

# **ON THE BASIS OF SEX:**

**Protection against discrimination on the grounds of sex and gender reassignment under the Equality Act 2010**

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Nothing in this paper should be interpreted as legal advice. Only courts can interpret the law.

# 1. INTRODUCTION

## 1.1. Terms of Reference and Scope of the Legal Provisions

This Report has been commissioned by Engender for the purposes of setting out the legal provisions relevant to the protection against discrimination available to individuals on the grounds of sex and gender reassignment under the Equality Act 2010 ('the Act').<sup>1</sup>

Although the Act was introduced in 2010, it consolidated and, in some respects, updated pre-existing legislative provisions, the most relevant of which in this context is the Sex Discrimination Act 1975 (SDA). The Act is accompanied by a set of explanatory notes<sup>2</sup> and two relevant Statutory Codes of Practice (CoPs)<sup>3</sup> as well as a suite of guidance documents for service users in a range of different contexts.<sup>4</sup> Legislative competence for matters relating to the Equality Act 2010 is reserved to Westminster,<sup>5</sup> with some limited exceptions.<sup>6</sup>

The intended purpose of the Codes of Practices is to provide detailed explanations of the provisions in the Act and to apply the Act's legal concepts to everyday situations. They are not legally binding but can be taken into account by courts and tribunals when interpreting the Act. However, as this report shows, the CoPs are unclear on some pertinent issues related to gender reassignment and silent on others and the resulting lack of up-to-date guidance is compounded by the dearth of case law in this area. Where the CoPs and other explanatory sources do provide guidance it can be used by courts and tribunals to aid in their interpretation of the law, although such sources are not binding so that a court or tribunal that had good reason for applying a different interpretation in the specific circumstances of a case would be entitled to do so.

Although there is a lack of decided case law on gender reassignment specifically, there is a large body of case law which provides further interpretation of the legislation on other grounds. In relation to sex, much of the case law associated with the relevant provisions of the Sex Discrimination Act is still relevant in identifying the current state of the law. It is

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<sup>1</sup> An Act of the UK Parliament which applies in Great Britain. Northern Ireland has its own equality law framework.

<sup>2</sup> The purpose of the Explanatory Notes (<http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>) is to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

<sup>3</sup> The Codes of Practice became law on 6 April 2011 and provide authoritative guidance for those interpreting the legislation. The relevant Codes are: Code of Practice on Employment ("The CoP on Employment") available at: <https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>; and the Code of Practice on Services, Public Functions and Associations ("The CoP on Services") available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>.

<sup>4</sup> Available at: <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-service-users>

<sup>5</sup> The Scotland Act, 1998. Available at: <http://www.legislation.gov.uk/ukpga/1998/46/contents>

<sup>6</sup> *ibid*.

necessary to give consideration to the legislation, case law and Codes of Practice in order to achieve the report's aim of identifying the current state of the law in regard to discrimination on the grounds of sex and gender reassignment.

In addition to domestic law, there is a growing body of international law comprising a range of legal instruments. It is important to consider such instruments as they can be taken into account by courts when interpreting the Act. The European Convention on Human Rights (ECHR) has special status in this regard as it is incorporated into domestic law by the Human Rights Act 1998 which came into force in the UK in October 2000. Throughout the period of the UK's EU membership, the principle of supremacy has ensured that EU law always took precedence in the case of any conflict between the two. Post January 2020, the EU (Withdrawal) Act 2018 provides for the retention of most provisions of EU law until Parliament otherwise legislates.

## 1.2. The Use of Terminology in the Report

The terminology used in this report is intended, as far as is possible, to reflect that used in the Equality Act itself. The report is concerned with the interplay between the protected characteristics of 'sex' and 'gender reassignment' as provided for under the Act. In order to ensure clarity when referring to the gender reassignment provisions of the Act, the terms 'trans' and 'non-trans' will be used to distinguish between those who identify with the sex other than the one assigned to them at birth (trans) and those who identify as the sex assigned to them at birth (non-trans).

Although the Act is a fairly recent piece of legislation, it does not necessarily reflect current thinking on gender identity and gender fluidity. For example, it does not recognise a 'neutral' sex or gender but rather refers to 'gender reassignment' which assumes a process of transitioning 'by changing physiological or other attributes of sex'<sup>7</sup> for the purpose of reassigning sex. This approach appears to rely on a binary choice which does not include a 'neither' option.

