

The EHRC Letter on The Equality Act and the definition of 'sex' (3 April, 2023) Briefing Paper

Wrong in law and highly dangerous

1. Introduction

Kemi Badenoch, the Minister for Women and Equalities, recently wrote¹ to the Equalities and Human Rights Commission ('EHRC') asking for advice on amending the definition of the word 'sex' in The Equality Act 2010 ('EA 2010') to clarify the law.

The letter starts by citing two recent legal cases and claims they '*have raised legitimate questions about the definition of sex in the Equality Act 2010*'. Given both cases are consistent with past case law, it is hard to see how they have raised questions on which the advice is sought.

The first, *Fair Play for Women v UK Statistics Authority*², is an authority for the proposition that once a transgender woman³ has obtained a Gender Recognition Certificate ('GRC') under the Gender Recognition Act 2004 ('GRA'), her sex for the purposes of the Census Act 1920 is *female*.

The other, *For Women Scotland (No 2)*⁴ is an authority for the similar proposition that obtaining a GRC means a trans woman's sex under the EA 2010 is *female* as well. The letter concludes:

"On this basis [the EHRC's powers under s. 11 EA 2006], and mindful of the need to appropriately balance rights to gain clarity in what is a technical and contested area of law, I would like your considered advice of [sic] the benefits or otherwise of an amendment to the 2010 Act on the current definition of 'sex', along with any connected or consequential enactments, bearing in mind the advantages and disadvantages that such a change might entail for affected groups"

In reply, Baroness Falkner, Chairwoman of the EHRC, provided a letter⁵ of advice to Badenoch on behalf of the EHRC on the 3 April 2023. She wrote:

*"There is no straightforward balance, but we have come to the view **that if 'sex' is defined as biological sex for the purposes of EqA, this would bring greater legal clarity in eight areas.** [...] On balance, we believe that redefining 'sex' in EqA to mean biological sex would create rationalisations, simplifications, clarity and/or reductions in risk for maternity services, providers and users of other services, gay and lesbian associations, sports organisers and employers. **It therefore merits further consideration.** [the EHRC's bold]"⁶*

Below is an analysis of the EHRC's reply from a legal standpoint. The letter is littered with ill conceived, or false understandings which if not recognised as such, could lead to dangerous misconceptions about the law and the reality of trans people's lives. We focus here on the main issues. Under the guise of 'clarifying' the law, the EHRC's advice letter in effect calls for the destruction of the legal rights transgender people have enjoyed under equalities laws for the last 20 years⁷ or more.

Although a letter of 'advice', in which the EHRC invites the government to conduct further analysis, it is not without consequences. The EHRC is seen as an independent and expert body, and its advice carries weight. The government is actively considering legislating in this area and

the EHRC letter is an important tool in advancing their argument to MPs (and the public), that the law needs to change to erode the rights of transgender people in the UK.

2. In detail: Issues with the advice letter

2.1 The definition of the term 'sex' in the EA 2010 is already clear

The EHRC claims to have written this letter in order to bring clarity to the definition of the term 'sex'. Paradoxically, it confirms in its advice letter that the GRA *does* change the definition of the term 'sex' in the EA 2010⁸: by its own admission, there is no legal confusion as to the definition of this term. This position is correct and is supported by 20 years of case law⁹. If the definition of something is already clear and unambiguous then changing that definition will not bring further clarity, but risks introducing confusion.

The EHRC failed to define the term '*biological sex*' in its letter. In our view this is because a universal definition of the term '*biological sex*' is anything but simple. It is the transgender and intersex¹⁰ individuals, who today are able to fix their sex in law by obtaining a GRC, for whom the term '*biological sex*' is hardest to define. Such individuals may have *both* male and female biological sexual characteristics, for example XY chromosomes and breasts¹¹.

The courts attempted to define '*biological sex*' in *Corbett v Corbett*¹² by defining a four or possibly five-part test. But even this test broke down for intersex individuals. In *W v W*¹³ the court tried to assess amongst other things whether an intersex woman's genitals at birth were long enough to be a micro penis, or should instead be viewed as an enlarged clitoris.

