2nd October 2024

Dear Baroness Falkner and John Kirkpatrick

We are writing to you with our response to the EHRC's 2025–2028 strategy (which we are also submitting via the survey).

In 2021 we responded to the EHRC's previous strategy consultation[1] urging it to address the crisis in relations centring on the two protected characteristics of sex and gender reassignment.

As we set out in our letter, the EHRC had previously become an advocate for activist groups, promoting a one-sided view of the conflict of rights over sex and gender identity, working closely with Stonewall, Mermaids and Gendered Intelligence and giving troublingly misleading advice, such as that Girlguiding could remain a "single-sex organisation" while admitting boys and men who identified as transgender.

In 2021 the EHRC had already turned a corner, refocusing on its purpose and mandate of impartial defence of everyone's rights, leaving the Stonewall Champions scheme and intervening in the Forstater appeal.

We wrote to the chair and CEO about how women who stand up against gender ideology are being bullied at work and in public life, and that this is undermining trust in the integrity of public organisations and regulators. We did not foresee that you would become the next target simply for doing your job, or how vicious and personal the backlash would be. Perhaps we should have.

We watched with horror the attacks in the media, unsubstantiated claims of racism and transphobia, the internal investigation, the two occasions where masked men poured urine around the entrance to the EHRC's London office, and complaints to the UN body GANHRI attempting to have the EHRC's A-grade status removed.[2]

As we wrote to GANHRI, you have faced the same kind of attacks, vexatious complaints and smears that have been used to harass and intimidate so many ordinary women at work.[3] We can only imagine the toll it must have taken on Baroness Falkner personally, and the reserves of courage you have had to draw on to withstand this attack and to hold to your determination to reposition the commission as a rigorous, objective regulator.

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[1] Sex Matters (2021). *Equality and Human Rights Commission: Submission to consultation on their strategic plan*.

[2] Sex Matters (2024). *Timeline of efforts to sabotage the EHRC's work to protect everyone's rights*.

[3] Sex Matters (2024). *Letter to GANHRI, 22nd January 2024*.

In our response to the 2022–2025 strategy we called on the EHRC to:

- **provide guidance that clearly communicates what the Equality Act 2010 defines and prescribes** in an area that has become muddied and confused, including:
    - **clarify the meaning of sex in the law**
    - **make clear that people should not be discriminated against or harassed because of their beliefs** on sex and gender
    - **advise service providers that they should have clearly expressed rules and policies** about single-sex provision – including everyday services, specialist single-sex services, and sports.
- **step back from using the Act to promote childhood transition,** a medically controversial treatment outside the EHRC's competency and mandate.

We also called on the EHRC to:

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

Taking stock, the EHRC has done much of this:

- met us and other gender-critical groups, in the ordinary stream of stakeholder meetings
- published guidance on single-sex services
- made interventions urging caution on the proposal to ban "conversion therapy " and on gender self-ID in Scotland
- responded to the Minister for Women and Equalities, recognising the difficulties caused by the interaction between the Gender Recognition Act and the Equality Act
- responded to UK Athletics on its misreading of the sports exception
- updated the technical guidance for schools
- provided guidance on discriminatory advertising
- published the draft of a new Code of Practice for consultation.

We thank you for these efforts, and for the courage and resolution you have shown. We will continue to provide positive and critical responses.

The Forstater ruling has brought significant progress. Gender-critical speech can no longer be seen as "outlawed," and employers and others must permit advocacy for women's rights. But the degree of institutional capture and confusion over the law, and the activist backlash (including what EHRC itself experienced) mean that there is a a long way to go to realise EHRC's vision of a society **"founded on equality and human rights, where everyone has the opportunity to live well and to live well together".**

Yours sincerely

Maya Forstater, CEO

Comments on strategy

Pillar 1

Acting as the guardian of equality and human rights protections, including evidencing issues, supporting more effective standards, improving compliance and enforcing the law

The law, and misrepresentation of the law, has done so much damage to women and girls and to institutions that it is **now essential to use the equality and human-rights framework clearly and simply, using natural language, to protect women's rights.**

The term "legal sex" is misleading, even if the judgement of the Inner House of the Court of Session in the For Women Scotland Case is upheld. The situation concerning the Equality Act remains complex, and the issue cannot simply be expressed as being that a person has a "legal sex" that overrides biology in all situations where the Equality Act applies.