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<sup>7</sup> Equality Act 2010, Part 2, Chapter 1, Section 7. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/7>

# 2. THE EQUALITY ACT 2010

Part 2 of the Act defines 'key concepts'. These consist of 'protected characteristics'<sup>8</sup> and 'prohibited conducts'.<sup>9</sup>

## 2.1. The Protected Characteristics

There is no general prohibition against discrimination. The Equality Act prohibits discrimination on the grounds of specific 'protected characteristics'.<sup>10</sup> Prior to its coming into force in 2010, there were six prohibited grounds of discrimination (often referred to as 'strands'), each with its own legislation. These were sex, race, disability, religion or belief, sexual orientation and age. There are now nine protected characteristics, including three characteristics which were formerly dealt with under the SDA. Gender reassignment is one of these.

The nine protected characteristics are:

- Age;
- Disability;
- Gender reassignment; Marriage and civil partnership;
- Pregnancy and maternity;
- Race;
- Religion or belief;
- Sex;
- Sexual orientation.

## 2.2. The Prohibited Conducts

The forms of conduct prohibited under the Act consist of different behaviours which amount to unlawful discrimination. The prohibited conducts which are particularly relevant in the current context as they apply to the protected characteristics of sex and gender reassignment are:

- **Direct discrimination.** This occurs when an individual is treated less favourably than another person in a similar situation because of a protected characteristic.<sup>11</sup> The Act thus relies on the use of a comparator to establish whether an individual has been subject to discrimination. The comparator will generally be someone who does not have the protected characteristic.<sup>12</sup>
- **Discrimination by association** and **discrimination by perception** are forms of direct discrimination which apply specifically to sex and gender reassignment.<sup>13</sup> **Discrimination**

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<sup>8</sup> Equality Act 2010, Part 2, Chapter 1, Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1>

<sup>9</sup> Equality Act 2010, Part 2, Chapter 1, Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/2>

<sup>10</sup> Equality Act 2010, Part 2, Chapter 1, Section 4. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/4>

<sup>11</sup> Equality Act 2010, Part 2, Chapter 2, Section 13. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/13>

<sup>12</sup> An exception is direct discrimination on the grounds of pregnancy or maternity for which no comparator is required – see sections 17 and 18 which refer to 'unfavourable' rather than 'less favourable' treatment.

<sup>13</sup> Both forms of discrimination apply to all protected characteristics with the exception of marriage and civil partnership and pregnancy and maternity.

**by association** arises when someone is treated unfavourably on the basis of another person's protected characteristic. **Discrimination by perception** arises when someone is treated unfavourably because others believe they have a protected characteristic, even though they do not have it.

- **Indirect discrimination** arises when a specific policy or way of working puts people with a protected characteristic at a particular disadvantage.<sup>14</sup>
- **Harassment.** This occurs when an individual is made to feel humiliated, offended or degraded because of a protected characteristic.<sup>15</sup>
- **Victimisation.** This occurs when an individual is treated unfavourably because they have made a complaint of discrimination under the Equality Act. It can also occur if the individual is supporting someone who has made a complaint.<sup>16</sup>

In some circumstances gender reassignment may give rise to specific protection on the grounds of disability. This would apply where the individual concerned has been diagnosed with the medical condition of gender dysphoria and it has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.<sup>17</sup> In such cases, disability (not gender reassignment) would be the protected characteristic giving rise to the claim and the individual would also be able to claim protection against two further prohibited conducts:

- Discrimination arising as a consequence of disability<sup>18</sup>
- Breach of the duty to make reasonable adjustments<sup>19</sup>

Trans workers are also specifically protected against discrimination if they are treated less favourably than non-trans workers in relation to absence from work related to their trans status, for example, because a worker is proposing to undergo, is undergoing, or has undergone a process connected to gender reassignment.<sup>20</sup>

## 2.3. The Scope of the Act

The provisions of the Act apply across a number of different fields, namely:

- Services and public functions<sup>21</sup>
- Premises<sup>22</sup>
- Work<sup>23</sup>
- Education<sup>24</sup>

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<sup>14</sup> Equality Act 2010, Chapter 2, Section 19. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/19>

<sup>15</sup> Equality Act 2010, Part 2, Chapter 2, Section 26. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/26>

<sup>16</sup> Equality Act 2010, Part 2, Chapter 2, Section 27. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/27>

<sup>17</sup> Equality Act 2010, Part 2, Chapter 1, Section 6. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/6>