It should be noted that this case dates from pre-2000 and prior to the GRA. Today, W could obtain her human rights by following the administrative procedure laid down in the GRA. But if the EHRC proposals become law, this would no longer be the case. Hence more cases such as W should be expected as individuals seek to reclaim rights that have been stripped away.

Regardless of whether the government tries to codify the *Corbett* definition of '*biological sex*' or another such definition in the EA 2010 or just leaves it to the courts, amending the EA 2010 will lead to more confusion not clarity.

2.2 Changing the term 'sex' fixes non-existent issues with the EA 2010

Two 'problems' raised by the EHRC are not issues at all.

2.2.1 Maternity rights for trans men with GRC's

The advice letter claims:

*"As things stand, protections in the EqA for pregnant women and new mothers fail to cover trans men who are pregnant and whose legal sex is male. Defining 'sex' as biological sex would resolve this issue"*¹⁴

This is an incorrect view of the law. Section 12 GRA 2004 ensures trans men who have GRCs still benefit from the '*maternity*' measures contained in the EA 2010. The wide scope of s.12 was confirmed by the Court of Appeal in *McConnell v the Register General*¹⁵. There is therefore no need to change the definition of 'sex' to ensure that trans men with GRC's benefit from maternity protections.

2.2.2 Associations for lesbians

The advice letter states:

“If sex means legal sex, then sexual orientation changes on acquiring a GRC: some transwomen with a GRC become legally lesbian, and some trans men with a GRC become gay men. As things stand, a lesbian support group (for instance) may have to admit a trans woman with a GRC attracted to women without a GRC or to trans women who had obtained a GRC. On the biological definition it could restrict membership to biological women.”¹⁶

The first thing is to note is that the concept of a trans woman who is sexually attracted to other trans women who have obtained a GRC, but is not attracted to those who haven't obtained a GRC, is entirely irrational. Adding further to the confusion, is the phrase 'women without a GRC'. This is baffling until it is realised the EHRC, the UK's equalities and human rights regulator, has adopted 'gender critical' language. By 'women without a GRC' the EHRC means, *cisgender* women and *transgender men* who have not obtained a GRC. Further analysis of the EHRC's view of same sex attraction under the EA 2010 is futile though as the example is misconceived from the start.

Many associations are *not* covered¹⁷ by the EA 2010, for example if they have less than 25 members or don't have a membership controlled by rules and a selection process. These associations are free to exclude any one they like.

However, an association covered by the EA 2010 is not allowed to restrict its membership to just lesbians. This is because the EA 2010 only allows single protected characteristic associations¹⁸. Restricting an association to just lesbians requires restrictions on two protected characteristics: restricting the protected characteristic of *sexual orientation* to *same sex attracted*¹⁹ and restricting the protected characteristic of *sex* to *female*²⁰.

Therefore, changing the definition of 'sex' does not impact lesbian support groups. Lesbian support groups are either not associations under the definition in the EA 2010 or they are unlawful.

2.3 The proposed 'benefits' of changing the term 'sex' are not 'benefits'

The advice letter suggests that 'benefits' relating to all-women shortlists, women's book clubs and occupational requirements flow from changing the term 'sex'. This is *not* the case.

2.3.1 All-women shortlists ('AWS') for political parties

“Currently, trans women with a GRC could benefit from 'women-only' shortlists and other measures aimed at increasing female participation. Trans men with a GRC could not. A biological definition of sex would correct this perceived anomaly”²¹

It is unclear why a political party would wish to have an AWS that *included* trans men with GRC's but excluded trans women with GRCs. No openly transgender woman has ever been elected to Parliament. As transgender women are underrepresented in Parliament, there is no reason why they, like cisgender women, should not be able to benefit from a positive action measure in this regard.

Trans men are perceived as²² and live as men. Furthermore, to obtain a GRC trans men must sign a statutory declaration stating they live as men and intend to live as men for the rest of their lives²³. Taking advantage of a measure only open to women is not living as a man. It is also doubtful whether a trans man who appeared on an AWS would receive any benefit at all.