The Gender Recognition Act provides at Section 9 that:

> (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
>
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

Thus a person's sex for the purposes of law depends on the particular law. There is no such thing as a singular "legal sex" and it is misleading to state that there is. For example: for the purpose of sexual intercourse, rape, inheritance and parenthood a person's sex in law is their immutable biological sex. For the purpose of marriage and pensions a person's sex in law can be changed by acquiring a gender-recognition certificate. All of these are "legal" purposes.

A person's sex is immutable and likely to remain salient to other people, and there is no sense in which a gender-recognition certificate can override this.

Recommendation 1: The EHRC should stop using the term "legal sex" and refer to "sex as modified by a gender-recognition certificate" where needed.

Protecting single-sex services

The EHRC must face up to conflict of interests between women and trans-identified men in considering what it means to "live well and live well together" :

- Some trans-identified people think that in order for them to "live well", other people must be forced to pretend they have changed sex and to let them break sex-based rules (such as by men who identify as women using women's spaces).
- This undermines other people's ability to "live well" if they are sanctioned at school or at work, or even lose their job, for speaking truthfully, or if they lose single-sex facilities, sports and associations. In particular it leads to breaches of Article 3 as women find themselves sharing intimate spaces with men and being searched or given intimate care by them against their will.

In human-rights terms, transgender people's article 8 right to private life and autonomy comes into conflict with other people's rights under articles 3, 8, 9, 10 and 11.]

With so many more people identifying as transgender, expectations need to be reset in order to protect single-sex services and other people's human rights.

Making systematic use of our legal powers, while improving our response to new and pressing equality and human rights issues

The job of sorting out the law on sex and gender reassignment across the public and private sector has been undertaken by individuals, mainly women, mainly unpaid, and through legal cases funded through crowdfunding.

There has been a run of successful gender critical belief discrimination cases[4] including:

- Maya Forstater v CGD, EAT (2021) and ET (2022): direct discrimination, victimisation
- Allison Bailey v Garden Court Chambers (2022): direct discrimination and victimisation
- Denise Fahmy v Arts Council England (2022): harassment
- Rachel Meade v Social Work England and Westminster Council (2023): harassment (and awarded exemplary damages against the regulator)
- Jo Phoenix v Open University, ET (2023): harassment and victimisation

[4] Ruth Birchall and Jo Phoenix (2024). *Don't Get Caught Out – a summary of gender critical belief discrimination employment tribunal judgments.*

- Roz Adams v Edinburgh Rape Crisis (2024): discrimination and constructive dismissal
- Lizzy Pitt v Cambridgeshire County Council, ET (2024): harassment
- Laura Favaro v City University: successful settlement (still ongoing)
- Higgs v Farmor's School: claimant successful at EAT
- Natalie Bird v Liberal Democrat Party (2024): discrimination
- Shahrar Ali v Reason and Nott (Green Party case) (2023): non-employment case

These cases are the tip of an iceberg of institutional discrimination against people who express gender-critical beliefs. In each case the organisations and individuals wrongly thought they were acting in accordance with the law; often they were acting in line with training and guidance from sector bodies and NGOs.

Time and time again, these cases show that organisations do not understand what is lawful and what is not. In particular, there is reason to think that even the institutions that have faced successful claims have been resistant to learning the lessons from them; see for example Edinburgh Rape Crisis Centre's retention as a board member to date of Mridul Wadhwa, found by the tribunal to have been the controlling mind behind the egregious and deliberate discrimination against Roz Adams; the recent Dandridge review commissioned by the Open University; and the grudging acknowledgment by Social Work England of the Rachel Meade findings. There continues to be systematic discrimination against gender-critical people across many sectors, and this is undermining safeguarding.