<sup>18</sup> Equality Act 2010, Part 2, Chapter 2, Section 15. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/15>

<sup>19</sup> Equality Act 2010, Part 2, Chapter 2, Section 20. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/20>

<sup>20</sup> Equality Act 2010, Part 2, Chapter 2, Section 16. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/16>

<sup>21</sup> Equality Act 2010, Part 3. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/3>

<sup>22</sup> Equality Act 2010, Part 4. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/4>

<sup>23</sup> Equality Act 2010, Part 5. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/5>

<sup>24</sup> Equality Act 2010, Part 6, which includes schools (Chapter 1) and further and higher education (Chapter 2). Available at: <http://www.legislation.gov.uk/ukpga/2010/15/part/6>

# 3. THE FOCUS OF THIS REPORT

This report is concerned with the protected characteristics of ‘sex’<sup>25</sup> and ‘gender reassignment’<sup>26</sup> under the Equality Act and specifically if/how the two interrelate with each other in law.<sup>27</sup> Recent reviews of the Gender Recognition Act (GRA)<sup>28</sup> have catalysed commentary and debate, particularly in relation to concerns that the protection of trans women against discrimination poses a threat to the protections currently available to non-trans women by way of the prohibition of sex discrimination under the Equality Act.

Although this report is not intended to directly address the ongoing public debates surrounding this and related issues, it recognises the concerns expressed on all sides of those debates. It aims to provide a clear statement of the current law and to identify any areas of uncertainty that exist due to either the absence of specific statutory guidance on certain issues or to the lack of case law.

In the next section, the protected characteristics of ‘sex’ and ‘gender reassignment’ will be considered in the context of their definitions and operation under the Equality Act 2010.

## 3.1. Sex

Section 11 of the Equality Act provides:

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.

The Act provides further guidance in interpretation by stating that “‘woman’ means a female of any age’ and “‘man’ means a male of any age’.<sup>29</sup> No further definitions of the terms ‘male’ or ‘female’ are provided. This poses the question: are the Act’s provisions on sex discrimination intended to be applied on the basis of ‘biology’ or on the basis of gender roles or stereotypes?

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<sup>25</sup> Equality Act 2010, Part 2, Chapter 1, Section 11. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/11>

<sup>26</sup> Equality Act 2010, Part 2, Chapter 1, Section 7. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/7>

<sup>27</sup> See the EHRC’s statement on sex and gender reassignment: legal protections and language at <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

<sup>28</sup> The UK Government conducted a public consultation exercise ‘Reform of the Gender Recognition Act 2004’ which closed for responses in October 2018: <https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004> The Government’s response has not yet been published. The Scottish Government has conducted its own consultation exercise (November 2017-March 2018) as part of its ‘Fairer Scotland Action Plan. An analysis of responses has been published: <https://www2.gov.scot/Topics/Justice/law/17867/gender-recognition-review>. In June 2019 the Scottish Government announced its intention to carry out a further ‘full and public consultation’ on its Gender Recognition Bill which will reform the current GRA. The draft Bill and consultation were published on the 17 December 2019, and, at the time of publication, the consultation remains open until the 17 March 2020, see <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/3/>

<sup>29</sup> Equality Act 2010, Part 16, Section 212. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/212>

The term 'sex', rather than 'gender', is used throughout the Act in relation to the specific protected characteristic, with the exception of the provisions relating to the requirement for certain employers to publish information relating to differences in the pay of male and female employees which is referred to as 'gender pay gap information'.<sup>30</sup> The Statutory Codes of Practice draw a distinction between an individual's 'birth sex' and her 'reassigned sex' but only when referring to the protected characteristic of gender reassignment (see below).<sup>31</sup>

In attempting to clarify whether 'sex' is confined to biological distinction under the Act, it is necessary to ask what the purpose of the inclusion of 'sex' as a protected characteristic was.

Referring to the Act's prohibition of discrimination on the ground of sex, Bob Hepple, the UK's leading equality expert at the time of the Act's introduction,<sup>32</sup> has written 'For most legal purposes...it is the biological difference that is critical'.<sup>33</sup> This supports the notion that the intention of the legislation is to provide protection on the grounds of biological sex. However Hepple goes on to note that '... it must be recognised that the law's focus on the biological differences between men and women can be an obstacle to the achievement of full equality in practice'.<sup>34</sup> This is because discrimination on the grounds of sex often arises in relation to assumptions and practices that are related to socially constructed gender roles rather than biological difference which can 'encourage gender stereotyping and traditional social prejudices, which it is the goal of the law to remove'.<sup>35</sup>

The law thus recognises that women require protection against discrimination on the grounds of both their biological difference from men and the social construction of gender which influences social norms and individual and household behaviours so that women's lived experience differs from men's.