By appearing on an AWS, a trans man would out himself, likely undermine his entire public and lived presentation, and also suffer misogyny and transphobia. We cannot think of any circumstances in which a trans man, having been through transition, would wish to become elected on AWS and any attempt by one to do so would surely destroy his electoral prospects entirely. That the EHRC have used this as an example demonstrates again a staggering lack of understanding of the reality of trans people's lives.

2.3.2 Women's book clubs

The EHRC letter states:

*"As things stand, a women's book club (for instance) may have to admit a trans woman who had obtained a GRC. On the biological definition it could restrict membership to biological women."*²⁴

Like a lesbian association, a book club would only be viewed as an association under the EA 2010 if it has more than 25 members, and a membership controlled by rules and a selection process²⁵. For example, small gatherings of friends are excluded from the EA 2010. These gatherings are free to exclude trans women or any other minority protected under the EA 2010.

The EHRC does not explain why it is a problem that a book club which was classified as an association, which does not seem probable in practice, cannot exclude trans women. There are no issues of privacy or dignity with including trans women in a book club. Nor do the type of sensitive disclosures that occur in a rape crisis support group take place at a book club. One is left with the nagging suspicion that the EHRC view trans women, regardless of legal status, as men and therefore unwelcome at a women's book club. The reality though is that many women only book clubs²⁶ or other women only associations are inclusive of trans women.

The EHRC's letter also admits²⁷ that such a change would mean that a women's only book club covered by the EA 2010 *would have to admit all trans men* including those with GRCs. As stated above trans men look and are perceived as men. Those who have GRCs have also made a legal declaration to live as men. They have no interest in joining women only book clubs and would be as out of place as a cisgender man. Such a legal change allowing transgender men with GRC's to join women's book clubs would be a retrograde step. Once again, the position the EHRC has taken here is nonsensical.

2.3.3 Occupational requirements

The EHRC letter states:

*"Employers are sometimes permitted to restrict positions to women or to men. An employer can (for example) require that a warden in a women's or girls' hostel be female. At present, such a role would be open to a trans woman with a GRC, but not to a trans man with a GRC. A biological definition of sex would correct this perceived anomaly."*²⁸

There is no benefit to a trans man who has a GRC being able to work in a female specific role such as the warden of a women's hostel. As explained above, trans men live as, behave as and are perceived as men. Any woman or girl staying at the hostel would immediately perceive the transgender man as a man and this would cause alarm. This would defeat the purpose of designating the role as female only in the first place. Nor, once more, can we envisage any circumstances in which a trans man, having transitioned to live as a man, would wish to be employed in a role reserved for women, for the reasons similar to those outlined in 2.3.1 and 2.3.2 above.

2.4 Clarifications to the law do not flow from changing the term 'sex'

The clarifications to the law claimed by the EHRC do not actually flow from changing the definition of the term 'sex' with regard to occupational requirements and single/separate sex services.

2.4.1 Occupational requirements

Even if the definition of the term 'sex' were changed in the EA 2010, it may still be unlawful to exclude a trans woman with a GRC from a female specific role. Such an exclusion on the basis of her sex or her *gender reassignment* is only lawful if it is 'a *proportionate means of achieving a legitimate aim*'²⁹. Therefore, excluding a trans woman who has become legally male under a revised EA 2010 on the grounds of her sex is still subject to a proportionality test.

For example, a post operative trans women may have been living as a woman for many years. She may look and 'pass' as a woman and hence be perceived by others as a woman. The only reason for excluding such a trans woman from a role, such as the hostel warden example used by the EHRC, would be prejudice. Excluding someone solely on the basis of prejudice would *fail* the test of proportionality³⁰.

Therefore, regardless of an individual's legal sex, a balancing exercise which weighs the harm to the trans woman against possible discomfort to other people still needs to be conducted. If a balancing exercise is needed regardless of legal sex, then changing the definition of the term 'sex' does not bring any clarity in this area.