Recommendation 2: The EHRC should undertake an inquiry under s16 EA 2006 into unlawful discrimination against people, especially women, with gender-critical beliefs.

This could include a review of lessons learnt from this run of tribunals, and assessment of whether guidance and training is in line with the law.

Recommendation 3: The EHRC should use its power to enter into legally binding Section 23 agreements with organisations to systematically address discrimination against gender-critical people.

For example, the EHRC should invite universities to engage in a common Section 23 agreement to address the problem of gender-critical discrimination and harassment, and to extract themselves from the discriminatory policies they have adopted through their engagement with Stonewall and Athena Swan. This could include developing a set of model

policies that are compatible with the Equality Act to replace Stonewall-promoted policies (including those on data collection and transition at work).[5]

We suggest that regulators should be another focus of this work. The conduct of Social Work England in Rachel Meade's case was particularly concerning (as reflected by the award of exemplary damages made by the tribunal). Bearing in mind the responsibilities of social workers for the welfare of vulnerable children and adults, it is of the utmost importance to ensure that their regulator is not suppressing social workers' professional engagement with the implications of the Cass Review.

Making clear, authoritative and up-to-date guidance and codes of practice available to duty-bearers to help them to understand and comply with their legal obligations.

The Codes of Practice should be updated and corrected to provide clear guidance, in particular on single-sex services.

The EHRC must be clear that allowing men who identify as women (with or without a gender-recognition certificate) into a "female" or "women's" service or space means that it becomes a mixed-sex service or space. It is not possible to provide a space that includes males and females, and at the same time to tell women (expressly or through signage) truthfully that it is female-only.

Recommendation 4: Guidance should be clear and simple. Answers to questions about who can use single-sex services should be concrete and reality-based, and available in easy-reading and postcard-sized versions, making it clear that:

- men who identify as women (whether they have a GRC or not) **are not entitled** to use women's spaces or services or play in women's sports
- **it is reasonable for women and girls who have been told that a space is female-only to expect not to find any men there** (whether transvestites, transsexuals, cross-dressers, transwomen, or men who identify as non-binary or gender-fluid)
- not providing a separate space for women or separate sports for women, or having ambiguous rules that invite men to access these, **is likely to be unjustifiable indirect discrimination against women.**

[5] Sex Matters (2024). *Learning from the Jo Phoenix case*.

Promoting the Public Sector Equality Duty (PSED) as a constructive way to raise compliance in priority sectors

The EHRC's interpretation of the Equality Act (based on what it calls "legal sex") means that the public-sector equality duty does not work for women.

If the protected characteristic of sex relates to having a certificate (what the ERHC calls "legal sex") not actual sex, then in any conflict between women and transgender males, women's rights will not be considered, because being female is not a protected characteristic.

The EHRC's concept of "legal sex" applied to the Public Sector Equality Duty means that duty holders do not need to consider the needs of female people (those who may get pregnant, become mothers, go through menopause and so on) because these people are not defined as sharing a protected characteristic.

It also means that allowing people with male bodies (who may according to the EHRC become "female" through acquiring a certificate) into "female-only" spaces cannot be considered sex-based harassment or discrimination since these people are, according to the EHRC's categories, "women".

This is one of the reasons why we think this is the wrong interpretation (we are intervening in the For Women Scotland case on this).

It is clear that the Equality Act intended for women and men to be recognised as groups with different needs and interests. As Caroline Criado Perez has pointed out in her book *Invisible Women*, a world designed for men as the default disadvantages women.[6]

If there is no recognition that women suffer from disadvantage because of the shared characteristic of being female (as opposed to having a certificate that says female) provisions that are meant to support women are not defended or advocated for, as there is no language, data or category that can be used.

