent)*.

[18] *Senior President of Tribunals' Annual Report* (2021).

The case of Mx M[19], where the judge drew substantively on the *Bench Book,* concerns the asylum application of a Salvadoran man who identified as “non-binary” and asked to be referred to by she/her pronouns. The tribunal refer to “her” and a “transgender woman”.

From the description in the judgment and his subsequent media interviews, “Mx M” is clearly a gay man with long hair who is an occasional cross-dresser or female impersonator. The tribunal could and should have given him asylum from well-evidenced persecution in El Salvador on the basis of his sexual orientation. Instead, the court followed the *Bench Book* and said that he might be “neither male nor female”, or might be a woman, which is then cited as a precedent for considering “gender identity” to be innate.

2021: Better but not good enough

Changes made in December 2021

Following the Forstater EAT judgment, the Chacko report, and a letter from concerned lawyers and academics[20], the Judicial College significantly revised the ETBB’s chapter on transgenderism in its interim revision released in December 2021.

Maureen O’Hara, who led the development of the letter, has written about these changes, which are summarised in the table below.[21]

Despite these changes, the book still uses ideologically loaded terms such as “gender assigned at birth” rather than legal terms or clear language such as “sex”.

It suggests that a person’s “gender history” (that is, their biological sex) can become a “minor footnote” in their life history (which is implausible), and that a male person who transitions as a child can go on to become a mother (which is impossible).

The most recent version (the July 2022 revision) did not make any further changes to the transgender chapter.

[19] *Mx M (gender identity – HJ (Iran) – terminology) El Salvador [2020] UKUT 313 (IAC).*

[20] See O’Hara, Maureen (2022). ‘The new interim version of the Equal Treatment Bench Book’, *Legal Feminist*.

[21] As above.

Summary of changes in the December 2021 revision of the Transgender chapter[22]

Previously	December 2021 revision
It is "important to respect a person's gender identity" by using "appropriate" pronouns	Pronouns are a matter of preference and courtesy
No recognition of other people's rights	Recognises that other people have a right to speak clearly and truthfully
Gender recognition certificate changes sex for all purposes	Clarifies that a gender recognition certificate does not change a person's sex for all purposes, but only for some legal purposes, and that it cannot rewrite history
Says it is a fact that person who insists on referring to a trans person using sex-based terms is an act of bad faith	Says it is a possibility that person who insists on referring to a trans person using sex-based terms is an act of bad faith
Uses the term "cis" without comment	Recognises that the term "cis gender" is not a neutral descriptor

Compelled speech in court

The December 2021 edition of the *Equal Treatment Bench Book* recognises that "there may be situations where the rights of a witness to refer to a trans person by pronouns matching their gender assigned at birth, or to otherwise reveal a person's trans status, clash with the trans person's right to privacy". However, it also states that it will be a rare situation where the witness's rights prevail.

The book says:

> "It should be possible to respect a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate. A person's gender at birth or their transgender history should not be disclosed unless it is necessary and relevant to the particular legal proceedings."

This wording is vague and value-laden, suggesting that accurately describing and referring to someone by their sex is not respecting their gender identity.

[22] For the detailed edits, see Sex Matters (December 2021). *Changes to the Equal Treatment Bench Book*.

This guidance against using sex-based pronouns accurately "unless it is necessary and relevant to the particular legal proceedings" in order to respect a person's privacy has no legal basis. It is also disconnected from reality: in almost every case a person's sex is disclosed by their face, their body, their gait and their voice. It may also be clear from their personal history. It is likely that all witnesses who have interacted personally with someone will know that person's sex.

The book supports its argument against allowing people to use ordinary language by quoting Sir James Munby (then President of the Family Division of the High Court) as saying:

> "The facts of the individual cases in which the disclosure question will arise are likely to vary widely. In some instances it will be relevant to the issues to know that an individual has a transgender history. In others it will be entirely irrelevant. Disclosure should not [be] permitted in those cases where it is unnecessary and irrelevant to the issues. There is a need for judges to be aware of and astute to the issues."

This is cited as coming from the 2016 report of the Women and Equality Select Committee on transgender equality. In fact, it is a partial quotation used by the Select Committee, which drew it from trans-advocacy group GIRES, quoting what may be a letter from Mumby. It is not clear what the status of Mumby's statement is, but what is clear is that the full quote refers only to people with a Gender Recognition Certificate.

