

# Briefing Note: Impact of Gender Recognition Reform on Sex Based Rights

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**This briefing note concerns the way the Equality Act 2010 (“EqA 2010”) and the Gender Recognition Act 2004 (“GRA 2004”) interact. It is intended to accompany the slides presented in the Scottish Parliament on 29 January 2020**

## Executive Summary

The Scottish Government’s Equality Impact Analysis has failed to understand the current law with regards to when a person has obtained female legal sex status using a Gender Recognition Certificate (“GRC”). It has not identified nor has it analysed the impact of Gender Recognition Reform on sex-based rights.

There are many sex-based rights, which are negatively affected and, in the case of equal pay completely extinguished by suspending recognition of a person’s biological sex. I will only review a selection of them in this briefing note.

Currently there are sex discrimination exceptions in the Equality Act which allow single sex service providers to exclude both men and transwomen who do not have a GRC. Once a transwoman obtains a GRC a service provider may only rely upon a gender reassignment discrimination exception. This disallows a public body from undertaking the supporting public functions required to provide the service such as allocating budget to it. I will provide an in depth review of how single sex provision works and the likely impact of gender recognition reform.

There is cause for significant concern that single sex service provision on the lines of natal sex will be rendered unworkable and severely compromise the rights which women currently have to single sex services. Scotland is already experiencing a chilling effect on the use of the sex exceptions, which is, in my view putting local authorities at risk of breaching women’s human rights

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## 1. Gender Recognition and Legal Sex change

- 1.1 Once a person has a Gender Recognition Certificate (GRC) “their gender becomes for all purposes the acquired gender” in line with section 9(1) Gender Recognition Act 2004 (GRA). This means that their legal sex status is recognised by the state as having changed. But according to section 9(3) of the same Act there are exceptions to this rule.

### Box 1. Gender Recognition Act 2004 Section 9

9      **General**

(1) 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).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

[◀ Previous: Provision](#)      [Next: Provision ▶](#)

- 1.2 In effect the State is allowed to suspend gender recognition to consider natal sex in certain circumstances. However, this is not done in a transparent way, since the Act never defines either sex or gender. We will look at the Equality Act 2010 (EqA 2010) definition of sex later, although it should be noted that gender is not defined by the EqA 2010 either.

