

Rt Hon Kemi Badenoch MP
Secretary of State for Business,
Energy and Industrial Strategy and
Minister for Women and Equalities
Via email only

From: Baroness Falkner,
Chairwoman
Our ref: 1203Badenoch

Monday 03 April 2023

Dear Secretary of State,

Thank you for your letter of 21 February requesting our considered advice on the benefits or otherwise of an amendment to the Equality Act 2010 (EqA) 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.

You rightly mention section 11 of the Equality Act 2006, which sets out under sub section 11(2)(a)-(c) our power to advise government about the effectiveness of the current law and the likely effect of any proposed change of law, as well as to recommend amendments to existing legislation. We write in line with that statutory provision.

This letter provides our initial response. Should the Government wish to pursue work in this area, we recommend detailed policy and legal analysis. We would

be happy to support that process. Doing so is in line with our current strategy. The consultation for our Strategic Plan revealed that, out of all protected characteristics, sex was important to the highest proportion of respondents, and that many respondents were concerned about the interaction between the protected characteristics of gender reassignment and sex. This is reflected in our Strategic Plan for 2022-2025: 'we will contribute to public debates and clarify the law on equality and human rights issues, particularly in the area of balancing competing rights.' This focus is also in line with the Public Sector Equality Duty.

The Equality Act 2010 attempted to strike reasonable balances between the rights of people with nine different protected characteristics. Since 2010, however, society has evolved considerably in matters relating to the two protected characteristics of sex and gender reassignment. For example, language has evolved: the Act refers to trans people as 'transsexuals', and uses the terms 'sex' and 'gender' at times interchangeably, with the requirement on employers to report 'gender pay gaps' in fact a duty to report on pay differences according to the protected characteristic of sex. Moreover, many trans people today would not describe themselves as transitioning from one sex to the other, but rather as living with a more fluid gender identity or without reference to a binary gender identity at all. Their legal protection in the Act may be unclear as in practice trans people are unlikely to be required to provide proof of their legal status except in unusual and uncommon situations. There is also a lack of clear jurisprudence on the interpretation of the law, with some parties reluctant to take

legal action or to appeal first instance judgments. Finally, as you know, this area has become so polarised and contentious that it is inhibiting civil debate.

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.

However, this raises questions in legal interpretation and in practice. Notwithstanding the existence of statutory exceptions permitting different treatment of trans people where justified, and our guidance to explain the law, it has not been straightforward for service providers and employers to apply the law, including in areas such as sport and health services.

The EHRC has looked at this issue over several successive Board meetings and has considered various routes forward, all of which have advantages and disadvantages for one group or another. 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**.

These are as follows.¹

- Pregnancy and maternity: 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.
- Freedom of association for lesbians and gay men: If sex means legal sex, then sexual orientation changes on acquiring a GRC: some trans women 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.
- Freedom of association for women and men: 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.
- Positive action. 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.

¹ For background see annex.

- Occupational requirements. 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.
- Single sex and 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.
- Sport. At present, to exclude trans women with a GRC from women's sports, the organiser must show that it was necessary to do so in the interests of fairness or safety. A biological definition of sex would mean that organisers could exclude trans women from women's sport without this additional burden.
- Data collection. When data are broken down by legal not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena. A biological definition of sex would require public bodies like universities to apply this category, without

the complexity added by a legal definition of sex, to the analysis of data collected in fulfilling the Public Sector Equality Duty.

The change would be **more ambiguous or potentially disadvantageous in three areas.**²

- Equal pay provisions. At present, a trans woman with a GRC can bring an equal pay claim by citing a legally male comparator who was paid more. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.
- Direct sex discrimination. At present, a trans woman with a GRC can bring a claim of direct sex discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer the right from some trans women to some trans men.
- Indirect sex discrimination. At present, a trans woman with a GRC could bring a claim of indirect discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.

² For background see annex.

It is also important to consider the human rights implications. There is a question whether defining ‘sex’ as biological sex would engage the right to respect for private and family life in Article 8 of the European Convention on Human Rights (read with Article 14). In connection to changes to legal sex, the courts have found violations of Article 8 if what is at stake is *simply* an individual’s right of recognition. This includes the right to marry and the right to a pension in their acquired gender. However, in cases where a state is balancing *competing* rights, for instance the rights of trans women and of biological women, Strasbourg has allowed a wider margin of appreciation. Indeed, human rights law may *require* the statutory recognition of biological sex. For instance, the enjoyment of separate sex and single sex spaces or sporting activities (see 8.6 and 8.7), when closely related to biological sex, is likely to fall within the material scope of Article 8. The more targeted any change is, the less likely it is to be a violation of Article 8 rights. As the National Human Rights Institution for England and Wales we are happy to advise further on the human rights perspective on these issues if that would assist.

