Disposing of the myth that you must discriminate against trans people in the workplace

Abstract

In recent months various figures in the 'Gender Critical' movement have launched a range of attacks on the rights of transgender people. Some have argued that the Equality Act 2010 is being misinterpreted by various organisations or that the right of a trans woman to access some single-sex spaces contravenes Health and Safety legislation (despite this legislation having been in place for many years without any issues).

These voices have attempted to establish a legal case for discrimination against transgender people, basing their arguments on an erroneous understanding of the law. These false arguments have multiplied and spread widely, influencing the discourse up to government level and stimulating a frenzy of anti-trans hate, much of it from people who have little or no knowledge of the law in this area, nor the important principles which underpin it.

This paper looks at the rights of trans people in the workplace to use toilets and changing facilities in accordance with the gender in which they live. It explains that this does not breach Health and Safety legislation and on the contrary organisations that restrict the facilities their trans employees use risk having to pay unlimited compensation. It draws extensively on statutory and case law and it will be of use to anyone who wants to know the facts, especially to those who have legal training or an interest in law.

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1 Introduction

Transgender people are people who are born in one sex, but live as members of the opposite sex. The enactment of the Gender Recognition Act 2004 ('GRA') brought the UK in to compliance[1] with the European Convention on Human Rights ("ECHR') by providing a mechanism to recognise transgender people's *acquired gender*. A transgender person who meets the formal requirements of the GRA obtains a Gender Recognition Certificate ('GRC') and their legal sex becomes their lived gender, in legal terms their acquired gender, *for all purposes*[2].

At the time it was enacted, the GRA was considered a ground breaking piece of legislation as surgery was not a precondition to gender recognition. However, the GRA has not worked well in practice. The government estimates[3] that there are between 200,000 and 500,000 transgender people in the UK, yet at the start of the consultation only around 5000[4] or so had obtained formal recognition of their change of gender.

In 2017, the then government proposed to reform the GRA[5] and launched a consultation the following year[6]. Reform of the GRA should have been a simple administrative matter for transgender people, specialist doctors and specialist lawyers. However, 'gender critical' feminists, who believe on ideological grounds that transgender women are really men and should not be allowed to change their gender, opposed the reform. They successful weaponised the fallacy that GRA reform would *let men declare they are women and access women's single sex spaces*[7].

As this article will explain, the legal test for when transgender women can access women's single sex spaces in the course of their employment was articulated in the Court of Appeal case of *Croft v Royal Mail*[8] 18 years ago. This case predates the commencement of the GRA and subsequent statutory change over the years since, including the enactment of the

[1] The Appellate Committee of the House of Lords held in *Bellinger v Bellinger* [2003] UKHL 21 that UK law was incompatible with the ECHR

[2] Section 9(1) Gender Recognition Act 2004.

[3] Para. 28. Minister for Women and Equalities*. Reform of the Gender Recognition Act – Government Consultation*. July 2018. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf [Last accessed 3 June 2021]

[4] Op. Cit.

[5] See https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality [Last accessed 3 June 2021]

[6] Op. Cit. 3

[7] For example, Freedman and Auchmuty stated the GRA reforms would allow "*anyone to access [cisgender] women's spaces at any time, having self-proclaimed that they are a [cisgender] woman*" (Freedman R. & Auchmuty R., *Women's Rights and the Proposed Reforms to the Gender Recognition Act.* OxHRH Blog, 17 August 2018. Available from http://ohrh.law.ox.ac.uk/womens-rights-and-the-proposed-changes-to-the-gender-recognition-act [Last accessed 3 June 2021]) and this response to those claims (Bowyer R. *Gender Recognition Reform – The Current Debate is Misconceived.* OxHRH Blog, 4 October 2018. Available from http://ohrh.law.ox.ac.uk/gender-recognition-reform-the-current-debate-is-misconceived [Last accessed 3 June 2021])

[8] [2003] EWCA Civ 1045

GRA, have not affected its validity. On the contrary, a similar legal test was codified in respect of discrimination in the provision of services[9].

The 'gender critical' feminists' campaign was successful. Their fallacious arguments were oxygenated intensively by the media, including by influential titles such as the Guardian, Economist, Times, Telegraph and the BBC, leading to a highly toxic public debate. In the summer of 2020, the government changed track and abandoned its proposals for reform.