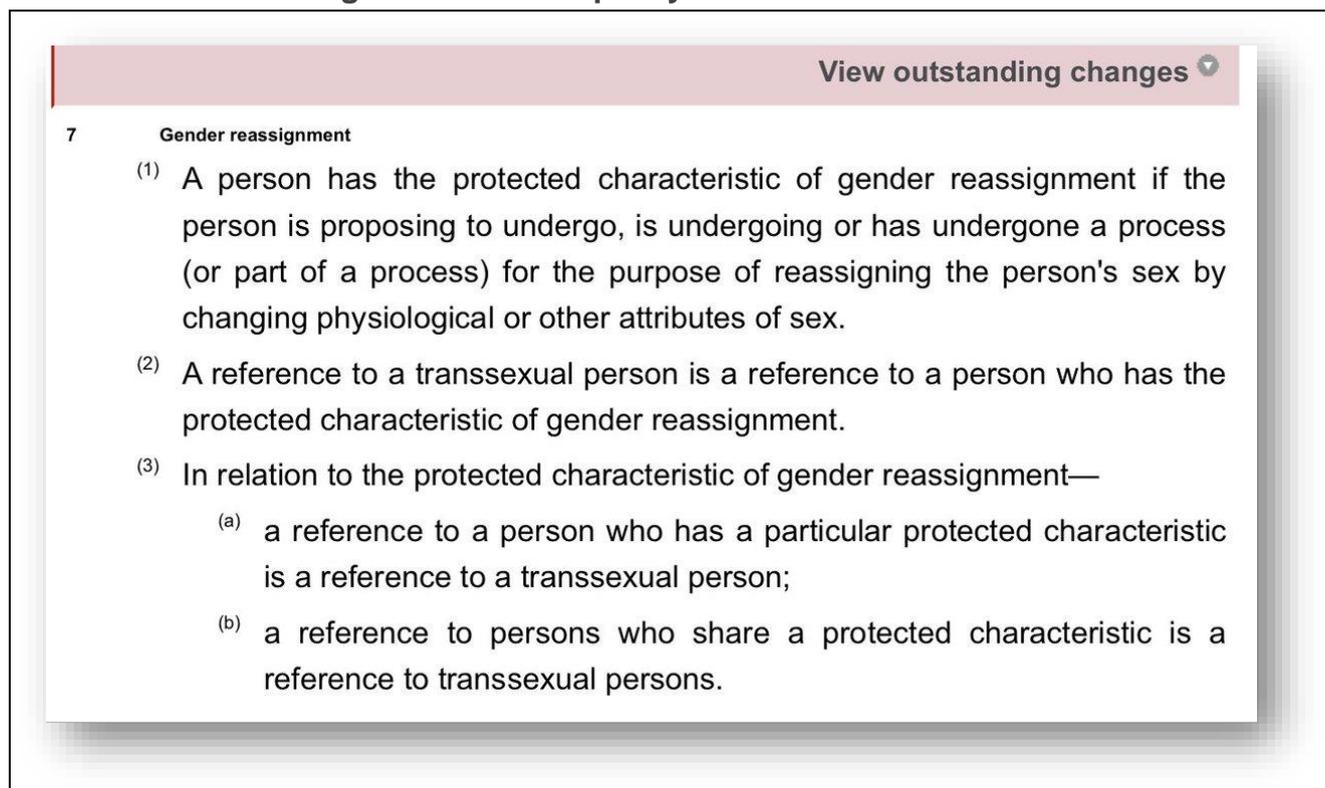
## 2. Exceptions to Gender Recognition

- 2.1 The major exceptions to gender recognition are found at sections 15, 16, 19, 20 and 12 of the GRA 2004 as noted briefly below. These are not the only exceptions within the Act, although they are the most straight-forward.
- Section 15 and 16 relate to peerages and succession (women who change their legal sex are still disallowed from inheriting).
  - Section 19 relates to sports where the impact of natal sex is acknowledged. The GRA 2004 recognises that “gender” affects advantages in sports. The best interpretation of “gender” in context is natal sex.
  - Section 20 refers to gender-specific offences (such as rape) acknowledging natal sex.
  - Section 12 - parenthood does not change sex so that a someone who is legally a man may still be described as a child’s mother on the child’s documentation.
- 2.2 The EqA 2010, in the words of section 9(3) GRA 2004 is covered by "any other enactment", and is capable of making specific exceptions to the recognition of legal sex. In fact, EqA 2010 makes the most important exceptions.
- 2.3 There are a large number of exceptions where the State is able to suspend gender recognition and allow State agents, employers and service providers to treat someone according to their natal sex rather than their legal sex. I will however, for the sake of this particular briefing, concentrate only on those relating to service providers.
- 2.4 Due to section 19 of EqA 2010 the exceptions in the GRA 2004 can only be invoked where objectively justified as “a proportionate means of achieving a legitimate aim” as otherwise an individual may experience indirect discrimination on the basis of their gender reassignment.

### 3. Gender Reassignment does not change Sex

- 3.1 The EqA 2010 definition of gender reassignment is set out in Box 2. It should be noted that a person may be simply at the stage of proposing to reassign attributes of sex to fit within the definition of gender reassignment set out in section 7 EqA 2010

#### Box 2. Gender Reassignment in the Equality Act 2010

A screenshot of a legal document, likely a statute or regulation, showing the definition of gender reassignment. The document has a light pink header with the text "View outstanding changes" and a small downward arrow. Below the header, the section is titled "7 Gender reassignment". The definition is presented in three numbered paragraphs: (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. (3) In relation to the protected characteristic of gender reassignment— (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

- 3.2 Nothing above sets out that the individual has changed legal sex. This is instead a protection, which attaches to the process of changing physiological or other attributes of sex. As it is a process, protected status is conferred from the moment that the person proposes to undergo a process (which is unspecified and does not require either surgery or hormone treatment).
- 3.3 At the time of the 2017 Scottish Government consultation on GRA reform, the EHRC held the incorrect position that that gender reassignment changed the legal sex status of the gender reassigned individual.
- 3.4 The EHRC issued clarification in the summer of 2018, stating that legal sex status only changes once an individual has a GRC: "... 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."<sup>1</sup>