The extent of these impacts will depend in part on the future of the Gender Recognition Reform (Scotland) Bill (GRR). If that Bill becomes law, the effect of the proposed change would arguably be broader. This is for two reasons.

- First, the GRR lowers the threshold for acquiring a GRC. It is therefore likely that if it becomes law, over several years the number of people possessing a GRC will increase significantly. More people will then fall under the scope of points 8.1-8.8 and 9.1-9.3.

- Second, it would have a greater effect on the operation of the Public Sector Equality Duty. That duty, as applied to the protected characteristic of sex, requires public bodies to advance the interests of women as a class in so far as they are disadvantaged as a class. If ‘sex’ means legal sex and the GRR became law, then the class of women would become possibly larger and certainly more porous. If ‘sex’ means biological sex, then it would not. This would make a difference to *whose* interests the public body was advancing.

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 potential implications of this change should be carefully identified and considered, with due regard to the Public Sector Equality Duty and in particular any possible disadvantages for trans men and trans women. There are also likely to be some consequential amendments to the EqA that would be required, the detail of which we have not covered in this short initial response, but which we would be happy to discuss further if that would assist. Government may wish to undertake a broader consideration, including through consultation, of the societal changes that have occurred in this area and how we, as a nation, want to approach issues of sex and gender in the evolving context. There is a clear need to move the public debate on these issues to a more informed and

constructive basis. This would be welcomed by the many who do not take the polarised positions currently driving public debate. We recognise that these decisions properly sit with Government and Parliament.

In conclusion, we wish to note that this letter considers the consequences of the narrow and limited amendment on which you sought our advice. There may be other ways to achieve roughly the same ends, for instance a series of more targeted amendments to specific provisions in the EqA, on which you will wish to take additional advice.

We look forward to working with you and others to find ways forward on these important issues. In the meantime, we will continue to perform our independent role enforcing equality law and protecting the rights of everyone in Britain.

Yours sincerely,



Baroness Kishwer Falkner of Margravine
Chairwoman
Equality and Human Rights Commission

ANNEX A:

Pregnancy and maternity. Sections 13(6), 17 and 18 of the Equality Act 2010 outlaw discrimination against women on the basis of pregnancy or maternity.

Currently these provisions would fail to cover trans men who are pregnant and whose legal sex is male. The affected cohort is not hypothetical, as the case of [REDACTED] illustrates.³ [REDACTED] is a trans man who sought and obtained fertility treatment, became pregnant and delivered the baby.

If references to sex in these provisions were read to refer to biological women, a trans man like [REDACTED] would be protected whether or not he had obtained a GRC.

Freedom of association for lesbians and gay men. Section 12 defines a person's sexual orientation as their orientation towards persons of the same sex or towards persons of the opposite sex. Schedule 16 para 1 permits the restriction of membership to persons who share a protected characteristic.

Currently the law does not allow the exclusion of trans people who hold a GRC from an association whose membership is restricted on the basis of sexual orientation. For instance, on the current definition of sex, a lesbian support group (if it met the definition of an association: see Section 107 and explanatory notes) could not restrict membership to biological women. It would have to admit a trans woman with a GRC attracted to biological women or trans women

³ [REDACTED]

with a GRC. There is no provision in law for it to exclude them. This has an impact on freedom of association for lesbians.⁴

A change in the law would allow sexual-orientation-based associations to restrict membership on the basis of biological sex as well as sexual orientation.

Freedom of association for women and men. Schedule 16 para 1 permits the restriction of membership to persons who share a protected characteristic.

Currently the law does not allow the exclusion of trans people who hold a GRC from an association whose membership is restricted on the basis of sex. For instance, on the current definition of sex, a women's social club or religious organisation (if it met the definition of an association: see Section 107 and explanatory notes) could not restrict membership to biological women. It would have to admit any trans woman who had obtained a GRC. There is no provision in law for the association to exclude them. This has an impact on freedom of association for women.

A change in the law would allow sex-based associations to restrict membership on the basis of biological sex.

Positive action. Section 104 provides that political parties can restrict shortlists for electoral candidates to those who share a protected characteristic. Section 158 creates a general power for employers, service providers and others to implement measures to improve participation for under-represented or

⁴ [Lesbian Spaces - Advice for FiLiA.pdf \(squarespace.com\)](#) sections 46-53

disadvantaged protected characteristic groups. Section 159 creates a specific power for employers to favour under-represented or disadvantaged protected characteristic groups in recruitment and selection in ‘tie -breaker’ situations.

