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Dear [REDACTED]

## **Legal positions adopted on transgender equality**

Under section 3 Equality Act 2006 ('EA 2006'), the EHRC is under a general duty to encourage and support the development of a society in which "*people's ability to achieve their potential is not limited by prejudice or discrimination*" and "*each individual has an equal opportunity to participate in society*". However, the EHRC has taken positions on the law regarding transgender equality, which are both unsupported by the legal authorities and in contravention of this duty.

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

In the statement '*Our statement on sex and gender reassignment: legal protections and language*' published on 30 July 2018 and available on your website, the EHRC states:

*"... a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC"*

However, this position is directly contradicted by the opinions of the Law Lords in the well-known case of *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21 in which a trans woman who did not have a GRC was treated as female for the purposes of the Sex Discrimination Act. If a mistake has been made, then we would appreciate it if the EHRC could issue an update to the statement of the 30 July 2018. On the other hand, if the EHRC believes it is a fair and accurate reflection of the law then would you be able to explain the legal basis for this statement referencing the appropriate legal authorities.

### *The correct comparator for a trans person without a GRC*

In the recent case of *Authentic Equity Alliance v EHRC*, the EHRC took its position one step further and accepted that a trans person without a GRC *cannot* suffer *direct* discrimination on the grounds of *gender reassignment* if denied access to a single or separate sex service that corresponds with their lived gender in the context of services and public functions. As a result, the EHRC was forced to argue (successfully) that a trans person without a GRC could suffer from *indirect* discrimination if denied access to the appropriate facilities.

In so doing the EHRC appears to have compounded its original error. It seems that not only does it consider that a trans woman without a GRC cannot be viewed as female for the purpose of the Equality Act 2010 ('EA 2010'), but it also views the correct comparator for such an individual is a *cisgender man*. Both the common law and retained EU law is consistent that transgender people without GRCs can benefit from protection from *direct discrimination* on the grounds of *gender reassignment* in respect of single and separate sex services regardless of the context in which the services are provided. See for example, the Court of Appeal case of *Croft v Royal Mail* [2003] EWCA Civ 1045 (employment), the ECJ case *MB v Secretary of State for Work and Pensions Case C-451/16* (social security) and the County Court case of *Brook v Tasker* (unreported 7 March 2014, Halifax County Court) (services to the public); the last two cases occurring after the enactment of both the Gender Recognition Act and the EA 2010.

The failure to state that trans people without GRCs can suffer *direct discrimination* with respect to single and separate sex services potentially has very serious legal and practical consequences. It means that these trans people have to rely on a claim of *indirect discrimination*, which may well not offer the same level of legal protection.

It is common for policies that would be *prima facie indirect* discrimination to nonetheless be justified as proportionate on a blanket basis (under s. 19(2)(d) EA 2010). We would hope that a court would not take this approach when considering discrimination on the grounds of *gender reassignment*, but there is a serious risk that unlike *direct* discrimination, a court would decide that *indirect* discrimination can be justified on a blanket basis.

Further, the differing levels of legal protection might lead service providers to start asking any woman who '*looks trans*' to show their birth certificate. This could impact trans women regardless of whether or not they have a GRC and also cisgender women who do not appear to perform an 'acceptable' form of femininity sufficiently well. Given the increasingly hostile climate in the United Kingdom towards transgender people, we could foresee a situation in which organisations might even start posting signs saying 'No trans people without a GRC'. Your current position is making this increasingly possible.

As mentioned, the EHRC is under a duty to encourage a society in which individuals have an equal opportunity to participate. Such a society requires that transgender individuals have the opportunity to use single sex spaces that match the gender in which they present, regardless of whether they qualify for or have a GRC. A GRC is not issued until at least two years after an individual begins their transition and even then, if the individual is married, spousal consent is required (outside of Scotland). Not only has the EHRC adopted legal positions that will make an equal society less likely, it has done so without stating any legal authorities in their support.


Given the legal authorities and the legal duty for the EHRC to protect the rights of trans people, we would like to see the EHRC adopt the position that trans people without a GRC can suffer *direct* discrimination on the grounds of *gender reassignment* if excluded from a single sex space that matches their presentation in the context of employment and services. Under this interpretation of the law, service providers or employers are still able to exclude trans people if it is *proportionate* and on a *case-by-case* basis using para. 28 sched. 3 EA 2010 (services) and the rule in *Croft* (employment).

The duty to eliminate discrimination must mean adopting the strongest viable legal position for a protected characteristic rather than trying to second guess the courts. The EHRC can of course highlight the protection from *indirect discrimination* as well as *direct discrimination*; after all a party in court would be free to plead both grounds. If the EHRC still feels that the correct comparator always matches a trans person's birth certificate, please could you

explain your reasoning, with appropriate authorities and why the authorities we stated do not apply.

We look forward to hearing from you.

Yours sincerely

  
Trans Legal Project