After the success of the 'gender critical' feminist campaign against GRA reform, opponents of trans human rights have turned their attention to preventing transgender people without GRCs (i.e. the vast majority of transgender people) from being able to access single sex spaces in the course of their employment. If transgender people are unable to access toilets at work that match their acquired gender, they will be denied a basic utility and driven out of employment. To achieve this aim, 'gender critical' attacks have been focused on Stonewall.

Stonewall[10] is a LBGT rights organisation. It operates an annual 'Top 100 employers' ranking for LBGT rights to encourage equality in respect of sexual and gender minorities. Part of the appraisal for this list is whether employers have non-discrimination polices around gender identity and gender expression.

'Gender critical' feminists are now claiming that policies that Stonewall would like employers to introduce will result in the employer breaking the criminal law and as a result they should break off all ties with Stonewall.

The theory they are deploying is that trans people without a GRC are still legally the sex that was registered at birth. Further, employers are required under Regulations 20, 21 and 24 of the Workplace (Health, Safety and Welfare) Regulations 1992 ('the Regulations') to provide single sex facilities. Hence allowing trans people without GRCs to use these facilities in accordance with their lived gender, or legally speaking their *acquired gender*, breaches this legislation.

This argument is articulated by barrister Naomi Cunningham writing on the Legal Feminist blog[11] in February 2020 as follows:

"*Regulations 20, 21 and 24 of the Workplace (Health, Safety and Welfare) Regulations 1992 require employers to provide single sex toilet and changing facilities, unless instead they provide separate lockable rooms to be used by one person at a time. Trans people who do not have a GRC are still as a matter of law of the sex with which they were registered at birth; that is, their biological sex. It follows that employers which permit trans people to use facilities provided for the use of the opposite sex on the strength of self-identification are in breach of those regulations. Such breaches can be prosecuted as a criminal offence.*"

Legal Feminist provides no legal authorities for this proposition.

[9] See Para. 28 Sched. 3 Equality Act 2010 and paras. 13.57 – 13.60 the Equality and Human Rights Commission *Services, public functions and associations: Statutory Code of Practice* available from https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf [Last accessed 3 June 2021]
[10] https://www.stonewall.org.uk/ [Last accessed 3 June 2021]
[11] See https://legalfeminist.org.uk/2021/02/01/submission-and-compliance [Last accessed 24 May 2021]

Similar attacks and legal arguments appeared in the independent report[12], commissioned by the University of Essex, written by Barrister Akua Reindorf. The report concerns the cancellation of invitations to two gender critical speakers, Professor Jo Phoenix and Professor Rosa Freedman, to attend events at the university.

The report states that the University of Essex's policy "*Support Trans and Non Binary Staff"* is *"founded on an erroneous understanding of the law*"[13]. Even though the policy was written by the University of Essex, and no doubt reviewed by their HR specialists and lawyers, bizarrely the report places the blame squarely on Stonewall:

"*The policy is reviewed annually by Stonewall, and its incorrect summary of the law does not appear to have been picked up by them. In my view the policy states the law as Stonewall would prefer it to be, rather than the law as it is.*"[14]

The report goes on to make an even more serious accusation, but provides no authorities for this accusation, except referring to the Regulations:

"Insofar as its [the University's Trans and Non-Binary Staff policy] *effect is that single sex facilities may be used by whoever chooses to use them in accordance with their gender identity rather than their sex, it is a potential breach of health and safety legislation, which requires employers to provide toilets and changing rooms either on a single-sex basis or in individual lockable rooms*"[15]

This is the same legal theory articulated by Legal Feminist. It is however completely false. At the most obvious of levels, it seems ludicrous. Most trans people use the facilities that match their acquired gender and most trans people do not have GRCs. Therefore, the law has apparently been broken daily, by thousands of people, for almost 30 years. Yet the Legal Feminist blog and Reindorf's report fail to provide a single example of employers being prosecuted for allowing trans people without GRCs to use the toilets or changing facilities that match their gender presentation[16].

This article provides a detailed and comprehensive analysis of relevant statute and case law to show beyond doubt that the theory is false. Further, it shows that should an employer fail to allow transgender employees to use the toilets that match their acquired gender, the employer risks paying unlimited compensation.

[12] Available from https://www.essex.ac.uk/-/media/documents/review/public_version_-_events_review_report_-_university_of_essex---17-may-2021.pdf?la=en [Last accessed 24 May 2021]
[13] Op. Cit. Para. 243.11
[14] Op. Cit.
[15] Op. Cit. Para. 226
[16] And a case law search on BAILII (https://www.bailii.org) reveals no such cases.