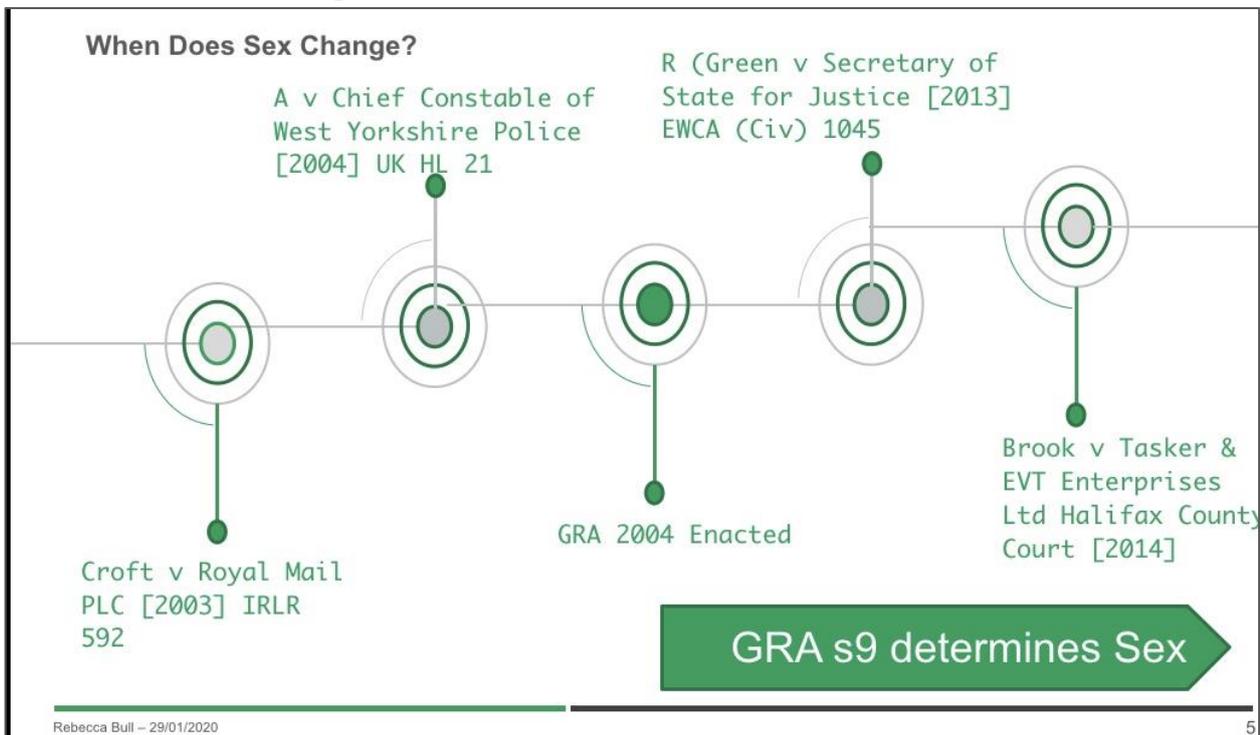
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<sup>1</sup> EHRC "[Our statement on sex and gender reassignment: legal protections and language](#)" 30 July 2018

## Case law on legal sex

3.5 There is a tension between the person for whom the GRA 2004 was created, who was conceptualised as (though not strictly limited to) a post-operative transsexual person<sup>2</sup>, and the person who has the protected characteristic of gender reassignment. As well as not requiring any surgical or hormonal changes, this does not require any psychological diagnosis, and includes those without a GRC, including those who would not qualify for one. The EHRC Code (which I will come to later) appears to make no differentiation between these two manifestations of gender reassignment, despite the second group not having changed their legal sex status.

### Box 3. Case law on legal sex



3.6 The case law in this area derives from the Court of Appeal case Croft v Royal Mail PLC [2003] IRLR 592 that predates both the EqA 2010 and also the GRA2004. This case was, however, affirmed in the High Court in R (Green) v Secretary of State for Justice [2003] EWHC 3491 and it updated the application of Croft at paragraph 68 to encompass whether a gender-reassigned individual has a GRC. . I quote paragraph 68 of that Judgement below:

<sup>2</sup> The stimulus for the GRA was a case brought successfully to the European Court of Human Rights (ECtHR) by a person who was post-operative ([Goodwin v. United Kingdom 2002 \(28957/95\)](#)). The GRA went further than the ECHR ruling required and extended its provisions to include those who had not had any physical medical treatment. This was presented as a concession for those who were unable for any reason to undergo such treatment, who were discussed at the time as likely to be marginal cases. A psychological diagnosis of dysphoria was used instead as the medical threshold. Subsequent ECtHR rulings for cases from other nations have judged surgical requirements to breach the ECHR, but upheld the right of states to apply a test of psychological need in allowing for a change of sex to be recognised in law.

“Frankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland. I am influenced by the judgment of the Court of Appeal in *Croft v Royal Mail Group PLC* [2003] EWCA (Civ) 1045. 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.”<sup>3</sup>

3.7 It seems possible that the source of confusion as to legal sex change may come from two sources. The first is *A v Chief Constable of West Yorkshire Police* [2005] 1 AC51. In this case, the police force determined that it would be unlawful for the trans claimant to search either male or female detainees. The House of Lords determined that the person should be regarded as a member of the sex, with which they identified if they were:

“visually and for all practical purposes indistinguishable” from their preferred sex and if they had done everything possible in terms of “hormone treatment and concluded a programme of surgery.”

3.8 However, this was intended to be a stopgap position “until the matter [of legal sex status] is resolved by legislation...The Gender Recognition Bill provides a definition and a mechanism for resolving these...questions” (para. 60 Lady Hale). It seems however, that despite this statement, West Yorkshire Police has been imported into the EHRC Code and also into various institutional understandings of when legal sex status has been obtained (I will come to this later).

3.9 The second potential source of confusion is the case of *Brook v Tasker* 2014, an unreported case heard by the Halifax County Court. In this case it was determined that a gender-reassigned customer had been directly discriminated against on the grounds of gender reassignment when prevented from using the ladies lavatories and subsequently victimised. There is no official record of the Submissions or the Judgment. However as it was a decision of the lower courts and cannot have overturned the Court of Appeal Judgment in *Croft*, I believe that section 9 of the GRA 2004 determines the point at which legal sex status has been obtained following the way in which Green updated *Croft*.

