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Dear [redacted]

EHRC legal positions on transgender equality

We write in respon ▪ to your letter dated 27 July 2021. Given the ongoing toxic nature of the 'debate' around the human rights of transgender people in the UK, and the EHRC's stated intention to produce further guidance on the application or otherwise of exceptions affecting trans people's access to single and separate sex spaces, we would like to return to the issues raised in your letter. We understand the guidance is to cover hospitals, schools, prisons and private firms.

We were deeply disappointed by your views, as expressed in your letter, which to us demonstrate that the EHRC has adopted legal arguments being promoted by those seeking to deny trans people established rights that allow them to take an equal part in British society. Despite the hysterical moral panic that has, uniquely in this country, infected the political discourse and obsessed the media, we continue to hope that the EHRC will act as an independent and expert body to fulfil its duty to "*promote awareness and understanding of rights under the Equality Act 2010*"[1].

In the attached document, we respond to your views and set out a legal critique of them. We begin with our understanding of the EHRC's view of the law, plus the legally incoherent results that emerge from this view. We then put forward legal arguments demonstrating that the EHRC's view of the law is contrary to the relevant authorities. Finally, we summarise our view of the law. We have also included a draft copy of our forthcoming paper on the *Green*[2] case.

We hope that even at this late stage the EHRC will reconsider the legal positions that it has adopted and the potentially calamitous legal consequences for trans people of those positions. Ideally, we hope that having read our research, the EHRC will adopt the positions

we have set out in this letter, or at the very least step back from some of the trans-hostile public positions it has recently adopted, to take a more visibly neutral stance.

[1] Equality Act 2006 s. 8(1)(d).
[2] *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin)

Going forward, we ask that the EHRC commissions a genuinely independent body to provide high quality and independent legal research in this area.

In the immediate term, we also ask that you take our views of the law and the authorities we reference into account when you formulate the guidance on single and separate sex spaces.

We look forward to hearing from you.

Yours sincerely

[redacted]
Trans Legal Project
Enc.

1 The EHRC's view of the law regarding single and separate sex spaces

We would summarise the EHRC's views of the leading cases is as follows:

Case	View
A v Chief Constable of West Yorkshire Police[3]	No longer good law following GRA
Croft v Royal Mail[4]	No longer good law following GRA
MB[5]*(at the CJEU)*	Confined to its facts
Brook v Tasker[6]	Not a precedent
Green[7]	Good law

Given the paucity of authorities in this area, what stands out is the number of cases from the senior courts that the EHRC reject. In fact, the EHRC's legal position is based on just one judgment of a High Court judge in *Green*, a domestic law case about discrimination in the exercise of a public function in the administration of a prison.

The EHRC's preference for *Green* over the cases in the more senior courts has a major impact on the rights of trans people regarding employment and services to the public. By disregarding *A* and also *Croft*, a case directly on point, and preferring *Green*, employment law is left unworkable. Further, trans people with and without a GRC risk facing blanket bans when trying to access services.

1.1 Employment

1.1.1 Trans people without a GRC

If the EHRC is correct in its view of the law, then trans people without a GRC would be unable to use toilets and other facilities provided under *The Workplace (Health, Safety and Welfare) Regulations* 1992 ('the Workplace Regs') that match their acquired gender. This is because the EHRC views the legal sex of such trans people to be their sex registered at birth and the Workplace Regs require that facilities are segregated by sex (unless unisex facilities are available with appropriate measures to ensure privacy). In such circumstances a trans person without a GRC would not have a claim for discrimination on the grounds of *gender reassignment* as the Equality Act 2010 ('EA 2010') provides an exception[8] to discrimination regarding anything done "*in pursuance*" of a statutory instrument.

This is of course exceptionally problematic for the participation of trans people in the work place, as without a GRC they would be forced to 'out' themselves to other employers and use facilities that align with their sex registered at birth. Being excluded from the work place will damage the mental health and financial wellbeing of trans people as well as place an increased economic burden on the state.

It is also problematic for other people such as cisgender women who would very likely suffer immense distress if a trans man (including those with a phalloplasty) was compelled to use open changing rooms and showers alongside them.

[3] [2004] UKHL 21
[4] [2003] EWCA Civ 1045
[5] *MB v Secretary of State for Work and Pensions* (Case C-451/16)
[6] Unreported 7 March 2014, Halifax County Court
[7] *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin)
[8] Schedule 23 paras. 1(1)(b) and 1(2)

Both of these problems arise due to the EHRC's preference for the authority of *Green* over *A* and *Croft*.