Currently, where positive action measures are created in favour of women, they benefit women without GRCs and trans women *with* GRCs. They do not benefit trans men who have obtained GRCs. It may be viewed as unjust that trans men with GRCs, who may have experienced discrimination as women at all earlier stages of their careers, lose the benefit of these measures at the point of legal transition. It may also seem unjust that trans women, who may have benefited from these structures prior to their transition, can obtain the benefit of these measures from the point of legal transition.

The proposed change would resolve these difficulties. It would ensure that sex-based positive discrimination measures are applied to biological women only, including those with GRCs.

Occupational requirements. Schedule 9, paragraph 1 permits employers to restrict recruitment and other in-work benefits (such as promotion and training) to those sharing a particular protected characteristic, on the basis that it is an ‘occupational requirement’ of the role that the holder has that protected characteristic. For example, it might be an occupational requirement that wardens in a women’s or girls’ hostel, or counsellors in a women’s refuge, be female.

Currently, if an employer establishes a sex-based occupational requirement that a job-holder be a 'woman', the role would be open to a trans woman with a GRC, and would exclude a trans man with a GRC. Some argue that it is inappropriate to include some trans women within an occupational requirement of this nature. They consider that the reason the requirement has been instituted – for example, to protect the privacy, safety or dignity of female service users – may be at issue when a biological man is employed, whether or not they hold a GRC.

The change to a 'biological sex' approach would resolve these concerns, by ensuring that trans women would not meet the requirement in question but trans men would.

On the other hand, Schedule 9 paragraph 1(3) already gives employers a specific power to exclude trans persons from an occupational requirement where it is proportionate to do so, and irrespective of whether they hold a GRC. However, under the current definition of sex, any such exclusion would be an additional explicit step. Taking this step may create prohibitive risks or costs; whereas under the proposed definition a restriction to biological sex would be the starting point.

Single sex and separate sex services. Schedule 3, paragraphs 26-27, make it lawful in some circumstances for service providers to discriminate on the basis of sex. For instance, it is lawful for a hospital to operate a 'women only' ward if this can be justified as a proportionate means of achieving a legitimate aim.

Currently, women who do not possess a GRC, and trans women who possess a GRC, have a *prima facie* right of admission to a ‘women only’ ward. To exclude all trans women, the service provider would have to take an additional explicit step subject to an additional proportionality assessment under Schedule 3 Paragraph 28. This is the subject of our recent guidance.⁵

On the other hand, *including* a trans woman in possession of a GRC would risk indirect sex discrimination against biological women, who may feel uncomfortable or unsafe with the presence of a trans woman.

In many circumstances it will be sensitive and impractical for service providers to take steps to find out whether a service user or customer has a GRC, and in some circumstances may risk the commission of a criminal offence (pursuant to s.22 of the Gender Recognition Act 2004, which prohibits disclosure of information about a GRC unless certain conditions are met).

The current position therefore puts operators of ‘women only’ services in a difficult position whether or not they wish to exclude all trans women.

The effect of adopting a ‘biological sex’ definition would be that a provider of a ‘women only’ service would not need to take further steps to exclude trans women who possessed a GRC. Although the service provider may still need to consider inclusion on an exceptional basis, the new definition would create

⁵ [Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/our-work/separate-and-single-sex-service-providers-a-guide-on-the-equality-act-sex-and-gender-reassignment-provisions)

simplicity and clarity for anyone proposing to segregate hospital or other services on the basis of a biological rather than a legal distinction.

Sport. Section 195 creates a general rule which allows sport to be organised on a single sex basis.

Currently, trans women with a GRC can be excluded from women's sport, but to do this the organizer must show that the exclusion is necessary for the purposes of (a) fair competition or (b) safety.

Under the biological sex definition, there would be a shift in favour of excluding trans women. Sporting bodies would no longer specifically have to justify the exclusion of all trans women from women's sport. We note that this issue has been the subject of recent clarifications by a number of sports bodies.

Data Collection. Section 149 creates a duty on public authorities to have due regard to (inter alia) the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This is the Public Sector Equality Duty (PSED).

Currently, a public authority (for instance, a university or a local health authority) might in pursuit of this duty collect data on, say admission to university or educational outcomes that are segregated by 'sex' in the sense of legal sex; and that are segregated by sexual orientation in the sense of legal sexual orientation. Academics conducting research using data have reported that:

‘Many people find the idea that small numbers of misclassified cases can be substantively important in statistical analysis counter intuitive.