3.10 The EQA 2010 definition of the protected characteristic of sex sets out that this is the status of being either a man or a woman (section 11 EqA 2010), as shown in Box 4.

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<sup>3</sup> [R \(Green\) v Secretary of State for Justice \[2003\] EWHC 3491](#)

#### Box 4. Equality Act 2010: Definition of sex

11

Sex

In relation to the protected characteristic of sex—

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

3.11 A woman is defined at section 212 EQA 2010 as a "female of any age". Unlike gender reassignment, which is a protected characteristic attached to a process, sex relates to a state of being.

3.12 Due to section 9 of GRA 2004, discussed earlier, a "male to female transsexual person" with a GRC will be legally included within the category "woman." We know from looking at the Hansard records from the time that it was intended that this status should only be granted to "a very small number of people who suffer very seriously because of the condition [of gender dysphoria] that they have suffered" Lord Filkin Hansard Official Report 11/02/2004 col 1094-1095.

## 4. Legal sex change extinguishes Equal Pay Claims

4.1 The law relating to equal pay is found at chapter 3 of the EqA 2010 2010 as set out below.

### Box 5. Equal pay in the Equality Act 2010

*Sex equality*

**64 Relevant types of work**

(1) Sections 66 to 70 apply where—

- (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
- (b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

**65 Equal work**

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

- (a) like B's work,
- (b) rated as equivalent to B's work, or
- (c) of equal value to B's work.

(2) A's work is like B's work if—

- (a) A's work and B's work are the same or broadly similar, and

4.2 Pre GRA 2004 case law confirms the requirement that the comparator must be of the opposite sex. This is the case of Collins v Wilkin Chapman Ltd EAT 945/93 which relates to a claimant who attempted to use a comparator who, unbeknownst to the claimant, had the same legal sex status. At that point in time there was no mechanism to change legal sex status and the claim was dismissed, as the comparator was not of the opposite sex.

4.3 Currently a claimant may establish that a gender-reassigned comparator is their comparator if their natal sex is opposite to that of the claimant. Once a GRC has been obtained the claimant may not use the same comparator, as they are no longer the opposite sex to one another.

4.4 The vast majority of equal pay claims have, to date been based upon rated claims (section 65(1)(b)). This is, in the main, due to unwittingly indirectly discriminatory pay policies deployed by large employers who have Job Evaluation Schemes in place. However, those historically unequal pay schemes are, more or less confined to the past with a few notable exceptions.

4.5 I predict, the focus for equal pay will now be on like work and equal value claims (section 65(1)(b) and (c)). These are often stand-alone claims and they will be particularly negatively affected by the loss of a previously available comparator.

- 4.6 It is particularly important to note that there is no ability to rely upon a hypothetical comparator. This has been challenged in the Employment Appeal Tribunal<sup>4</sup> due to the European Directive relating to equal pay (the EU Equal Treatment directive No 2006/54) having been recast but Mr Justice Elias determined that the Directive could not expand Article 157 of the Treaty (previously Article 141 of the Treaty of Rome).
- 4.7 When consulting on the Equality Bill, the UK Government came to the view in its Green paper that that the equal pay regime should continue to require actual, as opposed to hypothetical comparators.<sup>5</sup>
- 4.8 A new section was added in relation to unequal pay as the result of direct discrimination (section 71 EqA 2010). However the factual matrix, which would enable one to bring such a claim, is very restrictive, since pay schemes are generally sex neutral policies and can only be indirectly discriminatory. It is important to note that the burden of proof is more onerous on a Claimant making out a direct discrimination claim, whereas for an indirect discrimination claim, once disproportionate impact has been established, the burden of proving a defence is placed with the Respondent. Of further note is the fact that an equality clause is not inserted into the Claimant's contract and so it is not possible to recover six years worth of back pay.
- 4.9 Lastly it should be noted that, particularly in the context of a late transitioning higher earner, an unexpected consequence is not just that an equal pay comparison is extinguished; a previously impossible equal pay claim can be created.

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<sup>4</sup> Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley 2008 ICR 1047

<sup>5</sup> "A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain (June 2007)"

## 5. Current state of play regarding single sex services

- 5.1 Service providers and employers (among others) may not discriminate against women or men by treating one sex less favourably than the other (section 13 EqA 2010). Women's biological differences are acknowledged and different treatment relating to breastfeeding, pregnancy and childbirth will not breach this prohibition.
- 5.2 A service provider may not institute a neutral policy, practice or criterion which disproportionately negatively impacts one sex unless doing so can be objectively justified. If the policy is not a proportionate means of achieving a legitimate aim, it is indirectly discriminatory (section 19 EqA 2010)
- 5.3 In order to recognise the difference between the sexes and enable society to provide different services, the EqA 2010 has the sex exceptions. Without these exceptions service providers would be in breach of section 29 EqA 2010 and unable to provide sex-informed services.
- 5.4 Service providers rely upon Schedule 3 Part 7 paragraph 26 to 28 EqA 2010 to be able to acknowledge and provide separate, different and single sex services, as discussed next.