> "In specified circumstances, section 22(4) of the Gender Recognition Act 2004 permits the disclosure of what would otherwise be 'protected information' about an individual who has applied for a Gender Recognition Certificate.
>
> The effect of section 22(4)(e) is that 'protected information' may be disclosed 'for the purposes of proceedings before a court or tribunal.' The facts of the individual cases in which the disclosure question will arise are likely to vary widely. In some instances it will be relevant to the issues to know that an individual has a transgender history.
>
> In others it will be entirely irrelevant. Disclosure should not be permitted in those cases where it is unnecessary and irrelevant to the issues. There is a need for judges to be aware of and astute to the issues."[23]

Only a minority of trans people have a GRC, but in any case the ETBB overplays its effect in imposing secrecy about a person's sex.

Section 22 of the Gender Recognition Act makes it an offence for someone who has obtained "protected information" in an official capacity to disclose that information to any other person

[23] Gender Identity Research & Education Society (2020). *Court information for trans parents.*

(there is an exception for legal proceedings). In most cases witnesses will not be covered by Section 22 at all if they have not discovered a person's sex in an official capacity (by having access to their records), but through ordinary interaction in person.

In considering whether a witness can be allowed to speak freely, the ETBB says that a judge should consider factors including "why the witness is unwilling or unable to give evidence in a way which maintains the trans person's privacy". It says that a concession might be made to a victim of domestic abuse or sexual violence at the hands of a trans-identifying person. In fact, demanding that any witness refrain from using ordinary words to describe their experience undermines their ability to give evidence that is "the truth, the whole truth and nothing but the truth", and is likely to be compelled speech, inconsistent with the decision of the Supreme Court in *Lee v Ashers Baking Co [2018] UKSC 49*.

Legal professionals may be able to use gender-neutral terms such as "the claimant" and "the defendant" fluently, or to avoid the use of pronouns altogether. (For example, in the case of *Elan-Cane v The Secretary of State for the Home Department* over "X" passports, in which the claimant uses the pronouns per/per/perself, the claimant's counsel managed to represent the whole case without using any pronouns for her client.) But for most people, the linguistic gymnastics required to avoid pronouns take up cognitive resources.[24]

Moral pressure

As well as the spurious legal argument for extreme and impossible privacy about a person's sex, the ETBB adds moral pressure, stating that a trans person may feel a sense of being "othered" or viewed as "inauthentic" if referred to in a way they reject. It alleges that referring to a person by their "deadname" (the name they previously used) is considered "highly disrespectful and may well be inhibiting and possibly humiliating to a witness" and that "judges should be aware of the sensitivities, and exercise extreme caution about 'outing' someone where their gender is not relevant to the specific issues in the case." The book states:

> "It is important to be alive to the possibility that the gender history of a person is something which an opponent litigant may seek to use in order to place pressure on them, such as by deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents."

In the December 2021 revision, a section was added reporting a survey that found that 99% of trans adults said they had experienced transphobia on social media. There is also a new, long quotation of an obiter passage from *R (on the application of C) v Secretary of State for Work and*

[24] This is known as the Stroop effect.

Pensions, in which Baroness Hale begins her judgment with an account of the traumas faced by trans people "and the importance to them of being acknowledged in their acquired gender":

> "A person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

The updated chapter notes that "gender-critical" belief is protected, but includes the ominous warning that:

> "'Misgendering' a trans person on a particular occasion, gratuitously or otherwise, can amount to unlawful harassment in arenas covered by the Equality Act 2010."

None of this moral pressure is legitimate. Witnesses in court take an oath to "tell the truth, the whole truth and nothing but the truth". They should not be obstructed from doing so. Any application to protect the privacy of witnesses or others involved in a court hearing can be dealt with in the normal way, by applications to the court for redaction or restricted reporting orders.

It is prejudicial to suggest that a witness who uses the ordinary words man, woman, male, female and the pronouns he and she may be doing so in bad faith. As the Forstater employment tribunal stated:

> "We reminded ourselves that it would be an error to treat a mere statement of Ms Forstater's protected belief as inherently unreasonable or inappropriate."[25]

The changes needed

Urgent update with two warnings

The next interim revision of the Equal Treatment Bench Book should at a minimum:

- include a prominent warning to judges that it is only intended as guidance for the conduct of hearings and should **not be used in lieu of evidence submissions and legal argument** in deciding substantive matters

[25] *M Forstater v CGD Europe and others [2022] UKET 2200909/2019.*

- include prominently in the transgender chapter a warning (for the avoidance of confusion) that **to self-identify as a (trans) man or woman does not change a person's sex**
- rename the chapter on "gender" as "sex" in line with the Equality Act and the statement by Lord True to the House of Lords on 23rd May 2022.[26]

A root-and-branch review

It is our view that ETBB cannot be revised effectively through line-by-line edits using the current process. It has moved too far from its original aims, and the process for revision is not open, transparent or focused on its mandate.