2 The Regulations

The Regulations implement EU Directive 89/654/EEC. Under the Regulations, employers have to provide separate sanitary conveniences for men and women unless these are provided in separate rooms which can be locked from the inside[17]. There are no restrictions on how washbasins for washing hands, forearms and the face are provided[18]. If showers are "*required by the nature of the work*"[19], separate facilities are needed for men and women unless they are provided in a room which can be locked from the inside and is intended for use by one person at a time.[20] If an employee has "*to wear special clothing for the purpose of work*"[21] and the employee "*cannot be expected to change in another room*"[22] then under Reg. 24 "*the* [facilities] *shall not be suitable unless they include separate facilities for, or separate use of facilities by, men and women where necessary for reasons of propriety and the facilities are easily accessible, of sufficient capacity and provided with seating*. "[23].

The Regulations only cover showers where "*required by the nature of the work*" and changing facilities where the employer needs "*to wear special clothing*". If the employer provides changing rooms and showers as part of a gym or for employees who are cyclists, then these facilities are outside the Regulations. In terms of changing facilities required under Reg. 24, the key words are "*where necessary for reasons of propriety*". Factors that impact on whether the clause of the regulation requiring separate facilities is even applied include: what the changing facilities are used for; the design of the facilities; and the policies the organisation has regarding the use of its facilities. Hence both Naomi Cunningham and Akua Reindorf are incorrect in stating that the Regulations require changing rooms to be provided on a single-sex basis or with individual lockable room.

Although provision of toilets will always come under the Regulations, it is likely to be comparatively rare for the provision of showers or changing rooms to both be required by the Regulations and trigger the obligation to provide separate facilities. Where there *is* an obligation under the Regulations to provide separate facilities there are different approaches to interpretation that the courts could apply.

(a) A literal interpretation of the Regulations

A literal reading of the Regulations would be that merely *providing* separate facilities of sufficient quality is enough to comply with the Regulations. There is nothing in the Regulations that says employers must *monitor* the facilities and discipline any transgender staff using facilities that do not match their birth certificate. In practice employers label the facilities clearly and seek to ensure that cisgender employees use the facility that matches their sex registered at birth. Under a literal interpretation of the Regulations this would be sufficient to meet their obligations.

[17] Regulations 20(2)(c) of the Workplace (Health, Safety and Welfare) Regulations 1992
[18] Op. Cit. Reg. 21(3)
[19] Op. Cit. Reg. 21(1)
[20] Op. Cit. Reg. 21(2)(h)
[21] Op. Cit. Reg 24(1)(a)
[22] Op. Cit. Reg 24(1)(b)
[23] Op. Cit. Reg. 24(2) as amended by the Health and Safety (Miscellaneous Amendments) Regulations 2002 (SI 2002/2174) regulation 6(g)

(b) A purposive interpretation of the Regulations

A purposive interpretation of the Regulations would be needed to impose a duty to regulate toilets and changing facilities to ensure transgender people use toilets that match their birth certificate. For all the Regulations, the purpose of single sex facilities is clearly for *reasons of propriety*. However, imposing such a duty in order to achieve this purpose immediate leads to a practical problem and a contradiction.

The practical problem is how do employers know which employees are using facilities that do not match their birth certificates? Posting staff at the entrance to each facility to check birth certificates is impractical, intrusive and demeaning. Further, it, is likely to breach their employees right to privacy[24].

The contradiction becomes apparent when considering what an employer's response should be on discovering they employ a transgender man who does not have a GRC, but who might be bearded, muscular with a flat chest and male genitalia. This interpretation of the Regulations would allow him to use multiple occupancy women' showers, although this would be highly humiliating for him, and would surely violate the privacy and dignity of the women who also use the facilities. On the other hand, if his employer allowed him to use the men's facilities, his employer would possibly be criminally liable with employees facing up to two years in prison[25].

Hence such a purposive interpretation of the Regulations fails to achieve the purpose it sets out to achieve. If a purposive interpretation of a regulation fails to achieve the intent of the regulation, then it cannot be correct.

(c) European jurisprudence

The correct interpretation of the Regulations must also take into account the jurisprudence of the European Court of Human Rights ('ECtHR') and the Court of Justice of the EU ('CJEU')[26]. The reasons for this include that the Regulations implement an EU directive, the need to give effect to EU law prohibiting discrimination against transgender people and the need to give effect to the European Convention on Human Rights ('ECHR').

[24] For example, under Article 8 of the European Convention on Human Rights

[25] Section 33(1)(c) and Schedule 3A Health and Safety at Work etc. Act 1974.