### Separate and Different Sex Exceptions (paragraph 26)

- 5.5 Sch 3 Part 7 paragraph 26 (1) concerns situations where a service is provided to people of both sexes, separately. This allows service providers to provide separate sex services if joint provision would be less effective. Table 1 sets out the EqA 2010 wording in paragraph 26 alongside the examples provided in the EHRC statutory code for service providers. My comments are provided in the last column.
- 5.6 Limiting service provision in this way must be a proportionate means of achieving a legitimate aim - also referred to as "objective justification". A good example of this would be separate sex hostels for people suffering domestic abuse (see EHRC, 2011: 195).<sup>6</sup>
- 5.7 Turning to paragraph 26(2) we see different services are permissible if it is not reasonably practical to provide separate and different services for each sex. Again, objective justification is needed and consideration of effectiveness is required.
- 5.8 The EHRC code does not provide an example but a likely scenario where services might be different for each sex could be Brazilian waxing where genital differences necessitate a different service.
- 5.9 Service providers using paragraph 26 exceptions to provide female-separate services may have a policy not to provide a service to men or transwoman without a GRC, so long as they meet the requirements set out above. As explained above transwomen are, at this stage, not to be treated as having changed their sex for the purposes of the EQA2010. Exceptional circumstances are not required.

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<sup>6</sup> EHRC (2011) [Services, public functions and associations Statutory Code of Practice](#)

**Table 1. Separate and different sex exceptions (Sch 3, part 7, para. 26)**

Para.	EqA 2010	EHRC Code	Comments
26(1)	A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if (a) a joint service for persons of both sexes would be less effective, and (b) the limited provision is a proportionate means of achieving a legitimate aim	Separate hostels for men and women experiencing domestic abuse as unisex hostel less effective.	Allows effective service provision
26(2)	A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if— (a) a joint service for persons of both sexes would be less effective, (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and (c) the limited provision is a proportionate means of achieving a legitimate aim.		Allows practicable and effective service provision
26(3)	This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service	Planning application approval enabling modification of premises to provide separate sex services	Allows public functions to be undertaken

### **Single Sex Exceptions (paragraph 27)**

5.10 The exceptions in paragraph 27 cover situations where a service is provided for only one sex. These are set out in Table 2 below. Subsection 2 sets out where one sex needs a particular service. The EHRC code provides the example of post-natal exercise classes for women. The Explanatory Notes to the EqA 2010 provide the example of cervical smear testing.

- Subsection 3 looks at services provided to both sexes and where it is considered it would be insufficiently effective to provide them jointly. The EHRC code provides two examples. In the first a service provider identified that one sex is not accessing services and tailored a single sex service. In the second, intersection of two protected characteristics is considered, in this case religious beliefs and sex leads them to provide female only services.

- Subsection 4 allows for single sex services where providing the service to both sexes is impracticable and ineffective. Under the EHRC code a female-only support unit for domestic violence sufferers would be allowable. Subsection 5 allows for single sex services in hospital or where special supervision or attention is required.
- Subsection 6 allows for single sex service where a number of people use the service at the same time and a woman might reasonably object to a man's presence. The EHRC code provides the example of separate sex changing rooms as being lawful. It also states that separate sex provision is acceptable for intimate services
- Subsection 7 considers situations where there would be physical contact and a woman might reasonably object to having that contact with a man. An allowable service would be a judo class. Female only first-aid training would, however, be considered unreasonable. The Explanatory Notes to the EqA 2010 provide the example of a female massage therapist operating in her client's homes being able to provide a woman only service because she would feel uncomfortable massaging men in that environment.

5.11 In each instance above, a service may be provided to women and not to men or transwomen who have not changed their legal sex status (i.e. without a GRC). If persons of the other sex are admitted to the service then the service itself ceases to be a single sex service and the provider loses the ability to justify excluding one sex from the service and in so doing avoiding charges of sex discrimination.

**Table 2. Single-sex exemptions (Schedule 3, part 7, para. 27)**

Para.	EqA 2010	EHRC Code	Comments
27(1)	A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if— (a) any of the conditions in subparagraphs (2) to (7) is satisfied, and (b) the limited provision is a proportionate means of achieving a legitimate aim.		Objective Justification required throughout
27(2)	The condition is that only persons of that sex have need of the service.	Post-natal exercise classes may be women only	Allows Recognition of sexed need
27(3)	The condition is that— (a) the service is also provided jointly for persons of both sexes, and (b) the service would be insufficiently effective were it only to be provided jointly.	Religious women won't use swimming pool at same time as men, women-only swimming sessions allowed	Allows effective service provision
27(4)	The condition is that— (a) a joint service for persons of both sexes would be less effective, and (b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.	Women-only support unit due to domestic or sexual violence, no parallel men-only unit due to low demand	Allows practicable and effective service provision. EHRC example is intersectional considering more than one protected characteristic
27(5)	The condition is that the service is provided at a place which is, or is part of— (a) a hospital, or (b) another establishment for persons requiring special care, supervision or attention.	Single-sex wards in hospitals and nursing homes and single-sex facilities in mental health facilities.	Allows recognition of sexed needs in hospital/special care supervision or attention
27(6)	The condition is that— (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.	Separate male and female changing rooms or any service involving intimate personal health or hygiene.	Allows reasonable objections to male presence
27(7)	The condition is that— (a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and (b) B might reasonably object if A were not of the same sex as B.	Sports sessions involving high physical contact such as judo or self-defence classes.	Allows reasonable objection to male contact