The concept of indirect discrimination can be particularly useful in identifying the difference between sex and gender in this context. For example, protection against discrimination on the basis of a woman's inability to comply with an age requirement (such as 'candidates should be under 28 years of age') due to her absence from the labour market for a number of years due to childcare commitments<sup>36</sup> or her status as a lone mother unable to work night shifts<sup>37</sup> are not directly linked to biological difference - as men can also provide care for children - but to the fact that it is overwhelmingly women who do provide such care.

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<sup>30</sup> Equality Act 2010, Part 5, Chapter 3, Section 78. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/78>

<sup>31</sup> For example, see the CoP on Services, p. 30, para 2.19. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>32</sup> A leading UK equality expert, Hepple was co-author (with Mary Coussey and Tufyal Choudhury) of *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing 2000) which set out the findings of an influential review which recommended the consolidation of the framework into a single Act and is seen as the trigger for the Equality Act 2010.

<sup>33</sup> B. Hepple (2011) *'Equality: The New Legal Framework'* Hart Publishing. Page 44.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *Price v Civil Service Commission and the Society of Civil and Public Servants* [1977] IRLR 291, EAT.

<sup>37</sup> *London Underground Ltd v Edwards* (No. 2) [1998] IRLR 364, CA.



Gender stereotyping as a form of direct discrimination can also be used to illustrate the distinction between 'sex' and 'gender'. For example, a mixed sex school which restricted cookery classes to girls only on the basis that as women they will be responsible for cooking within households would be acting illegally. Such an assumption would not be based on the biological differences between men and women but wholly related to socially constructed gender roles and stereotyping. The grounds for challenges to such stereotyping which have been brought through case law include a rule that only male police officers are permitted to carry firearms,<sup>38</sup> and the total exclusion of women from the Royal Marines on the basis that '...their presence is incompatible with the requirement of 'interoperability', that is to say, the need for every Marine, irrespective of his specialisation, to be capable of fighting in a commando unit.'<sup>39</sup>

The preservation of the use of both terms ('sex' and 'gender') is, thus, important in relation to women's rights. The restriction of the definition of sex to a purely biologically determined status would result in a narrower application of the Act.

When considering the distinction between sex and gender and the scope of the law, other statutes and associated case law in distinct (albeit related) areas may provide specific definitions which result in different outcomes. For example, in *Corbett v Corbett*,<sup>40</sup> an early case concerned with the legality of a marriage which took place in 1963 between a man and a trans woman, the Court adopted a biological definition of sex in finding that,

the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.<sup>41</sup>

Although reliance on a biological definition of sex remains in place in regard to marriage for those trans people who have not obtained a Gender Recognition Certificate (GRC) – see further below - and an amended birth certificate, the Corbett case is not directly applicable to anti-discrimination law. As the case law demonstrates,<sup>42</sup> the interpretation of the concept of sex under anti-discrimination law is quite different from that applied in the context of marriage with the former tending towards a broader definition beyond biological difference which incorporates the social construction of gender.

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<sup>38</sup> Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651. The European Court of Justice accepted that that the policy was instituted by the Chief Constable 'to protect women from risks' and held that it was up to a national tribunal to determine whether this type of action meant for public safety was allowed EU law. There is no longer any blanket ban on women police officers being armed.

<sup>39</sup> Case C-273/97 *Sirdar v. The Army Board* [1999] ECR I-7403. The European Court of Justice held that exclusion of women from service in special combat may be justified under EU law by reason of the nature of the activities in question and the context in which they are carried out. In 2016 the ban on women serving in ground close combat roles was lifted.

<sup>40</sup> *Corbett v Corbett* [1970] 2 All ER 33.

<sup>41</sup> *ibid*, at p. 83.

<sup>42</sup> See, for example, the cases referenced in footnotes 31 and 32 above.

As in all areas of the law, it is important to apply the specific definition provided by the Equality Act as interpreted in associated case law and Codes of Practice if the legal question or related issue relates to equality and comes within the Act's scope. As with all legislative provision, the way in which the Act and the predating legislation is interpreted has changed and will continue to change over time in line with social and economic progress. This is reflected in case law developments and in amendments made to the Codes of Practice and associated guidance and to the legislation itself by way of regulation.