[26] For non-lawyers reading this article, s. 3(1) Human Rights Act 1998 ('HRA') requires courts to interpret legislation in such a way as to ensure it is compatible with the European Convention on Human Rights. Section 2(1)(a) HRA requires courts to take into account rulings of the ECtHR. Section 6 European Union (Withdrawal) Act 2018 requires courts to follow retained EU law including case law made prior to the UK's exit from the EU. Supremacy of EU law over the law of member states was established in the European Court of Justice cases of *Costa v ENEL* and the need for courts in member states to interpret their laws to give effect to EU law was established in the case of *Marleasing*.

3 The Court of Appeal case of *Croft v Royal Mail*

The interpretation of the Regulations with regards to transgender employees was considered by the Court of Appeal in the case of *Croft v Royal Mail*[27].

Sarah Croft was a transgender woman with the protected characteristic of *gender reassignment* who transitioned from male to female while working for the Royal Mail. Almost a year after she started her transition, the Royal Mail still required her to use the disabled toilet instead of the female toilet. She brought an action for discrimination on the grounds of *gender reassignment* under the Sex Discrimination Act 1975 ('SDA').

Lord Justice Pill, who wrote the leading judgment, explains the submission by the Royal Mail to the court as follows[28]:

> "*… Workplace Directive 89/391 stipulates at Annex 2, paragraph 13.2.3, that provision must be made for separate lavatories or separate use of lavatories for men and women (carried into domestic law by the Workplace (Health, Safety and Welfare) Regulations 1992 SI 1992/3004, Regulation 20). The introduction of a category of persons in section 2A of the 1975* [Sex Discrimination Act] *did not alter the dichotomy between men and women recognised in sections 1 and 2. With reference to toilet facilities, it is first necessary to determine to which sex the applicant belonged and then to decide whether the applicant was treated less favourably than others of that sex, it is submitted… The applicant was still in law a man, and, as in the case of any other man, there was no sexual discrimination in not permitting the use of the female toilets*"

This argument was rejected by all three justices at the Court of Appeal. LJ Pill stated "*I do not accept that the respondents can escape liability on the basis that the applicant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men.*"[29] LJ Jonathan Parker stated "I *agree with* [LJ Pill] *that that submission is to be rejected. In the context of access to lavatory facilities, which are necessarily segregated on grounds of sex, such an approach seems to me to make little sense where, as in the instant case, the applicant is undergoing gender reassignment. It seems to me to ignore the fact that that process of gender reassignment has begun*"[30]. LJ Keene did not provide his own reasons, but stated he agreed with the other two judgments.

LJ Pill then explains that "*It is in my judgment inherent in a situation in which two sets of facilities, male and female, are required and in which a category of persons changing from one sex to the other is recognised, that there must be a period during which the employer is entitled to make separate arrangements for those undergoing the change*"[31]. So, for a certain period an employer has the discretion to treat a transgender person differently. LJ Pill

[27] [2003] EWCA Civ 1045
[28] Op. Cit. Paras. 34 and 36
[29] Op. Cit. Para. 46
[30] Op. Cit. Para. 72
[31] Op. Cit. Para. 51

then sets out that the legal test for the moment when a person in the applicant's position is entitled to use the female toilets[32] "*depends on all the circumstances, including her conduct and that of the employers*". He goes on further "*The employers must take into account the stage reached in treatment, including the employee's own assessment and presentation*".

The *ratio* clearly includes both the legal test stated by LJ Pill and consequently the rejection of the legal test proposed by the respondent, the Royal Mail.

It would be unthinkable given the wide discretion enjoyed by the judges in *Croft* for them to have interpreted the SDA in such a way as to impose a criminal obligation on employers. Had the judges felt their discretion was restricted, perhaps by explicit language in the statute, they would have certainly explicitly flagged up the incompatibility between the SDA and the Regulations in order for Parliament to remedy it. The only possible conclusion is that the judges felt that allowing a transgender employee to use a single-sex toilet at her workplace once the right to use the female toilet had arisen did not breach the Regulations.

Although *Croft* was about the female toilets, our view is that the legal principles in *Croft* would also extend to employer provided showers and changing facilities. Like toilets, changing facilities are sensitive spaces with separate facilities being provided for men and women. Once the right for a trans person to use the showers and changing facilities matching their acquired gender has arisen, then there could be no breach of the Regulations.