27(8)	(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.	LA allocating funding for single-sex service or PCT contracting with a VSO to provide counselling for women who have had a mastectomy	Allows public functions to be undertaken
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## 6. Legal sex change impact on single sex services

6.1 Once a male individual has obtained a GRC, the State recognises the change of legal sex status and there is no difference between them and women for the purposes of the protected characteristic of sex.

### Gender reassignment exceptions (paragraph 28)

6.2 The exceptions, which then apply, are set out in Paragraph 28 of Schedule 3, as shown in Table 3 (over). These allow separate sex services and single sex services where objectively justified. In these exceptions, the basis of excluding a transwoman who has a GRC is gender reassignment not sex.

6.3 The reasons why a service user may want or require a separate, single or different sex service are, however, very unlikely to be on the basis of gender reassignment. A sole female masseuse's reasons for wanting to avoid physical contact with a state-recognised male to female person would be due to perception of and contact with somebody of male biological sex, rather than due to gender reassignment status.

6.4 We have seen already, however, that the Employment Tribunal Judge in Forstater v CGD Europe and others: 2200909/2019 has taken exception to such a hypothetical scenario and requires a service provider to frame its use of the exception on the basis of gender reassignment which requires a level of sophistry on the part of the service provider (and indeed on service-users who may wish to challenge any inclusion of gender reassigned people). Indeed, it appears that if the reasons why the exceptions were invoked were on the grounds of sex rather than gender reassignment then this may render the exception invalid and the exclusion discriminatory.

6.5 In my view however the standard of objective justification required for excluding transsexual male to female people from female spaces should not be any different from those requiring exclusion of men from female spaces. However there seem to be extra barriers to the use of this exception, which have been created via the EHRC statutory code, as discussed next.

**Table 3. Gender Reassignment exceptions (Schedule 3, part 7, para. 28)**

<b>Para.</b>	<b>EqA 2010</b>	<b>EHRC Code</b>	<b>Comments</b>
28(1)	A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.	Clothes shop has separate changing areas with cubicles for both sexes; not appropriate or necessary to exclude transsexual woman from female changing room as privacy and decency assured by separate cubicles.	<ul style="list-style-type: none"> <li>• Contrary to evidence.</li> <li>• Out-dated due to technological advances in spy cameras and filming devices</li> <li>• Not intersectional in that it does not consider more than one protected characteristic</li> </ul>
28(2)(a)	The matters are – (a) the provision of separate services for persons of each sex;	No example	<ul style="list-style-type: none"> <li>• Code and Act previously allowed:</li> <li>• effective service provision</li> <li>• public functions</li> </ul>
28 (2)(b)	(b) the provision of separate services differently for persons of each sex;	No example	<ul style="list-style-type: none"> <li>• Code and Act previously allowed:</li> <li>• effective and</li> <li>• practicable service provision</li> <li>• public functions</li> </ul>
28(2)(c)	(c) the provision of a service only to persons of one sex.	No example	<ul style="list-style-type: none"> <li>• Code and Act previously allowed:</li> <li>• recognition of sexed needs,</li> <li>• effective and practicable service provision</li> <li>• consideration of intersectional protected characteristics</li> <li>• intimate sexed needs in special care, supervision or attention,</li> <li>• reasonable objections to male presence and contact</li> <li>• public functions</li> </ul>