2.4.2 Single/separate sex services

*"Service providers are sometimes permitted to offer services to the sexes separately or to one sex only. For instance, a hospital might run several women-only wards. At present, the starting point is that a trans woman with a GRC can access a 'women-only' service. The service provider would have to conduct a careful balancing exercise to justify excluding all trans women. A biological definition of sex would make it simpler to make a women's-only ward a space for biological women."*³¹

Even if the definition of 'sex' were to be changed, then a service provider could *not* simply exclude all trans women from a ward regardless of whether a balancing exercise is conducted. *Croft v Royal Mail*³² established that once a trans woman, even if legally male, has made sufficient progress in her transition she can no longer be excluded from female single sex spaces. Such a point has to be decided on a case-by-case basis³³. We believe that this is a sensible and sensitive approach. Although an employment case, there is no reason why the reasoning in *Croft* would not apply to services to the public.

Alternatively, a trans women excluded from a female single sex ward would have a claim for *indirect discrimination*³⁴ unless it was a '*proportionate means to achieving a legitimate aim*'³⁵. Again, such an exclusion would have to be applied on a case-by-case basis³⁶.

In summary, even with a change in the definition of the term 'sex', a blanket ban on all trans women from a women's single sex ward *would still not* be lawful. This is because trans women could still only be excluded on case-by-case basis. Therefore, this change brings no clarity to the law on single/separate sex services.

2.5 The letter ignores the real harm that these EA 2010 changes would cause trans people

Although the legal impact on trans people of changing just the term 'sex' in the EA 2010 is bad enough, the EHRC warn that consequential changes would also be required³⁷. We disagree. The

EA 2010 has been working reasonably well for trans people without GRCs for over a decade, albeit they have only been able to enjoy limited rights. Changing the term ‘sex’ would give every trans person with or without a GRC the same reduced legal status.

However, the EHRC seems to desire further changes to the EA 2010, not to make the act work, but *to make the act work in the way it desires*. Were these changes made, the effect on trans people in the UK would be devastating. Trans people, for reasons that we explain below, could be excluded from all single/separate sex facilities from toilets to hospital wards and all competitive sports, even grassroots events. Yet the letter does not even mention the harm that its proposals would do to trans people, let alone weigh these harms against the purported benefits of its proposals.

2.5.1 Sports

Trans women can already be excluded from sport if necessary for fair competition or safety³⁸. However, the EHRC in its letter pushes to exclude trans women from sport *even if it is safe and fair* for them to complete. If the EHRC proposals go ahead, trans women would have no redress against the grassroots level bans currently being applied across many sports in the UK³⁹. They would be shut out of the social and fitness benefits of participating in sport.

Responses by sporting bodies to include trans women in renamed male categories (so-called ‘Open’ categories etc) are deeply problematic. Trans women will need to ‘out’ themselves to take part in these categories, become subject to public ridicule and abuse, need to deny their gender identity in public and, if they have been taking female hormones for any length of time, look ahead to a life of being unable to compete with the male athletes with whom they have been grouped.

2.5.2 Single and separate sex services

Single and separate sex services go far beyond the hospital wards mentioned in the advice letter. They range from toilets to rape crisis services and cover both services to the public and services provided to employees. Although organisations would be under no obligation to segregate on the basis of biology, if the EHRC’s desired changes were made to the EA 2010 (so that organisations *could* segregate on a blanket basis on the basis of ‘*biology*’) they would likely be compelled to do so.

Organisations that allowed trans people to use facilities based on their lived gender would come under intolerable political⁴⁰ and media⁴¹ pressure. Any organisation that held out would be threatened with litigation for *indirect sex discrimination*⁴². If no gender-neutral facilities were available, trans women who in desperation used the men’s facilities would face threats of violence.

If the service provider felt that trans women using the men’s facilities was too disruptive, it could exclude the trans woman from *both* men’s and women’s facilities using the exceptions contained in the EA 2010⁴³. Trans men who used the ladies’ facilities would also be likely to be excluded for the same reasons. Unable to use the appropriate facilities, trans people would be excluded from employment and society altogether.