[32] Op. Cit. Para 53

4 The effect of *A v Chief Constable of West Yorkshire* Police on *Croft*

Julius Komoroski writing in the Journal of the Law Society of Scotland[33] about transgender discrimination law implies that *Croft* was overridden by the subsequent case of *A v Chief Constable of West Yorkshire Police*[34]. He states: "*(I have not overlooked Croft v Royal Mail Group plc [2003] ICR 1425. That also predated the* [Gender Recognition Act]*, but was not mentioned by the Law Lords in the later West Yorkshire Police decision. Given their silence, I omit further comment.)"*[35]

We believe he is badly mistaken in believing that the Law Lords have signalled their disapproval of *Croft* by not commenting on it. If the Appellate Committee of the House of Lords disapproved of a judgment, then it was not shy in telling the world[36].

The real reason the Law Lords did not mention *Croft* is that *A* and *Croft* concerned different points of law. The events in *A* took place prior to the amendment to the SDA to prohibit discrimination on the grounds of g*ender reassignment. A* was a case about discrimination on the grounds of *sex*, genuine occupational qualifications and whether a transgender woman should be viewed as female for the purposes of s. 54(9) Police and Criminal Evidence Act 1984 ('PACE'). Officers conducting searches under s.54 PACE can require the detainee to remove their clothes and hence s. 54(9) PACE requires that the search is carried out by an officer of the same sex as the detainee. *Croft* on the other hand was about discrimination on the grounds *of gender reassignment* in the context of a transgender woman using the women's toilet. The Law Lords no doubt considered that *Croft*, which was about a piece of legislation which had not yet been enacted at the time of the events in *A*, did not offer any insight into the legal issues they faced in *A*.

[33] J. Komoroski. "*Sex and the Equality Act*". Law Society of Scotland Journal. Volume 65 Issue 1. Available from https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/. [Last accessed 31 May 2021]
[34] [2004] UKHL 21
[35] Op. Cit. 33
[36] See for example Lord Reid's well-known speech in *Cassell v Broome* [1972] AC 1027 castigating the Court of Appeal.

5 The effect of the Gender Recognition Act 2004 on *Croft*

Croft occurred before the enactment of the GRA. As a result, at the time of the events in her case, Sarah Croft would have been unable to obtain a GRC and hence would have been unable to change her legal sex "*for all purposes*" such as marriage.

Some gender critical authors, in the context of examining the law relating to discrimination in the provision of services, have ignored *Croft* in their articles[37]. The only reason I can think of for this is if they believe the enactment of the GRA has rendered the decision in *Croft* moot. These authors instead prefer the flawed judgment in *R (on the application of Green) v Secretary of State for Justice*[38]. This is curious as this judgment approved *Croft* with HHJ Richardson writing "*I am influenced by the judgment of the Court of Appeal in Croft v Royal Mail Group PLC [2003] EWCA (Civ) 1045.".* Nonetheless, we address the judgment in *Green* briefly later on in this article and in more depth in a separate article.

We first explain (a) that the GRA preserves prior case law including *A* and *Croft*. We then argue (b) that even if the GRA been passed prior to *Croft*, the decision in *Croft* would have remained the same. Finally, we examine (c) the adverse impact of replacing the legal test in *Croft* with a test based on the possession of a GRC.

(a) The GRA was drafted to preserve previous case law

The GRA was drafted in a careful and deliberate way to avoid overriding prior cases. Using the term "*for all purposes*" recognises that it is possible to change one's legal sex for some purposes. White and Newbegin note that "*there is no balancing statement that the absence [emphasised in italics] of a GRC conclusively shows that that a person's legal sex is NOT their affirmed gender*"[39].

Even after the passage of the GRA, the courts have determined there are additional *purposes* for which possession of a GRC is not needed for legal recognition. This is illustrated in the area of Social Security by the case of *MB v Secretary of State for Work and Pensions*[40] in the Grand Chamber of the ECJ. In this case the court held that a transgender woman should be recognised as female for the purpose of the EU Social Security directive even though she did not hold a GRC.

Our view of *Croft* is that legal sex does not affect the right to use the toilet at work and hence the GRA, which is only concerned with legal sex, has no impact on *Croft* for this reason. If

[37] See for example Norman J. *Has everyone REALLY got it wrong?* (Filia, 26 Aug 2018). Available from https://filia.org.uk/latest-news/2018/8/23/has-everyone-really-got-it-wrong. Last accessed [25 May 2021] and A. Asteriti and R. Bull. *Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?*'. Modern Law Review, 22 July 2020. Available from https://www.modernlawreview.co.uk/asteriti-bull-sharpe [Last accessed 29 May 2021]

[38] [2013] EWHC 3491 (Admin)

[39] R. White and N. Newbegin. *A Practical Guide to Transgender law.* Law Brief Publishing, 2021. Page xxi.