## **EHRC Statutory Code warns against using the gender reassignment exception**

- 6.6 The EHRC statutory code provides an example of an unacceptable implementation of this exception only. It states that it would be a breach for a service provider to provide female only changing rooms excluding a transwoman with a GRC as separate cubicles provide sufficient privacy. It does not give a single positive example of when the exceptions could be used, unlike paragraph 26 and 27.
- 6.7 This is particularly surprising when the Explanatory Notes in the EqA 2010 provide the following example of a group counselling session provided to female victims of sexual assault:
- “It would be permissible for organisers to disallow a male to female transsexual person from attending as they judge that female clients may not attend.”<sup>7</sup>
- 6.8 Every other example provided by the Code mirrors the Explanatory Notes apart from this one. Reading Alex Sharpe’s paper “*Will Gender Self-Declaration Undermine Women’s Rights and Lead to an Increase in Harm*”<sup>8</sup> Modern Law Review 2020 we see an interpretation of the Explanatory Notes as “not determinative” and that sexual abuse service user’s discomfort in the presence of a transwoman may be insufficient reason to use the exceptions. Sharpe reminds us that, “not one single case has been reported where a service provider has successfully relied on a sex-based exception” and that the “exceptions set a high evidential bar.” (2020: 14) Sharpe prefers to rely upon the EHRC Statutory Code.
- 6.9 The EHRC statutory code states that the Paragraph 28 exception should only be used in exceptional circumstances, without describing such circumstances. It sets out that this exception also be applied on a “case by case” basis but does not give an example of a policy that is capable of being applied in such a way. In my view the only way that this can be workable is if “case by case” relates to the particular services provided rather than the service users. However, in practice it appears that service users are finding this aspect of the guidance very confusing as can be seen from the responses referred to by the Women and Equalities Committee Inquiry Report “Enforcing the Equality Act”.<sup>9</sup>
- 6.10 It would appear that the EHRC code intends for the “case by case” basis to apply to individual service users due to the drafting in paragraphs 13.59 and 13.60. Paragraph 13.59 in particular seems to be a regression to the pre GRA 2004 position as per the West Yorkshire case, stating, “where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.” As set out in section 3 above, there is reason to believe that it would be incorrect to rely upon this case since it predates the GRA 2004.

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<sup>7</sup> Equality Act 2010 [Explanatory Notes, Schedule 3, para. 740](#).

<sup>8</sup> Sharpe, A. (2020) [Will Gender Self-Declaration Undermine Women’s Rights and Lead to an Increase in Harm](#) Modern Law Review (online first 11 January 2020)

<sup>9</sup> All documentation relating to this inquiry can be found in the link provided below.

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/enforcing-the-equality-act-17-19/>

- 6.11 The EHRC Statutory Code therefore clashes not only with GRA 2004 but also with the EqA 2010 Explanatory Notes. If the Code is followed, then Paragraph 28 exceptions are almost impossible to apply. Unlike the Paragraph 26 and 27 exceptions which show sex-based service provision respecting reasonable sexed boundaries, practicality, efficacy, intersectional considerations and enabling public functions, the Code questions the motives of service-users, whereas previously the only analysis required was whether they met the positive threshold of being reasonable and straight-forward sex-based reasons were accepted (see para 13.60 of the EHRC statutory code which states that “Care should be taken in each case to avoid a decision based on ignorance or prejudice.”)
- 6.12 Sharpe states that there must be evidence of actual risks of harm and there is a general lack of evidence of harms to women arising from trans-inclusion such that exclusion from “woman-only spaces is not justified in public policy terms by a handful of cases”.(2020; 9) If this is correct then women’s rights to single sex services reduce dramatically once a transwoman obtains a GRC.
- 6.13 It is worth noting that the single sex exceptions set out in paragraph 27 allowed for reasonable objection to both male presence and male contact. Sharpe however argues that discomfort of the type experienced in a judo lesson or with regards to intimate care is insufficient as it relates to “imagined risk” which “lack a proper evidential basis and a few isolated cases out not to inform good public policy decision-making”.
- 6.14 Sharpe also argues that discomfort would have to be tested to show whether it meets a proportionality threshold before use of the exception could be justified (Ibid; 17). If Sharpe is correct in this interpretation of the exceptions then, once a GRC is obtained, it becomes much harder to provide single sex services on the basis of natal sex and more difficult to use the exceptions.
- 6.15 Komorowski (2020)<sup>10</sup> posits that it ought to be the case that the standard required to apply the sex exceptions “should not be assumed to be any higher than that required for excluding, for instance, men from female wards from hospitals and the like...proportionality could be assessed on a class, rather than an individual basis”. I adopt his position although this view appears to be greatly at odds with both the EHRC statutory guidance and also Professor Sharpe’s view.
- 6.16 The EHRC Statutory Code has however previously been criticised in the course of litigation and been found to be misleading with regards to the definition of disability in Aderemi v London and South Eastern Railway EAT[2013] ICR 591 and was not followed. I would suggest that in this instance a similar argument could be made. Banasczyk v Booker EAT/0132/15/RN provides us with another case in which the EHRC code was put aside, in this case because it was out of step with EU law.
- 6.17 Moreover, it is apparent from the Equality Act Codes of Practice post Consultation Report (2011)<sup>11</sup> that the Codes were more reliant on the input from various

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<sup>10</sup> Komorowski. J. (2020) [Sex and the Equality Act](#). Journal of the Law Society of Scotland, 13 Jan 2020

<sup>11</sup> Equality and Human Rights Commission (2011) [The Equality Act Codes of Practice post consultation report](#)

lobbying groups than on strict attention to the statute in that the Codes were amended in line with responses received to an original draft Code:

“Various transsexual stakeholder groups responded to the formal consultation and also participated in the parallel consultation events taking place on the non- statutory guidance.”