## 3.2. Gender Reassignment

Section 7 of the Act provides:

- (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.

This ground was not originally included in the Sex Discrimination Act, but EU case law<sup>43</sup> applied sex discrimination law to discrimination against trans people.<sup>44</sup> As a result the SDA was amended in 2000<sup>45</sup> to give this protection. The definition of gender reassignment contained in Section 7 of the Equality Act is broader than that in the SDA in that it does not refer to the need for the process of reassigning sex to take place 'under medical supervision'. Furthermore, under the SDA the protection given to trans people only extended to direct discrimination in employment and vocational training. This restriction does not exist under the Equality Act which applies protection against indirect discrimination, harassment and victimisation, as well as direct discrimination, to trans people in all of the fields covered by the Act.

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<sup>43</sup> *P v S and Cornwall CC* [1996] IRLR 347; *Cheshington World of Adventures Ltd v Reed* [1997] IRLR 556.

<sup>44</sup> The Act uses outdated terminology ('gender reassignment' and 'transsexual') but applies it broadly and inclusively. See EHRC guidance (<https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>) and the Women and Equality Committee's 2016 recommendations (<https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination#recommendations>) regarding the use of terminology in the Act which both note are outdated in terms of common usage with 'trans' being the preferred term.

<sup>45</sup> By the Sex Discrimination (Gender Reassignment) Regulations 1999 which extended the provision of the Sex Discrimination Act 1975 to cover discrimination on the grounds of gender reassignment which was defined as 'a process which is undertaken under medical supervision 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'. The Regulations have now been replaced by the Equality Act 2010.

During the Act's passage through the House of Commons, an unsuccessful attempt was made to replace the term 'gender reassignment' with 'gender identity' so as to align it with UN and Council of Europe terminology.<sup>46</sup> Although the amendment was defeated, the Solicitor General gave assurances that the definition of gender reassignment under the Act, coupled with the implicit inclusion of discrimination because of the perception of reassignment,<sup>47</sup> would be broad enough to encompass non-medical acts or behaviour by a trans person.<sup>48</sup>

As Section 7 makes clear, for the purposes of discrimination law a trans person is to be treated as having the gender identity which the individual *proposes to be, or which has or is being assigned as a full or partial process.*<sup>49</sup> This means that self-identification will enable the individual to claim protection under the Equality Act on the grounds of the protected characteristic of gender reassignment without the need to acquire a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004 (see below). It is not necessary to actually undergo surgery or other relevant medical treatment so that, for example, a person who was registered as female at birth and who now lives as a man will be protected regardless of any physiological changes or lack thereof. This is supported by the Codes of Practice for Services and Employment<sup>50</sup> which state that 'Under the Act 'gender reassignment' is a personal process (that is, moving away from one's birth sex to the preferred gender), rather than a medical process'<sup>51</sup> and that services providers 'should treat transsexual people according to the gender role in which they present'.<sup>52</sup>

Furthermore,

The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.<sup>53</sup>

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<sup>46</sup> House of Commons Public Bill Committee, 6th sitting, col 164, 11th June 2009, Lynne Featherstone, at 60. Interestingly Scotland was one of the first countries to introduce protection for 'gender identity' in the context of the now repealed Offensive Behaviour at Football and Threatening Communications Act 2012 which referred specifically (in s. 1(4)) to 'transgender identity' defined (s. 4(3)) as any of the following: transvestism; transsexualism; intersexuality; by virtue of the Gender Recognition Act 2004, changed gender; any other gender identity that is not standard male or female gender identity.

<sup>47</sup> See Section 13 of the Equality Act 2010. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/13>

<sup>48</sup> House of Commons Public Bill Committee, 6th sitting, columns 168-9, 11th June 2009, Vera Baird, Solicitor General, at 168, 'That is what the provision is about. It makes it clear, by deliberately leaving out the medicality, that we are talking about a personal process, which may be proposed but never gone through.' Available at:

<https://publications.parliament.uk/pa/cm200809/cmpublic/equality/090611/pm/90611s04.htm>

<sup>49</sup> *A v Chief Constable of West Yorkshire Police and another* [2004] IRLR 573.

<sup>50</sup> As explained above (at 1.1, paragraphs 2 and 3), although the CoPs are not legally binding they do provide authoritative guidance to courts and tribunals when interpreting the Act.