Recommendation 5: Review guidance on PSED and EIAs to make clear that sex means the material reality of being male and female – not gender identity.
This is the interpretation of the Equality Act consistent with the Human Rights Act.

Recommendation 6: Intervene in the For Women Scotland case to support an interpretation of the Equality Act informed by human rights.

[6] Caroline Criado Perez (2019). *Invisible Women: Exposing Data Bias in a World Designed for Men*, Chatto & Windus.

Maintaining and promoting an authoritative and comprehensive evidence base through the Equality and Human Rights Monitor

The Equality and Human Rights Monitor framework (developed in 2017) gave away the definition of sex without any consideration of the impact this would have on the integrity or utility of survey data.

> "Sex: refers to a man or a woman. In the survey data we use for our own statistical analysis, this characteristic is self-defined and allows transgender people to self-identify according to their gender and not their biological sex. Therefore, this characteristic is referred to as 'Gender' in our data tables."

A framework which does not consider the needs and characteristics of women (female people) separately from those of men (including male crossdressers, transsexuals and men who identify as transgender or non-binary) is neither comprehensive or authoritative.

Recommendation 7: The EHRC should be clear in its data monitoring that it seeks to monitor data on the two sexes.

Establishing our position as a regulator of equality and human rights in emerging technologies, including artificial intelligence

Getting sex clear in digital identities is an opportunity to protect both the rights of women and of trans-identifying people of both sexes.

The obtaining of consent and sharing of information can only work if there are clear categories. For example: a woman consenting to disclose the data that she is female to a healthcare provider is consenting to share the accurate data that she is female. This information cannot be stored robustly unless the "F" marker in the sex field really means female, and isn't also used for trans-identifying males. If the "F" marker is also used for trans-identifying males, the effect for each woman who has consented to the storage of accurate sex data is that the information that is stored for her is not that she is female, but that she is either female or a trans-identifying man. That is not accurate, and is unlikely to be the basis on which she has consented.

Digital identity verification systems can solve the problem of the confusion and corruption of sex data.

It would be gender-reassignment discrimination if trans-identifying people were not able to accurately verify their sex where the information is needed. It would also be indirect sex discrimination if the system was built so that it could not verify sex data accurately for anyone, since this is particularly detrimental to women.

A digital identities standard could make clear what sex means, and how service providers can verify someone's sex (such as by reference to their sex as registered at birth, or as vouched by a medical professional).[7]

Recommendation 8: The EHRC should engage with digital-identity data standards, highlighting that everyone needs to be able to have their sex accurately recorded and validated for their own safety and to access appropriate services.

Playing a convening role

The EHRC's 2025–2028 strategy includes under its core pillar: "playing a convening role to support mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights". This follows on from the previous strategy of "facilitating and creating the conditions for constructive and respectful dialogue between people with different views".

The debate on sex and gender is frequently characterised as "toxic" and the EHRC has found itself at the heart of that.

Recommendation 9: The EHRC should step forward in convening difficult conversations and bringing stakeholder groups together around a robust concept of universal human rights and mechanisms for balancing them. Private or separate meetings should be offered to all comparable groups or none; they should not be offered as a substitute form of engagement for groups that refuse to engage with other stakeholders.

A critical cross-cutting issue to pillar 1: safeguarding

In November 2023 we wrote to you about safeguarding after the EHRC made a recommendation for schools to collect data on bullying those protected characteristics including sexual orientation and gender identity.[8] We pointed out the safeguarding risk this creates: to collect this data, schools need to classify all children as gay or straight and "cis" or trans, which are adult sexual identities. This incident illustrates the safeguarding problem of putting the Equality Act before other statutory obligations.

Schools have a statutory responsibility to have measures in place to prevent all forms of bullying, and must not discriminate on the basis of protected characteristics, but this does

[7] Sex Matters (2024). *Digital verification services*.