“Feedback from the consultation events was incorporated into the employment and services codes where appropriate, particularly on issues of confidentiality, use of single sex services and the legal definition of transgender.” (2011: 11)

- 6.18 The report also states that: ‘A number of concerns were raised about the exceptions, in particular the exceptions for.. single sex services and separate services. These sections have been revised as a result.’ (2011; 13).
- 6.19 In my view the Code does not adequately does not adequately reflect the EqA 2010 and it seems that it has been deliberately edited in order to take into account the views of only one stakeholder group (gender reassignment) over those of women. Indeed there is no record of women’s groups’ involvement in this particular aspect of the Code. In my view the Code is fundamentally flawed and has departed from statute.
- 6.20 If I am wrong however, then the paragraph 28 exceptions are significantly less robust than paragraphs 26 and 27 and that therefore women’s sex-based rights will be negatively affected.

### **Effect on Public Sector Functions**

- 6.21 In order to provide separate, different or single sex services, the public sector must be able to undertake certain tasks such as securing planning permission or allocating funding (see paras 26(3) and 27(8) in Tables 1 and 2 above). The ECHR code examples are respectively approving a planning application that would enable modification of premises to provide separate services for women and men and a local authority allocating funding for a single-sex service or a primary care trust contracting with a voluntary sector organisation to provide counselling for women who have had a mastectomy. Service providers must be able to do all the background work in order to provide separate and single sex services
- 6.22 Unlike the paragraph 26 and 27 exceptions there is no acknowledgement that there are a host of functions required from the public sector which enable services to be provided and no provision in the EqA 2010 to enable authorities to provide public sector support. It is no use having the right to provide female-only provision but not being able to allocate budget, contract out work or provide planning permissions.

### **Hierarchy of Rights**

- 6.23 A gender-reassigned person may challenge a service provider’s use of Paragraph 28 via direct discrimination claim, but a woman is not able to bring such a claim. As Sharpe states with regards to the EqA 2010, “There appears to be no good reason to think GRC holders were intended to bear an asymmetrical relationship to [the] balancing of rights. While trans women GRC holders are considered women for legal purposes, it is clear they are not considered women for all legal purposes.” (2020; 13). I would argue that there is an asymmetry, as women may not bring a

direct discrimination claim against a service provider, which adopts a trans-inclusion policy; but transwoman may bring a claim against a service provider, which does not adopt such a policy. In my view there is already a hierarchy of rights, which works to the disadvantage of women, that has been overlooked until now.

### **Summary of impact on separate, different and single sex services**

6.23 Below I set out in short form what I have expounded upon in greater detail in sections 5 and 6. As I have discussed, the exceptions in paragraphs 26 and 27 of Schedule 3 part 7 of the Equality Act, may be applied by a single sex service to legitimately exclude both men and transwomen. However, once a gender-reassigned person obtains a GRC then this has the following impact:

- Ability to use paragraphs 26 and 27 falls away
- Service providers' use of paragraph 28 requires sophistry
- Statutory Code hostile to implementing paragraph 28
- Case by case policy application as set out in the Code renders female-only policies unworkable
- Public sector functions which would support the service become discriminatory (as no exception from gender reassignment discrimination has been provided)

### **Real Life Consequences**

6.24 These are just a few of the considerations the Government should consider as, in my view the questions raised need to be addressed in its Equality Impact Assessment;

- Without public function, how will it be possible to deliver public sector single sex services?
- Would single sex service providers be able to secure insurance?
- Would there be a chilling effect on single sex service provision?
- Will female service users self-exclude?

## **7. Concerns outside the scope of this paper**

7.1 Reforming the GRA 2004 will have impact on the current sexed rights available under the EqA 2010 as well as the Public Sector Equality Duty which currently requires that protected characteristics are not set in a hierarchy and ensures a balance between sex and gender reassignment rights.

- Separate or Single Sex Accommodation
- Separate or Single Sex Sports
- Single Sex Associations\*
- All Women's Shortlists\*
- Single Sex Schools\*
- Sexual Orientation\*
- Occupational Requirements

7.2 Currently women may enforce their rights to single sex (as opposed to trans-inclusion) regarding accommodation and sports, associations, shortlists, schools and sexual orientation via indirect sex discrimination claims. By contrast transwomen with GRCs are able to bring direct discrimination claims.

\*Harassment: I have not touched upon this, but the Forstater Judgment gives some insight as to how women would lose the right to complain about trans-inclusion being unwanted conduct on the grounds of sex.

None of the asterixed bullet points have any provision in the EqA 2010 which would enable a balance of sexed and gender reassignment rights.

Disclaimer: This note has been produced by a lawyer with a background in discrimination law as a contribution to discussion of and comment on the Scottish Government's proposals to reform the Gender Recognition Act. It should not be treated as legal advice, but as a commentary on the legal position. It raises questions about the assumptions which appear to underpin the Scottish Government's proposals, particularly its assessment of their impact in law, and further strengthens the case for the Scottish Government clarifying its understanding of the relevant law, setting out in detail the basis for that understanding, and commissioning an independent review of its Equality Impact Assessment via an appropriately qualified legal practitioner.