3. Conclusion

In its letter of 3 April advancing the case to change the definition of ‘sex’ to ‘*biological sex*’ in the EA 2010, the EHRC is engaged in an extraordinary display of legal misunderstanding, confusion and prejudice. There is no trans crime wave. Trans people have received no new legal protections for 12 years. Instead, the EHRC is attempting to create and then (with confused and contradictory results) to solve a ‘problem’ that does not reflect reality.

Even by the EHRC's own admission, the definition of the term 'sex' in the EA 2010 is clear. Paradoxically, given the stated aims of the EHRC, attempting to change it will lead to legal uncertainty. Claimed clarifications from changing the definition to 'biological sex' are either *not* necessary, do *not* produce any benefits or will *not* actually result from this legislative change. If the definition of the term 'sex' is changed, the consequential amendments that the EHRC recommend will do enormous harm to trans people in the UK. Trans people will be driven out of sports, employment and society as a whole. Large numbers of those who can leave Britain will do so, heading for jurisdictions where they will hope to find basic levels of societal respect and legal protections. Others, driven out of work, and feeling entirely unwelcome in British society as a whole, may be left subsisting on benefits.

Trans Legal Project, 8 June 2023

¹ *Letter from the Minister for Women and Equalities to the Chairwomen of the EHRC dated 21 February 2023* ('MWE Letter'). Available from <https://www.equalityhumanrights.com/en/file/43051/download> [Last accessed 6 May 2023]

² [2021] EWHC 940 (Admin) Available from <https://fairplayforwomen.com/wp-content/uploads/2021/04/R-Fair-Play-for-Women-Ltd-v-UK-Statistics-Authority-09.03.21JUD-1.docx> [Last accessed 27 May 2023]

³ It is also an authority for the proposition that once a trans man has obtained a GRC, his sex for the purposes of the Census Act 1920 is male. However, as the moral panic that has gripped the UK concerns trans women, the focus of this article is the rights of trans women.

⁴ [2022] CSOH 90

⁵ *Letter from the Chairwomen of the EHRC to the Minister for Women and Equalities to the Chairwomen dated 3 April 2023* ('EHRC Letter') Available from <https://www.equalityhumanrights.com/en/file/43056/download> [Last accessed 6 May 2023]

⁶ *Ibid.*

⁷ If the advice and consequential amendments are enacted to realise the EHRC's vision of the EA 2010 then rights set out in *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21 ('A'), *Croft v Royal Mail* [2003] EWCA Civ 1045, the Gender Recognition Act 2004, the Sex Discrimination Act 1975 and later the Equality Act 2010 would all be overturned.

⁸ Per the EHRC Letter 'A particularly contested matter that you refer to in your letter is the meaning of 'sex' in law. The Gender Recognition Act 2004 provides that the gender of a person with a Gender Recognition Certificate (GRC) becomes the acquired gender 'for all purposes' and recognised as their legal sex, broadly equivalent to the way sex recorded at birth is recognised in law for other people. This concept of 'legal sex' has been confirmed by the courts in their interpretation of the meaning of the protected characteristic of sex in the EqA. The EHRC has consistently understood this to be the position in the law as it currently stands and we have based our guidance and interventions until now on that understanding.'

⁹ See Baroness Hale in *A* para. 42 Per Baroness Hale "The Gender Recognition Bill is currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. These are wider than the post-operative conditions with which the domestic and European case law has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live.", HHJ Richardson QC in *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin) 'He is in a male prison and until there is a Gender Recognition Certificate, he remains male. ... Male to female transsexuals are not automatically entitled [under the EA 2010] to the same treatment as women – until they become women' and *For Women Scotland (No 2)* [2022] CSOH 90

¹⁰ Historically intersex individuals could not obtain a diagnosis of *gender dysphoria* and therefore could not satisfy the requirements of GRA s. 2(1)(a). This changed in *The Diagnostic and Statistical Manual of Mental Disorders* (5th ed.; DSM-5; American Psychiatric Association, 2013). See https://www.ncbi.nlm.nih.gov/books/NBK577212/table/pediat_transgender.T.dsm5_criteria_for_g/ [31 May 2023]