<sup>51</sup> See CoP on Services, para. 2.19. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>; CoP on Employment, para. 2.23. Available at: <https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

<sup>52</sup> See CoP on Services, para 13.57. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>53</sup> CoP on Services para 228; CoP on Employment, para 2.34. Available at:

<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

Consequently,

Transsexual people should not be routinely asked to produce their GRC as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If a service provider requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation.<sup>54</sup>

The Guidance does not specify what, if any, evidence can be requested or provided if the individual concerned has not sought or acquired a new birth certificate. The EHRC has provided a statement on how a trans person's sex should be identified where they require to claim protection under the Equality Act on the grounds of their sex,

Under the Act, the protection from gender reassignment discrimination applies to all trans people who are proposing to go, are undergoing or have undergone (part of) a process of gender reassignment. At the same time, a trans person is protected from sex discrimination on the basis of their legal sex. This means that 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.<sup>55</sup>

Although this guidance may, at first glance, appear to be useful it does give rise to some uncertainties. For example, the term 'legal sex' does not have a definitive interpretation given that, as outlined above, 'sex' has been interpreted under the equality legislation as both biological sex and socially constructed gender. It is also difficult to determine how protection against discrimination by perception (see section 2.2. above) fits into this reading of the Act.

### **3.3. Interaction between the Equality Act 2010 and the Gender Recognition Act 2004**

The Gender Recognition Act (GRA) was introduced into UK law in May 2004.<sup>56</sup> It provides for two processes by which trans people aged 18 and over can apply for a GRC either on the basis that they are 'living in the other gender', or that they have changed gender under the law of another country.<sup>57</sup> A GRC can be used to instruct the appropriate Registrar General (for England and Wales, or for Scotland) to issue a new birth certificate with the applicant's acquired sex

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<sup>54</sup> CoP on Services, para 2.27. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>; CoP on Employment, para 2.30. Available at: <https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

<sup>55</sup> See <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>. The exceptions are considered in more detail below.

<sup>56</sup> The Gender Recognition Act applies to the whole of the UK, although the process of applying for legal recognition of the sex with which a person identifies is a devolved matter that the Scottish Parliament can legislate for.

<sup>57</sup> Gender Recognition Act 2004, Section 1(1)(a) and (b), respectively Available at: <http://www.legislation.gov.uk/ukpga/2004/7/contents>. A third 'alternative' route for those who are married or in a civil partnership is available under the Marriage and Civil Partnership (Scotland) Act and the Marriage (Same Sex Couples) Act 2013. This route is not available in Northern Ireland.

in place of the sex that was recorded at birth.<sup>58</sup> For those applying on the basis that they are living as the other sex, a Gender Recognition Panel, usually comprised of three legal and medical experts,<sup>59</sup> is responsible for assessing that an applicant for the certificate meets certain specified criteria, including a diagnosis of gender dysphoria, evidence of having lived in their acquired sex for at least two years, and an intention to continue to live in the acquired sex until death.<sup>60</sup>

Section 9 of the GRA provides that,

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

Although at its introduction the GRA was seen as a progressive step in the legal recognition of trans people's rights, the Act has since been the subject of criticism due to its restrictive scope and medicalisation of the process necessary to change an individual's birth identity.<sup>61</sup> In the vast majority of cases the Act is only applicable to trans people with a diagnosis of gender dysphoria, which is a medically recognised condition, and their ability to conform to a specified process aimed at transitioning from the sex they were registered with at birth.<sup>62</sup> This is a significantly narrower definition than that provided under the Equality Act. Whereas protection can be claimed under the Equality Act based purely on the self-identification of the individual, the GRA is underpinned by the need for a trans person's identity to be externally confirmed, thus implying a restrictive definition of what a 'transition' consists of.

Alongside the different approaches taken to the issue of identification of trans status by the GRA and the Equality Act another important distinction relates to the issue of age. The minimum age for legal gender recognition under the GRA is 18, which is aligned with the age at which the full rights and responsibilities relating to adult citizenship will apply. Government guidance specifically highlights that this mirrors the age at which trans people can access surgical treatment through the NHS, (although a diagnosis of gender dysphoria is the only medical requirement under the Act), whilst stressing that there is no intention on the Government's part to change the GRA age restriction at the UK level.<sup>63</sup>

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<sup>58</sup> Gender Recognition Act 2004, Section 10. Available at: <http://www.legislation.gov.uk/ukpga/2004/7/section/10>