[8] Sex Matters (2023). *Letter to Kishwer Falkner EHRC, 17th November 2023*.

not mean that they should formulate anti-bullying initiatives in terms of rights and protected characteristics instead of an understanding of child development and behaviour.

We think that it is a critical gap that the EHRC's governance manual does not mention safeguarding or include a process for due diligence over recommendations and guidance in this regard.

In March 2024 we published an analysis of the EHRC's response to the Department for Education's draft guidance for schools on gender-questioning children which illustrates the same problem.[9] The EHRC response says:

> "Provisions in the Equality Act, particularly those related to direct and indirect discrimination and protected characteristics, are central to the factors schools must consider when making decisions about gender-questioning children."

We argued that this was the wrong place to start. The best interests of the child is the central factor ("paramount", as stated in the UN Convention on the Rights of the Child) that schools must consider when making individualised decisions about any child. The best interests of the child are prioritised in *Keeping Children Safe in Education* (KCSIE) and in the statutory guidance on supporting pupils at school with medical conditions (issued under the Children and Families Act 2014).

Anti-discrimination protections apply, but they should be used to test the policies, not to drive them.

In particular, an approach that treats children with certain protected characteristics as exceptions risks direct discrimination, which cannot be justified however benign the motives of the discriminator. Such an approach is particularly concerning if it exempts children with a particular protected characteristic from general rules whose purpose is to keep children safe. KCSIE has recently been updated to reflect this.

On 6th April 2024, we received a response from the chair of the EHRC to our concerns about safeguarding, which said:

> "While we consider the safeguarding implications of our work where it is relevant to do so, our expertise and our remit lies in the equality and human rights framework, and that is where we have focused our response."

Our concern was that the EHRC said in its response to the DfE schools guidance on gender-questioning children that schools should recognise changes of pronouns by children and implement them consistently. This has safeguarding implications since "changing a child's pronouns" or other words such as girl/boy means that other people (children and adults) will treat them as if they are the opposite sex (or be confused into thinking they are the opposite sex). Those safeguarding implications also engage human-rights and

[9] Sex Matters (2024). *What does the law say about "gender-questioning children" in schools?*

discrimination concerns; it is impossible to treat human rights, discrimination and safeguarding as separate fields of expertise.

Schools need to be able to use clear words to keep children safe and treat them fairly.

Recommendation 10: The EHRC should have a published safeguarding policy, and a process for assessing the safeguarding implications of the guidance and recommendations it produces.

Pillar 2: places where sex matters

In undertaking its programme of work, the EHRC should be clear in considering where sex matters, and also where those who express clarity about the two sexes are vulnerable to discrimination and harassment.

Theme 1: Work

1. Sex discrimination, harassment and victimisation, including sexual harassment, in the workplace.
2. Risk of discrimination or rights breaches due to new technology in the workplace; for example, automated recruitment processes.

Theme 2: Participation and good relations

1. The impact of public services moving to digital by default, particularly on some groups such as older and disabled people.
2. The barriers disabled people face when accessing public transport.
3. Social tensions due to polarised public discussion of equality and human-rights issues.
4. The risk to freedom of expression of prohibiting the expression of certain views, or shutting down debate.

Theme 3: Justice and the balance of rights

1. Legal clarity around issues where there may be tension between the rights of two or more groups; for example, in relation to sex and gender or matters of religion or belief.

2. Hate crime, particularly for some protected characteristic groups.
3. Low charge and prosecution rates, long delays, high numbers of withdrawals and poor treatment of some groups around rape and serious sexual offences.
4. Children in youth detention experiencing human-rights violations; for example, solitary confinement and pain-inducing techniques.
5. The welfare and safety of women and girls in detention: for example, there are high levels of self-harm, issues for pregnant women and risks posed by inconsistent use of safe and appropriate settings.
6. The risk to the right to protest caused by changes in legislation and policing practices.