¹¹ For example, an intersex woman with complete androgen insensitivity syndrome or a transgender woman on cross-sex hormones

¹² [1971] P. 83, [1970] 2 All E.R. 33

¹³ See for example *W v W* Case No. 4119 of 1996

¹⁴ EHRC Letter

¹⁵ [2020] EWCA Civ 559

¹⁶ EHRC Letter

¹⁷ See s. 107(2) EA 2010

¹⁸ Single characteristic associations are lawful due to EA 2010 sched. 16 para. 1. Note that the title of the schedule is “*Single characteristic associations*”. Multi-characteristic associations are not lawful – see *Services, public functions and associations: Statutory Code of Practice* (EHRC, 2011) (‘Services Code’) para 12.49. Available from https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf [Last accessed 12 May 2023]

¹⁹ Note that gay man or lesbian are not protected characteristics. Per EA 2010 s. 12(1) the protected characteristic of “[S]exual orientation means a person’s sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex.”

²⁰ EA 2010 s. 11

²¹ EHRC Letter

²² If you have never met a trans man, then see for example this picture of activist and Professor of Law, Stephen Whittle, <https://www.mmu.ac.uk/staff/profile/professor-stephen-whittle> who is a delightful gentleman and we are sure has absolutely no desire to sit on an all women short list or to join a women’s book club! [Last accessed 23 April 2023]

²³ Gender Recognition Act 2004 (‘GRA 2004’) s. 3(4)

²⁴ EHRC Letter

²⁵ See s. 107(2) EA 2010

²⁶ For example, Glasgow Women’s Library Book Group. See <https://womenslibrary.org.uk/discover-our-projects/the-book-club/>

²⁷ Per EHRC Letter ‘*A change in the law would allow sex-based associations to restrict membership on the basis of biological sex.*’

²⁸ EHRC Letter

²⁹ EA 2010 sched. 9 para. 1(1)

³⁰ Note *Employment: Statutory Code of Practice* (EHRC, 2011) para. 13.20 warns employers not to have ‘*blanket*’ policies of applying the occupational requirement exception. Available from <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> [Last accessed 5 June 2023]

³¹ EHRC Letter

³² [2003] EWCA Civ 1045

³³ Per LJ Pill para. 53 ‘*The moment at which a person in the applicant’s position is entitled to use female toilets depends on all the circumstances, including her conduct and that of the employer*’

³⁴ EA 2010 s. 19, *AEA v EHRC* [2021] EWHC 1623 (Admin), Services Code paras. 13.57 – 13.60

³⁵ EA 2010 s. 19 and sched. 3 para. 28(1)

³⁶ Services Code para. 60

³⁷ EHRC Letter ‘*There are also likely to be some consequential amendments to the EqA that would be required ...*’

³⁸ EA 2010 s. 195(2)

³⁹ For example British Cycling – see <https://www.britishcycling.org.uk/about/article/20230526-about-bc-static-update--transgender-and-non-binary-participation-policies-0> [Last accessed 28 May 2023], British Triathlon – see <https://www.britishtriathlon.org/britain/documents/about/edi/transgender-policy-effective-from-01-jan-2023.pdf> [Last accessed 28 May 2023] etc

⁴⁰ See for example https://twitter.com/Baroness_Nichol/status/1262751537790500868 [Last accessed 12 May 2023]

⁴¹ P Baker *Representing trans people in the UK press – a follow-up study* (CASS, 26 November 2019) Available from <https://cass.lancs.ac.uk/representing-trans-people-in-the-uk-press-a-follow-up-study-professor-paul-baker/> [Last accessed 12 May 2023]

⁴² See the argument used in *FDJ v Secretary of State for Justice* [2021] EWHC 1746 (Admin). The claim failed in particular as per LJ Holroyde “[t]he difficulty which the Claimant faces, in my view, is that 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” (para. 83). If the EHRC has its way, then transgender women would no longer have a right to live in their chosen gender. As a result claims for indirect sex discrimination could well succeed.

⁴³ EA 2010 sched. 3 para. 28