1.1.2 Trans people with a GRC

Conversely, problems also arise with the EHRC's current legal position even when a trans person has obtained a GRC. Under the Workplace Regs, a trans woman with a GRC, but who has *not* had genital surgery, would be entitled to use the women's open showers and open changing rooms provided under the regs. If an employer tried to stop her from using these facilities, then that employer would have no defence to a claim of discrimination against them, brought on the grounds of *gender reassignment*. This is because the EA 2010 has no relevant exceptions and in the EHRC's view *Green* is definitive regarding the appropriate comparator.

We do not believe a trans woman has ever behaved in this way at work and our experience is that trans people do everything possible to blend in and avoid causing distress to others in settings like changing rooms. Nonetheless, we highlight this as a legal problem that results from abandoning *Croft*.

1.2 Services to the public

1.2.1 *Trans people without for a GRC*

As a result of the EHRC's views, trans people without a GRC would only have a claim for *indirect* discrimination as opposed to *direct* discrimination if denied access to a single or separate sex service provided to the public. The severely weakens the rights of trans people.

In order to succeed in a claim, the trans person must overcome two exceptions: the exception contained in EA 2010 s.19(2)(d) and the exception contained in EA 2010 Sched. 3 para. 28.

The EHRC '*Services, public functions and associations: Statutory Code of Practice*' ('the Services Code') paras. 5.25 – 5.35 cover the s. 19(2)(d) exception and there is nothing in these paragraphs that suggest this exception can only be applied on a case-by-case basis. Existing case law on other protected characteristics, such as age, makes clear that indirect discrimination can be justified on a blanket basis[9]. We would of course hope that the courts would take a different approach to *gender reassignment* discrimination, but if the EHRC disregards *A* and *Croft*, then the only consistent approach is to accept trans people can suffer discrimination on a blanket basis.

The well-known sched. 3 exception is covered by the Services Code paras. 13.57-13.60. These paragraphs take legal principles regarding *gender reassignment* discrimination in the context of employment and applies them to services. Yet, bizarrely, the EHRC now believes that the cases that underpin these legal principles are no longer good law.

Paragraph 13.59 holds that when a trans person "*is visually and for all practical purposes indistinguishable from a non-transgender person of that gender, they should normally be treated according to their acquired gender…*". The legal basis for this assertion is the case of *A*. Paragraph 13.60 holds that a policy excluding trans people should be applied on a "*case-by-case basis*" and advises service providers to consult with other service users before denying services to a trans person. The legal basis for this is of course *Croft*.

[9] See for example *Seldon v Clarkson Wright and Jakes* {2012] UKSC 16 on indirect *age* discrimination

Although J Henshaw in *AEA v EHRC*[10] confirmed that the EHRC was entitled to provide the guidance in these paragraphs, neither the legal status of *A* nor *Croft* was brought to his attention by either party. Had he known that these paragraphs express legal principles that both parties believed were no longer good law, he may have ruled differently.

The EHRC's view that *A* and *Croft* are no longer good law results in nullifying the legal principles that inform the Services Code paras. 13.57-13.60 which it has recently defended. As a result, trans people without a GRC risk being excluded on a blanket basis either under the s.19(2)(d) exception or the Sched. 3 exception.

1.2.2 Trans people with a GRC

It is common ground between Trans Legal Project and the EHRC that trans people with a GRC can suffer *direct discriminatio*n if excluded from separate sex services on the grounds of their *gender reassignment*. However, the sched. 3 exception discussed above still applies to direct discrimination. On the EHRC's view though there would be no legal underpinning for paras. 13.57-13.60 of the Services Code, as discussed above, which inevitable results in the risk that even trans people with a GRC could be excluded from services on a blanket basis.

2. Legal arguments contrary to the EHRCs views

It is trite law (and we are shocked that we need to write this) that a legal ruling as to the interpretation of the law is binding until either the decision is overturned by a superior court or by statute. In the case of domestic law rulings of the Law Lords or Supreme Court there is no superior court that can overturn them. However, the Supreme Court (previously the Appellate Committee of the House of Lords) could overturn them in a new case[11]. In the case of rights under EU law, these *cannot* be overturned by statutes enacted whilst the UK was a member of the EU.