[40] Case C-451/16

on the other hand *Croft* does determine someone's legal sex for the purpose of using the toilet at work, then this is clearly preserved by the wording in the statute.

(b) Had the GRA been passed prior to *Croft*, the decision in *Croft* would have remained the same

The Royal Mail in its submissions to the court in *Croft* referred to the Court of Appeal decision in *A v West Yorkshire Police*[41] and remarked that "*Kennedy LJ stated, at paragraph 13, that it was necessary to decide first what is "the appellant's legal gender". There had been gender reassignment surgery in that case and the Court concluded that the appellant had become female.*"[42] It was open for the judges in *Croft* to make undergoing gender reassignment surgery the test for the moment when Sara Croft was entitled to use the women's toilet, but they rejected this. Had the GRA been enacted prior to *Croft*, they would no doubt have rejected possession of a GRC as the test for using the women's toilet as well; after all both surgery and obtaining a GRC require the same two year "real life test".

(c) The adverse consequences of replacing the test in *Croft* with a test based on the possession of a GRC

The intent of the GRA was to bring the UK into compliance[43] with the ECHR by recognising the acquired gender of transgender people for the purpose of marriage. To avoid creating same sex marriages, the GRA as originally enacted imposed a requirement that applicants must be single.

If when the GRA commenced possession of a GRC replaced the test in *Croft*, married transgender people would have lost the right to bring a discrimination claim if they were prevented from using the toilets in their acquired gender. It would be strange for Parliament to have intended that legislation enacted to give legal rights to trans people should instead remove rights from them. Even more strange would be that Parliament intended this removal of rights by the mere commencement of the act, rather than any explicit language contained in the act itself.

Replacing the test in *Croft* with possession of a GRC also causes problems in the other direction. Under the GRA, a trans man could obtain a GRC without having gender reassignment surgery. If this trans man were to use an open changing room at his employer's gym, which did not have any cubicles[44], it might cause the other men distress and discomfort[45]. However, should his employer wish to require him to use the disabled or men's facilities, it would have no defence to a claim of discrimination on the grounds of *gender reassignment.*

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[41] [2002] EWCA Civ 1584

[42] Op. Cit. 27 Para. 34

[43] The House of Lords held in *Bellinger v Bellinger* [2003] UKHL 21 that UK law was incompatible with the ECHR

[44] This is purely a hypothetical example. Trans people are hypersensitive to causing discomfort to other people and will often avoid changing rooms altogether.

[45] Men tend to be less supportive of trans people using facilities that match their acquired gender than women. See for example https://www.ipsos.com/ipsos-mori/en-uk/majority-britons-say-transgender-people-face-discrimination-britain which showed support of 43% among women and just 33% among men.

The judgment in *Croft* explicitly takes account of European law[46]. Discrimination in the course of employment is covered by EU directives[47] and judges have to interpret English law in accordance with EU law under the *Marleasing*[48] principle of harmonious interpretation. It is

hard to see how replacing the flexible legal test in *Croft* with the strict test of having a GRC would be compatible with EU law.

To our minds, the judges in *Croft* have wisely recognised that whether or not trans people have the right to use single sex spaces cannot be decided on legal technicalities; given the diversity of single sex spaces and trans people such an approach would lead to undue hardship for trans people and violation of people's dignity. Instead, the judges recognised a flexible case by case approach is needed.

As a result, we believe that the legal test in *Croft* was unchanged by the enactment of the GRA.

[46] Op. cit. 27. Para. 52
[47] See directive 2006/54/EC and *P v S and Cornwall* Case C-13/94
[48] Case C-106/89

5 The Equality Act 2010

The other key legislative change since *Croft* is that the SDA has been repealed and replaced by the Equality Act 2010 ('EA 2010'). The EA 2010 is, for the most part, a consolidating act and most of the key clauses are similar or identical to the SDA. There is no language in the EA 2010 requiring trans people to have a GRC as a precondition to bringing a discrimination claim.

One difference between the SDA and the EA 2010 is the definition of the protected characteristic of gender reassignment. In s. 82(1) SDA, *gender reassignment* is defined as a medically supervised process "*for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process*". However, in s. 7(1) EA 2010, the requirement that the process is medically supervised has been removed. Provided an employee is acting in good faith, as indeed Sarah Croft was, it is hard to see how this change would have any effect on the reasoning in *Croft*.