<sup>59</sup> On the constitution of Gender Recognition Panels see the Gender Recognition Act, Schedule 1. Available at: <http://www.legislation.gov.uk/ukpga/2004/7/schedule/1>

<sup>60</sup> Gender Recognition Act 2004, Section 2. Available at: <http://www.legislation.gov.uk/ukpga/2004/7/section/2>

<sup>61</sup> See A. N. Sharpe (2007) *A Critique of the Gender Recognition Act 2004* Bioethical Inquiry 4 (2007) 1, 33. Available at: <https://link.springer.com/article/10.1007/s11673-007-9032-y>

<sup>62</sup> The World Health Organisation no longer recognises gender dysphoria as a mental illness, and rather classifies 'gender incongruence' as a condition related to sexual health. See World Health Organisation, ICD-11 for Mortality and Morbidity Statistics, HA61 Gender incongruence of childhood, available at: <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/344733949>

<sup>63</sup> Government Equalities Office, Trans People in the UK, available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721642/GEO-LGBT-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf). Note that the Scottish Government consultation on the 2004 Act highlighted the possibility of lowering the age restriction to 16: Scottish Government, Review of the Gender Recognition Act 2004: consultation, Part 4 (November 2017) available <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2017/11/review-gender-recognition-act-2004/documents/00527449-pdf/00527449-pdf/govscot%3Adocument/00527449.pdf>

In line with its self-identification approach, the Equality Act imposes no such age requirement on an individual claiming trans status. Prior to its replacement with the Equality Act, the Sex Discrimination Act required an individual claiming protection against discrimination on the grounds of gender reassignment to be undergoing a process of medical supervision. However, as Hepple notes, this resulted in 'unprotected children and young people, whose gender identity is less well-developed and who, therefore, are unlikely to seek medical supervision.'<sup>64</sup> The lack of an age restriction for those claiming protection from discrimination on the grounds of gender reassignment means that such protection applies across the broad scope of the Act, which includes the provision of education within schools. However, the specified prohibited conduct of harassment under Section 26 (see Section 2.2 above) does not apply to the protected characteristic of gender reassignment in the context of school education.<sup>65</sup> Protection in such cases would have to be based on the ground of direct discrimination rather than the free-standing ground of harassment.

The Equality Act's reliance on self-identification does pose certain questions regarding the operation of the exceptions to the general principles of equality and non-discrimination provided by the Act. These exceptions entitle those providing single-sex services and communal accommodation to exclude trans people in certain circumstances. In the next section, the exceptions will be set out and consideration will be given to their application to circumstances involving trans women.

### 3.4. Exceptions

The Equality Act contains exceptions, which allow for some forms of discrimination in certain situations. Two exceptions have the potential to be applied in circumstances involving trans people. One exception exists specifically in relation to services and public functions concerning the provision of separate, different and single sex services;<sup>66</sup> and the other is a general exception relating to communal accommodation.<sup>67</sup>

#### The Provision of Separate, Different and Single-Sex Services

In setting out a potential exception to section 29 of the Act, which applies the principle of non-discrimination to the provision of services, Schedule 3, Part 7 (28) provides,

- (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 subparagraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
- (2) The matters are -
  - (a) the provision of separate services for persons of each sex;
  - (b) the provision of separate services differently for persons of each sex;
  - (c) the provision of a service only to persons of one sex.

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<sup>64</sup> B. Hepple (2011) *Equality: The New Legal Framework* Hart Publishing, Page 44.

<sup>65</sup> Equality Act 2010, Part 6, Chapter 1, Section 85 (10) (a). Available at: <http://www.legislation.gov.uk/ukpga/2010/15/section/85> Note that this exception applies only to schools and that harassment on the basis of gender reassignment is prohibited for other service providers.

<sup>66</sup> Equality Act 2010, Schedule 3, Part 7 (28). Available at: <http://www.legislation.gov.uk/ukpga/2010/15/schedule/3>

<sup>67</sup> Equality Act 2010, Schedule 23(3). Available at: <http://www.legislation.gov.uk/ukpga/2010/15/schedule/23>



This allows those who provide separate or single-sex services to provide a different service to, or to exclude, someone who has the protected characteristic of gender reassignment in certain circumstances.<sup>68</sup> This includes those who have a GRC, as well as those who do not have a GRC but otherwise meet the definition under the Equality Act 2010, as long as the action taken is a proportionate means of achieving a legitimate aim. This is an established test in discrimination and human rights law which is commonly used to justify behaviours or impacts which, on their face, are discriminatory. It is known as the proportionality test (see further below).