Further, just because Parliament has enacted legislation similar to *pre-existing* case law, this does not in itself overturn that pre-existing case law. For example, even though *Wheeldon v Burrows*[12] was decided in the Victorian era when the property market was very different, even though it predates the great land law reforms of the 1920s and, most importantly, even though Parliament twice[13] legislated directly in this area, it still remains good law to this day. The difference between rights granted in *Wheeldon v Burrows* and rights granted under Law of Property Act 1925 s. 62 is a source of academic debate, but there is no debate that these rights emanate from two separate sources.

[10] [2021] EWHC 1623 (Admin)

[11] Under the terms of Lord Gardiner's 26 July 1966 Practice Statement

[12] (1879) LR 12 Ch D 31

[13] Conveyancing and Law of Property Act 1881 s. 6 and the Law of Property Act 1925 s. 62

2.1 A v Chief Constable of West Yorkshire Police

It is strange that the EHRC maintains that the speculative *obiter* from Baroness Hale in *A* means that she felt the GRA would overturn her decision in *A*.

The Law Lords in *A* knew that the government was bringing forth legislation that would become the GRA and they would of course have known that if they decided in favour of A that this decision would sit alongside the GRA (just like *Wheeldon v Burrows* and s. 62 LPA 1925). Deciding in favour of A could have been viewed as breaching public policy by circumventing the statutory requirements of the GRA. The decision might have also been incompatible with the GRA, causing problems going forward. All of these concerns are addressed by the submission from Rabinder Singh QC on behalf of the government, which Baroness Hale summarised as follows,

"*In the light of the Gender Recognition Bill, currently before Parliament, there is no policy objection to regarding Ms A as female for all purposes, including intimate searches. Nor would it be inconsistent with the wider ranging provisions in the Bill for us to hold that European Community law required that it be anticipated in this respect*."[14]

As noted in your letter to us of July 27th, 2021, Baroness Hale talks about "*questions of demarcation and definition*"[15]. However, the letter fundamentally misunderstands this part of the judgment. Baroness Hale refers to edge cases where it would not be clear that the ruling in *A* applies. She of course does not set out to undermine her own decision in circumstances where it is clear it should apply!

Baroness Hale gives two examples. First, she gives the example of an individual who "*has not successfully achieved the transition to the acquired gender*"[16]. Should this individual be treated in their acquired gender for the purpose of the Sex Discrimination Act 1975? Second, she refers to the case of *KB v National Health Service*[17]. In this case the CJEU decided it was for the national court to decide whether or not a trans man who was in a marriage like relationship with a female NHS worker was entitled to a survivor's pension. What rights would the individuals in KB have if their relationship "*was not as close to marriage*"[18]?

Baroness Hale then concludes:

"*The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the Employment Tribunals to make that judgment in a borderline case."*[19]

Baroness Hale is correct in stating that the GRA provides a mechanism for resolving these edge cases. She likely expected that trans people would prefer to take advantage of the GRA, which was intended to provide a streamlined route to full recognition of legal rights versus the alternative of an uncertain, expensive, complicated and slow process of obtaining partial legal recognition via the courts. But, just because the GRA contains such a mechanism to resolve edge cases, it does *not* mean that transgender individuals without GRCs are stripped off their legal rights under EU law.

[14] *A* para. 47
[15] Ibid. para. 60
[16] Ibid.
[17] Case C-117/01
[18] Op. Cit. A para. 60
[19] Ibid.

Moreover, as influential as Baroness Hale's speech is, these remarks have to be viewed as speculative *obiter* given that the GRA had *not been enacte*d at the time she made them. To determine if the GRA has overridden the decision in A, it is necessary to look at the wording of the GRA itself.

The key part of the GRA is clause s. 9(1), which states that:

"*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)."*

There are two things noteworthy about the drafting of this clause. Firstly, it uses the phrase "*all purposes*" thereby leaving it open whether an individual can have different legal genders for different purposes[20]. Secondly, it only specifies what happens when an individual has a GRC; it is silent on the effect of not having a GRC. In our view, consistent with its submission in *A*, the government was careful to preserve pre-existing case law.