As there is no statutory exception that allows excluding transgender woman from workplace toilets LJ Pill's test in *Croft* must remain good law.

In *Croft*, the judges found, after applying the test, that even though Sarah Croft was at least seven months into her transition, the right for her to use the female toilets had not yet arisen. However, the events in *Croft* took place 18 years ago and there has been a massive change in awareness and acceptance of transgender people during this period. These social changes are reflected in the Equality and Human Rights Commission ('EHRC') "*Services, public functions and associations: Statutory Code of Practice*" ('the Services Code'). Paragraph 13.58 contains an example of a transgender women using a woman's changing room in a shop. The example states that "*it would not be appropriate or necessary*" to exclude a transgender woman with the protected characteristic of *gender reassignment* from a changing room which has individual cubicles. The Services Code goes on to explain that the "*privacy and decency of all users can be assured by the provision of separate cubicles*".

The Services Code is not itself the law and only has legal weight with respect to the provision of services. For services though, examples within the Services Code would be "*seriously taken into account"*[49] by the courts. However, if the legal position for the last ten years has been that a transgender woman has the right to bring a discrimination claim if she is excluded from a female changing room in a shop, it is hard to see how a court applying the test in *Croft* today would nonetheless decide that she can be excluded from the female toilet at her place of work. After all the same privacy issues apply to both locations and are solved with separate cubicles.

As a result, we submit that it would now be unlikely for it to be ever lawful to exclude a transgender woman, with the protected characteristic of *gender reassignment*, from the women's toilet. This is consistent with the recent landmark case of *Taylor v Jaguar Land Rover*[50].

[49] Per Baroness Hale speaking in the House of Lords in *SCA Packaging v Boyle* [2009] UKHL 37 para. 67, statutory guidance "*has, of course, to be taken seriously into account when it deals with the factual matters which are relevant to the application of the legal tests"*

[50] Employment Tribunal case number 1304471/2018

White and Newbegin take a similar view as ourselves. They state *Croft* is "*unlikely now to reflect current best practice and it may well be that slightly different facts in the future might lead to a different outcome*."[51] They note the Government and Equalities Office's Guide, "*The recruitment and retention of transgender staff – Guidance for employers – November 2015*" states "*a trans person should be free to select the facilities appropriate to the gender in which they present. For example, when a trans person starts to live in their acquired gender role on a full time basis they should be afforded the right to use the facilities appropriate to the acquired gender role. … Where employers already offer gender-neutral toilets and changing facilities, the risk of creating a barrier for transgender people is alleviated*"[52]

[51] Op. Cit. 39. Page 118.
[52] Page 14. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/484855/The_recruitment_and_retention_of_transgender_staff-_guidance_for_employers.pdf [Last accessed 4 June 2021]

6 The Employment Tribunal case of *Taylor v Jaguar Land Rover* ('JLR')

Rose Taylor was a non-binary employee at JLR who began to transition from male to non-binary. On the 22 May 2017, she told her manager in writing that she was "*gender fluid*", that on some days she wished to wear some female clothing to work ("*mixed mode*"), and "*she wanted to fix a day to go to work dressed in female clothing*"[53]. During a follow up meeting with her manager and in accordance with the firm's previous practice, she was "*told to use the disabled toilets*"[54]. The Employment Tribunal unanimously held this was direct discrimination on the grounds of *gender reassignment*[55].

The decision of the Tribunal does not state if Ms Taylor had a GRC. However, even if she, in spite of being a non-binary person, wanted legal gender recognition as a woman, it is clear on the facts that this couldn't have happened. To obtain a GRC, an applicant has to have lived in their acquired gender full-time for a period of at least two years.[56] At the time the discrimination occurred she was still presenting as male at work.

There were no legal authorities on whether non-binary people are covered by the protected characteristic of *gender reassignment*, so this was something that the tribunal had to determine[57]. Using Hansard, the tribunal were able to determine that Parliament did intend that the protected characteristic of *gender reassignment* was to include both transgender and non-binary people[58].