The Lord Chief Justice and the Chair of the Board of the Judicial College should commit to a root-and-branch review of the ETBB with these aims:

- return it to its purpose of providing practical advice for conduct in the courtroom, cutting out all content which is outside this scope
- ensure that it is in line with, and does not undermine, the Equality Act 2010
- make clear that it is not a guide to the Equality Act – removing overlaps with the EHRC Codes of Practice and directing judges to refer to the statutory guidance for Equality Act questions.

These changes would also significantly reduce the size and improve the usability and focus of what has become a sprawling, unwieldy document.

A transparent and accountable process

The current process appears to be largely self-driven by a small self-organising committee. It is subject to neither government oversight nor transparency or challenge (or open justice) within the legal system. The committee is effectively acting as a voluntary organisation.

The Judicial College should publish details of how the ETBB committee is constituted and appointed, its mandate and how it works, and how other judges, and members of the public and expert organisations, can contribute: their comments should be published.

There should be a timetable, calls for comments on specific chapters and a notice of changes alongside revised versions.

[26] UK Parliament (2022). *Review of legislative drafting: statement made on 23 May 2022; Statement UIN HLWS46.*

EHRC case-law updates

In parallel with these reforms, the **Equality and Human Rights Commission** should commit to publishing periodic case-law supplements to the Equality Act Codes of Practice. This is the correct place for guidance to judges, service providers and employers on how to interpret the Equality Act based on developments in case law.

A useful set of supplements to the Codes of Practice was published in 2014, which identified developments in the law since the codes were approved.[27] However, they are hard to find and have not been promoted, and this exercise has not been repeated since. These documents should be updated annually with new case law and more strongly promoted alongside the codes.

The EHRC has statutory powers to update the Codes of Practice by placing amendments before Parliament. We understand that an updated Code of Practice is planned, following the EHRC's recent non-statutory guidance on single-sex services.

Recording sex across the justice system

The **government** also has a role to play. While the ETBB is produced "by judges for judges", the question of how people's sex is treated across the criminal and civil justice systems is not one that can be determined by any small committee of judges – it also concerns the policies and administrative systems of the Police, the Crown Prosecution Service, the Courts and Tribunals Service, and the Prison and Probation services. It should be consistent and clear.

The Ministry of Justice has recently confirmed that the Justice Secretary plans to change prison policy "so transgender prisoners with male genitalia are not housed with other biologically born women in the female prison estate", unless signed off by a Minister. The Home Secretary has ordered her office to begin working with the nation's police forces on a new procedure for officers to record the sex of criminals and ensure accuracy of crime recording statistics.

What is needed now is a **common framework** for recording sex across the justice system, based on a clear set of principles:

- Sex means biological sex – male or female. It should be recorded accurately for both statistical and administrative purposes.
- Keeping a person's sex secret is usually impossible, and often incompatible with the prevention of crime and the administration of justice. (For this reason, there are exceptions

[27] Equality and Human Rights Commission (2014). *Supplement to the Statutory Code of Practice on Services, Public Functions and Associations.*

to S.22 in the Gender Recognition Act, which allow for information on a person's sex to be shared as part of the judicial process.)

- Systems for compliance with Section 22 of the Gender Recognition Act 2004 must not undermine the accurate recording and use of data on sex for those with a GRC, as anticipated by the exceptions within Section 22, or for those without a GRC.
- In some cases, individuals may wish to record a transgender identity (such as transwoman, transman or non-binary) as well as their biological sex. This should be recorded separately; it does not change a person's sex.
- People with transgender identities may have particular needs and should be treated with respect.
- The privacy of people with transgender identities can be protected through routine data protection and specific court-ordered reporting restrictions, where applied for and proportionate.

The **Lord Chancellor and Secretary of State for Justice** and the **Home Secretary** should take this forward with their respective departments, removing from judges the temptation to implement gender self-ID that has never been enacted in law.

sexmatters

About Sex Matters

Sex Matters promotes clarity about sex in law, policy and language in order to protect everybody's rights.

We believe that sex matters in law and in life, and it shouldn't take courage to say so.

We are a human-rights organisation that educates and empowers people to:

- ensure that laws and policies are clear about sex
- understand and use the law to protect everyone's rights
- speak up and use clear language about the sexes.

Find out more at sex-matters.org

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