The meaning of this section of the GRA was examined by the Court of Appeal in the case of *MB*. MB did not have a GRC as she did not wish to dissolve her marriage, then a requirement to acquire one under GRA. She sought to exercise the right (that came from *Richards[21])* to draw her pension at the age of 60. At the Court of Appeal, LJ Underhill stated:

"*It is necessarily implicit in the scheme of the legislation that the acquired gender will not be recognised, for the purpose of legal rights which depend on gender … unless and until such a certificate has been issued."[22]*

This is a highly controversial position to take and one that we view as incorrect. The principle of legality means, per Lord Hoffman in *ex parte Simms[23]* that *"*[f]*undamental rights cannot be overridden by general or ambiguous words"[24]*. Fundamental rights, which surely include the right of trans people to be recognised in their acquired gender, cannot be removed by general words. But LJ Underhill does not use general words to remove this right; he goes further and implies words into the statute. He notes though that given the "*primacy of EU law*"[25], it was still possible in principle for a right in EU law to override the GRA. MB appealed to the Supreme Court, but the Justices unfortunately did not review LJ Underhill's interpretation of the GRA as they stayed the appeal pending a referral to the CJEU.

The rights in EU law recognised in *A* and *Richards* are of a different nature to each other. LJ Underhill in MB quotes LJ Aikens (in *Timbrell v Secretary of State for Work and Pensions*[26]*)* when he states that "*… the crucial feature in Richards was that there was 'no legislative or other legal means to give recognition to a person's acquired gender'*"[27]. He then goes on to state *"[t]hat situation no longer obtains*"[28] due to the passage of the GRA. In LJ Underhill's view not only has the GRA closed off any route to recognition of legal rights in domestic law except via a GRC (by implying words into the act), it had also extinguished the right in EU law found in *Richards.* MB does not get her pension. This is a strange interpretation of an

[20] Something that Baroness Hale speculated about in *A* (para. 52)
[21] *Richards v Secretary of State for Work and Pensions* (Case C-423/04)
[22] *MB v Secretary of State for Work and Pensions* [2014] EWCA Civ 1112 (*'MB C of A'*)
[23] [2002] 2 AC 115
[24] Ibid. para. 12
[25] *MB C of A* para. 12
[26] [2010] EWCA Civ 701
[27] *MB C of A* para. 11
[28] *MB C of A* para. 12

act intended to grant, not remove, rights for transgender people. The CJEU though disagreed with LJ Underhill and found that Member States could not impose a precondition of dissolving a marriage before allowing a transgender woman to claim her state pension[29].

It was open to the Law Lords in *A* to have decided that A was unable to enjoy her rights under an EU directive due to the failure of the government to legislate. The remedy would then have been compensation from the government for this failure. This would have been possible by reading the case of *KB* in a different way and extending the decision in *Bellinger*[30]. It would also have been understandable given the government was addressing the matter by legislating.

Instead, the Law Lords found that in EU law making a full transition[31] was a sufficient precondition for a transgender person to be recognised in their acquired gender for the purposes of the EU Employment directive. Per Baroness Hale:

"*In this case* [as opposed to the theoretical edge cases discussed earlier] … *Ms A has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She believes that she presents as a woman in every respect.*
…
In my view community law required in 1998 that such a person be recognised in her reassigned gender for the purposes covered by the [the EU Employment directive]"[32]

Not only did the Law Lords find EU Law required A's acquired gender to be recognised, they were able to do this by statutory interpretation[33]. Therefore, rather than interpret the GRA in a manner that *quashes* the right in *A*, the GRA must be interpreted in a manner that *gives effect* to this right.

More recently in *For Women Scotland v The Lord Advocate*[34], Lady Wise needed to decide whether trans women (with and without GRCs) would be recognised as women in EU law and therefore able to benefit from positive action measures that could be justified for women. She acknowledges that *A* was decided before formal recognition of gender reassignment in domestic law[35], but then goes on:

"[n]*otwithstanding that position, Lady Hale … concluded that the correct interpretation of P v S was that '... for the purposes of discrimination between men and women in the fields covered by the Directive, a transperson is to be regarded as having the sexual identity of the gender to which he or she has been reassigned*.'"