It is clear from the wording of the decision that it covers both transgender and non-binary people. The tribunal state: "*Firstly, telling a transitioning person to use the disabled toilets is, at the very least, potentially offensive to them because it suggests that their protected characteristic equates to a disability. Secondly, disabled toilets are for disabled people to use and should not be used by other people.*"[59]

In finding that direct discrimination had occurred, the tribunal took a different approach from *Croft*. Referencing the Employment Appeals Tribunal case of *Ladele*[60], upheld at the Court of Appeal[61], the tribunal stated:

"… *although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it.*"[62]

[53] Op. Cit. Para. 21
[54] Op. Cit. Para. 22
[55] Op. Cit. Para. 4
[56] Section 2(1)(b) Gender Recognition Act 2004
[57] Op. Cit. 50 Para. 2
[58] Op. Cit. Paras. 176-178
[59] Op. Cit. Para. 23
[60] *London Borough of Islington v Ladele (Liberty intervening)* EAT/0453/08
[61] *London Borough of Islington v Ladele (Liberty intervening* [2009] EWCA Civ 1357
[62] Op. Cit. 50. Para. 185(g)

Then, the Tribunal relying on the House of Lords case of *Nagarajan v London Regional Transport and Swiggs*[63] stated:

"*The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).*"[64]

Given that a person who was not transitioning would not be asked to use the disabled toilets, the tribunal found that direct discrimination on the grounds of *gender reassignment* had occurred [65].

Later in Ms Taylor's transition JLR decided that she should use whichever toilets she felt comfortable on a given day or if she wasn't comfortable with either option then she could use the disabled toilets[66]. The tribunal's reasons do not indicate giving Ms Taylor this flexibility breached the Regulations; in fact, the Regulations are not mentioned in the tribunal's reasons at all. However, the tribunal suggested that more appropriate options for a non-binary person included providing a gender-neutral toilet or "*possibly putting out a message to inform relevant staff which toilets the Claimant would be using.*"[67]

This is a first instance case, but nonetheless it is influential. It was the first time that non-binary people have been recognised as having the protected characteristic of *gender reassignment*. JLR has chosen not to appeal and accepted the finding of the Tribunal. It will pay £180,000 in compensation to Ms Taylor. Further, it has agreed to commission a report by Stonewall, or another recognised diversity organisation, to investigate diversity and inclusion at the organisation.

In *Croft*, the employer was allowed to require a transgender woman to use the disabled toilet for a period of time before permitting her to use the women's toilet; after *Taylor* this is no longer an option.

[63] *Nagarajan v London Regional Transport and Swiggs* [1999] UKHL 36
[64] Op. Cit. 50. Para 186
[65] Op. Cit. Para 212
[66] Op. Cit. Para 64
[67] Op. Cit. Para 65

7 The High Court case of *Green v Secretary of State for Justice*

The 2013 case of *Green* appears to contradict the legal analysis and cases presented in this article. In *Green* the High Court found that the comparator for a trans woman without a GRC is always a cisgender man. As a result, a transgender woman could not suffer discrimination on the basis of *gender reassignment*, unless she was treated more badly than a cisgender man. A full analysis of the problems with the judgment in *Green* requires a separate article. Suffice to say, Professor Alex Sharpe writing in *Modern Law Review* iterates just a few of the problems with *Green*. She concludes

"*It seems unlikely Green would have survived an appeal or that our superior courts presented with such a scenario today would proceed as HHJ Richardson did.*"[68]

[68] A. Sharpe. *Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?* (2020) 83(3) MLR 539

8 Conclusion

The argument that the Regulations require transgender people to use the toilets that match their birth certificate was rejected by three senior judges in 2003. It was not the law then and it is not the law today.

In terms of showers and changing facilities, most facilities - such as those provided as part of a gym or for cyclists - are not covered by the Regulations. For the few organisations that are required to provide showers and changing facilities under the Regulations, the best way to balance the risk of a discrimination claim under the EA 2010 with the remote risk of breaching the Regulations is to take practical steps. For example, for showers, partitions and frosted glass can be used to create individual lockable rooms. Changing facilities should contain at least some cubicles for use by anyone who needs privacy and a policy should be put in place in respect of changing rooms to ensure *propriety* is maintained[69].

The specific statements made by Naomi Cunningham and Akua Reindorf, that allowing transgender people without a GRC to use toilets and changing rooms that match their acquired gender breaches or potentially breaches the Regulations are nonsense. Case law demonstrates that the risk companies face is *not* criminal liability for breaching the Regulations; but the risk of being required to pay unlimited compensation[70] for discrimination against transgender and non-binary employees. As companies and organisations navigate this area of law, encountering spurious legal assertions as they do so, they would be well advised to keep this in mind.

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[69] For example, requiring trans people who have not had full surgery to use cubicles and/or towels to maintain propriety

[70] Sections 119 and 124(2)(a) Equality Act 2010