However, small numbers of people identifying into the opposite sex can in fact have substantive implications for research findings and for assessing policy interventions.

‘Small errors can make a big difference when the baseline category is also small. One instance where this is likely to make a difference is data on gay, lesbian and bisexual people. The removal of sex as a category risks erasing lesbians and gay men as meaningful categories for analysis. For example, in data from over 40,000 people responding to the UK Household Longitudinal Study ‘Understanding Society’, two per cent said that they were gay, lesbian or bisexual. Of the 482 people who stated they were gay/lesbian, 183 were recorded as female.⁶ Given the small size of the gay and lesbian categories, it only takes a small number of people to switch sex-category to skew the data. Heterosexuals are by far the dominant category, and when opposite-sex-attracted people identify as the opposite sex, they are also likely to reclassify as same-sex-attracted. If one per cent of male respondents to the ‘Understanding Society’ study identified as lesbians, they would slightly outnumber the current lesbian category. If just 40 males were classified as lesbians, they would

⁶ Booker, C.L, Rieger, G., and Unger. J.B. (2017). ‘Sexual orientation health inequality: Evidence from Understanding Society, the UK Longitudinal Household Study’. *Preventative Medicine* 101: pp. 126-132.

represent 18 per cent of the lesbian category, which would clearly represent a major skew in the sex composition of the lesbian category. Such a skew in the data would risk significant distortion of research findings on gay and lesbian people.’⁷

Under the biological definition, the PSED would require public authorities to use biological sex and sexual orientation as instruments of data analysis. The effect would be to improve the efficacy of data as a means of advancing equality of opportunity between those who share, and those who do not share, these protected characteristics.

Equal pay provisions. Section 64 of the Equality Act 2010 requires that to bring an equal pay claim, the potential claimant must find a comparator of the opposite sex who is being paid more.

Currently, a trans woman possessing a GRC could make such a claim on the basis of a legally male comparator who was being paid more. A trans man possessing a GRC could *not* make a claim on the same basis.

Under the biological sex definition, a trans woman possessing a GRC would not be able to bring an equal pay claim on that basis. On the other hand, a trans man possessing a GRC would *gain* the right to bring an equal pay claim. The comparator in this case would be a person of the opposite biological sex, that is,

⁷ This analysis comes from Sullivan, Murray, McKenzie ‘Why do we need data on sex?’ in Sullivan et al. (ed.) *Sex and Gender: A Contemporary Reader*. Routledge: forthcoming 2023.

a trans woman. So the effect is to transfer the right, to bring such a claim, from some trans women to some trans men.

In a group equal pay case, a person with a GRC would be able to participate by way of a “piggy-back” claim⁸ and so would not lose the benefit of successful group litigation.

Direct sex discrimination. Section 13(1) outlaws direct discrimination against someone because of a protected characteristic such as sex. For instance, a woman may be asked to provide a guarantor for a loan in circumstances where a man would not be asked to do so.

Currently, a trans woman in possession of a GRC could bring a claim of direct discrimination if she had been treated less favourably because she was a woman. A trans man in possession of a GRC could not.

Under the biological sex definition, the situation would be reversed. As in the case of equal pay provisions, the effect of the redefinition is a transfer of rights from some trans women to some trans men.

However, it may be possible for a trans woman, whether or not in possession of a GRC, to bring a claim of discrimination by perception within section 13(1) EqA. It is not clear whether such a claim would require the claimant to ‘out’ themselves as trans.

⁸ See Hartlepool Borough Council v Llewellyn [2009] ICR 1426

Indirect sex discrimination. Section 19(1) outlaws indirect discrimination against someone because of a protected characteristic such as sex. For instance, a woman may be forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs.

Currently, a trans woman in possession of a GRC could bring a claim of indirect discrimination against (for instance) an employer that put in place a provision, criterion or practice that particularly disadvantaged women as a group. But a trans man in possession of a GRC could not.

Under the biological sex definition, the situation would be reversed. As in the case of equal pay provisions, the effect of the redefinition would be the transfer of rights from some trans women to some trans men.

It may be possible for a trans woman to bring a claim of indirect discrimination by association following the principles established in the European case of *CHEZ v Komisia* (ECJ 2015), which found that a claimant can establish indirect discrimination even if they do not share the protected characteristic of the disadvantaged group.⁹ However, the *CHEZ* precedent is legally complex, and as an ECJ precedent may not be secure in the post-Brexit legal landscape. It is

⁹ In 2020 the Employment Tribunal upheld a claim of indirect discrimination by association in *Follows v Nationwide* (2201937/2018).

unclear whether such a claim would require the claimant to ‘out’ themselves as trans.