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[29] *MB v Secretary of State for Work and Pensions* (Case C-451/16) para. 53
[30] *Bellinger v Bellinger* [2003] UKHL 21
[31] Lord Bingham describes the test as "*post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender*" (para. 11) and Baroness Hale describes the test as *"… has done everything that she possibly could do to align her physical identity with her psychological identity. … She has taken the appropriate hormone treatment and concluded a programme of surgery."* Our view is that these are two different descriptions of the same test and we prefer Baroness Hale's wording. That the two speeches are consistent is no doubt how Lord Steyn and Carswell felt they were able to agree with both them.
[32] *A* paras. 61-63
[33] Baroness Hale states *"This means that section 54(9) of PACE must be interpreted as applying to her in her reassigned gender…"* para. 59
[34] *For Women Scotland v The Lord Advocate* [2021] CSOH 31 ('FWS')
[35] Ibid. para. 60

Lady Wise's judgment states as a result that "*EU law confirms that discrimination against transwoman* [sic] *is sex discrimination*"[36] and Member States are entitled to legislate in domestic law on this basis. Rather than treat *A* as bad law, Lady Wise relies on this case for a key legal point.

For Women Scotland was heard in the Outer House of the Court of Session and is currently subject to an appeal. However, we have no reason to believe that the law in Scotland is different to the law in England and Wales in this area.

Given the specificity of the right in *A*, the lack of preconditions to enjoying it (other than making a full physical transition), the fact that it is directly applicable, the expectation of the Law Lords in *A* that it would sit alongside the GRA without undermining public policy and the continued judicial recognition of this right in *For Women Scotland*, our view is that the right in *A* remains applicable to trans people without a GRC.

2.2 *Croft v Royal Mail*

Regarding *Croft*, there is nothing in the GRA that determines the appropriate comparator for claims of discrimination on the grounds of *gender reassignment* related to separate sex spaces. Further, the *actus reus* of *Croft*[37] is that the legal test for determining the correct comparator does not depend on the legal gender of the trans person. Therefore, *Croft* remains unaffected by the commencement of the GRA.

When, the EA 2010 was enacted, Parliament once again had the opportunity to revisit the determination of the correct comparator in matters of employment. Again, Parliament chose to leave the law unchanged with respect to employment. However, Parliament added the statutory sched. 3 exception (discussed above) with respect to services. Therefore, the courts enjoy a similar discretion regarding services due to statute as they already do regarding employment due to *Croft*.

Finally, the case of *Green* does not support the notion that following the GRA *Croft* is no longer good law. Although, we do not think Green should be relied on for any purposes, if it is believed that *Green* is decided correctly, then there is no option but to accept *Croft* is good law because HJH Richardson states in the former that he was influenced by the decision in *Croft*[38]. The apparent dissonance this position creates is resolved by noticing that *Green* was only concerned with domestic law, but *Croft* was concerned with the implementation of an EU directive in domestic law[39].

2.3 *Green*

Green concerned the provision of services in the execution of a public function in a prison. It cannot be viewed as having "*general applicability*", given it did not concern any points of EU Law. On the other hand, discrimination on the grounds of *gender reassignment* (which under EU Law is viewed as *sex* discrimination) is prohibited in the areas of employment and services by EU directives. Whatever one's view of *Green*, it cannot be viewed as a

[36] FWS para. 61

[37] See our paper on *Green* that examines *Croft* in detail

[38] *Green* para. 68

[39] Per LJ Pill in *Croft* para. 52 *"The employer must respect the dignity and freedom of the employee (P v S, paragraph 22)…"*

precedent in employment and services cases (we have attached a draft copy of our paper regarding *Green*).

3. A summary of our view of the law regarding separate sex spaces

Our view of the status of the authorities is as follows:

Case	**View**
A v Chief Constable of West Yorkshire Police	Good law
Croft v Royal Mail	Good law
MB (at the CJEU)	Good law
Brook v Tasker	Good law but not a precedent
Green	Not relevant to employment or services (and a likely an incorrect decision)

3.1 Employment

Trans people with and without a GRC are able to bring a claim of *direct* discrimination on the grounds of *gender reassignment* regarding access to separate sex spaces. Whether or not the claim is successful will be decided following the rules in *Croft*. It is clear from *Croft* that allowing trans people to use the facilities that match their acquired gender does not breach the Workplace Regs.

3.1Services

Trans people with and without a GRC are able to bring a claim of *direct* discrimination on the grounds of *gender reassignment* regarding access to separate sex spaces. Whether or not the claim is successful will be decided by considering the sched. 3 exception and the guidance in the Services Code paras 13.57-13.60. To the extent the Services Code seeks to interpret the law rather than apply it, we believe the Services Code is accurate as it relies on legal principles underpinned by *Croft* and *A*.