

[REDACTED]
Trans Legal Project

By e-mail only:
[REDACTED]

Tuesday 27 July 2021

Dear [REDACTED]

Subject: EHRC legal positions on transgender equality

Thank you for your letter dated 1 July.

The Commission appreciates its duties under s.3 Equality Act 2006 and believes that it is fulfilling them with regard to the matters you raise for the reasons that follow.

The legal sex of a trans person without a GRC for the purposes of discrimination law

The Commission does not accept your criticism of the statement published on our website concerning sex and gender reassignment. It is true that in *A v West Yorkshire* the House of Lords read “sex” in the Police and Criminal Evidence Act ss 54(9) and 55(7) as applying to the “acquired gender” of a “post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender.” However, that case was prior to the introduction of the Gender Recognition Act 2004 (GRA). Baroness Hale also

T: 0161 829 8100

E: correspondence@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

noted when the GRA was going through parliament that once it was in force, it would “provide... a definition and a mechanism for resolving ... demarcation questions” as to who should and should not be regarded as having a “sex” different from their “birth sex”.

Following the introduction of the GRA, the legal sex of a trans person with a GRC is their lived gender as confirmed in their GRC. The sex of those without a GRC is their birth sex.

We acknowledge that it remains possible post GRA that there may be specific circumstances in which the courts will interpret ‘sex’ in legislation as being a person’s lived gender, even if they do not have a GRC (as happened in the pre GRA case of A). That may arise if such an interpretation is required to prevent a contravention of retained EU law. However, we have not identified any such circumstances in which we think that is likely happen (beyond those in MB which is dealt with below) and have based our statement on the law as it currently stands.

The correct comparator for a trans person without a GRC

It follows from our position set out above that we think that it is unlikely that a trans person without a GRC can claim direct discrimination on the grounds of gender reassignment if they are denied access to a single or separate sex service that corresponds with their lived gender.

As regards the case law cited in your letter, similarly to *A v West Yorkshire*, *Croft v Royal Mail* is a case that was decided under the Sex Discrimination Act 1975 and before the coming into force of the GRA. The court said, for example, that “Accepting that it is for Parliament to lay down the test of sexuality as provided in *Bellinger*, the Court has to consider a current and practical problem about the use of lavatories. Pending any action by Parliament, the Court must

T: 0161 829 8100

E: correspondence@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

attempt to resolve the question...” Parliament has since taken action by enacting the GRA.

In the MB case, the ECJ found a breach of EU Directive 79/7, which prohibits discrimination on grounds of sex, where a transwoman without a GRC was not treated as a woman for the purpose of pension entitlements. She had complained that although she had transitioned to, and was living as, a woman, she could not obtain a GRC without divorcing her female spouse which she did not wish to do. The ECJ found “Art 4(1) ... must be interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender”. In our view, the decision is likely to be narrowly interpreted as dealing with the position, prior to the amendment of the GRA, in which a person could not obtain a GRC while remaining married to someone of the sex corresponding with the gender they were seeking to acquire. That has now been resolved with the amendment to the GRA. Following the law being changed to permit marriage of same-sex couples in Great Britain, a person can now obtain a GRC while remaining married to a person of the sex corresponding with the gender they are acquiring.

Brook v Tasker is an unreported first instance decision which does not set a precedent for other courts to follow. It has been suggested that the Defendant did not contest the case and it is unclear to what extent the court considered the authorities and differing legal arguments, nor whether the Claimant had a GRC or not. This case does not therefore assist in determining the correct legal position.

Conversely, in *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin), the High Court had to decide who the correct comparator was in a

T: 0161 829 8100

E: correspondence@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

case of direct gender reassignment discrimination brought by a trans woman prisoner without a GRC. The High Court said “Frankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland I find it impossible to see how a female prisoner can be regarded as the appropriate comparator. The claimant is a man seeking to become a woman – but he is still of the male gender and a male prisoner. He is in a male prison and until there is a Gender Recognition Certificate, he remains male. A woman prisoner cannot conceivably be the comparator as the woman prisoner has (either by birth or election) achieved what the claimant wishes. Male to female transsexuals are not automatically entitled to the same treatment as women – until they become women.”

Green is a post GRA decision which sets a precedent and is of general applicability to the question of who the correct comparator is in a direct discrimination case, rather than one which is likely to be confined to its facts.

As regards your comment that indirect discrimination can be justified on a blanket basis, para 13.60 of our code of practice states: “As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances. A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available.”

T: 0161 829 8100

E: correspondence@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

In *AEA v EHRC*, Henshaw J concluded that our analysis in the above paragraph is correct. We have therefore been clear that a case by case approach is required and this approach has been endorsed by the High Court. Therefore we disagree that we are making it possible for an organisation to post signs saying 'No trans people without a GRC' as you suggest.

Taking into account all of the above, the Commission does not accept that it has taken legal positions which are contrary to the legal authorities or that it has acted in contravention of its duty under s.3 Equality Act 2006. The Commission has fulfilled its duties through setting out guidance on the law which says that the exceptions allowing exclusion of trans people from single and separate sex services must be applied restrictively on a case by case basis, and defending that guidance in the courts under challenge from *AEA*.

Yours sincerely,



Joint Acting Chief Executive

T: 0161 829 8100

E: correspondence@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com