The example given in the explanatory notes of when separate services may be provided for one sex in a way which excludes trans people<sup>69</sup> is a counselling service for vulnerable women, where service users may refuse to attend sessions if trans women are permitted to attend. The Code of Practice provides the example of single sex changing rooms in a clothes shop, in which the exclusion of trans people would not be proportionate due to the availability of separate individual cubicles.<sup>70</sup>

The Code of Practice on Services provides that,

If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present.<sup>71</sup>

It goes on to state that,

Service providers should be aware that 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.<sup>72</sup>

This guidance potentially creates an unhelpful hierarchy where the ability to 'pass' as a non-trans person of the acquired sex is potentially more important than the trans person's own self-identification. The margin for confusion and misapplication is wide. It would therefore be helpful if this aspect of the guidance could be reconsidered.

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<sup>68</sup> This exception does not allow for proportionate discrimination on the basis of sex; for example, a trans woman could potentially be excluded due to her trans identity, but not due to being a woman.

<sup>69</sup> Explanatory Notes. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

<sup>70</sup> CoP Services, p. 198. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

## Communal Accommodation and Associated Benefits, Facilities and Services

Schedule 23 (3) provides for exceptions to the prohibition of discrimination on the grounds of the protected characteristics of both *sex* and *gender reassignment* in relation to the provision of communal accommodation.<sup>73</sup>

It provides,

- 3 (1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—
- (a) the admission of persons to communal accommodation;
  - (b) the provision of a benefit, facility or service linked to the accommodation.

This exception allows a service provider to exclude a trans person from communal accommodation, and to refuse services connected to providing this accommodation on grounds of sex or gender reassignment in certain circumstances. As with Schedule 3, and other exceptions under the Equality Act, such exclusion must be a proportionate means of achieving a legitimate aim.<sup>74</sup> This aligns the provision of communal accommodation with the provision of separate or single-sex services as, in order to justify either exception, the proportionality test must be satisfied.

As the Code of Practice on Services states,

As discussed above in relation to separate services and single sex services, this must be considered on a case by case basis. In each case, the provider of communal accommodation must assess whether it is proportionate to exclude the transsexual person.<sup>75</sup>

The explanatory notes state that this exception,

...allows communal accommodation to be restricted to one sex only, as long as the accommodation is managed as fairly as possible for both men and women.<sup>76</sup>

The Explanatory Notes do not provide any specific examples of how this exception might apply in cases involving the exclusion of trans individuals from shared accommodation or related benefits, facilities or services.

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<sup>73</sup> Defined in the Explanatory Notes (para 998) as 'residential accommodation which includes shared sleeping accommodation which should only be used by members of one sex for privacy reasons'. Communal accommodation is further defined under Schedule 23, paragraph 3 (5) as 'residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex. Paragraph 3 (6) provides that 'Communal accommodation may include (a) shared sleeping accommodation for men and for women; (b) ordinary sleeping accommodation; (c) residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

<sup>74</sup> Equality Act 2010, Schedule 23. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>. See also the CoP on Services, para 13.66.

<sup>75</sup> CoP Services, para 13.67. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>76</sup> Explanatory Notes, para 997. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>



### 3.5. The Proportionality Test

The Code of Practice on Services provides further guidance on how the Schedule 3 exception relating to the provision of separate or single sex services should be applied in practice,

If a service provider provides single or separate sex services ... they should treat transsexual people according to the gender role in which they present. ... [Exclusion] will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim. ... The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex.<sup>77</sup>

This suggests that, in order to comply with the proportionality test, the service provider must take full account of the self-identification and related needs of the trans person when making a decision to exclude.

In reference to the exclusion of a trans person from shared accommodation permitted under Schedule 23, the Code of Practice on Services provides the following guidance regarding the need to ensure that any exclusion amounts to a proportionate means of achieving a legitimate aim,

When excluding a person because of sex or gender reassignment, the service provider must take account of:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and
- the relative frequency of demand or need for the accommodation by persons of each sex.<sup>78</sup>

This would appear to place the onus on the service provider to consider the provision of suitable alternatives to shared accommodation before reaching a decision to exclude. Alternatives might include the provision of single user facilities, separate cubicles or gender neutral facilities. Case law in related areas of discrimination law demonstrates that the threshold required to meet the proportionality test is high.<sup>79</sup>

In the current context this would, for example, require the production of robust data or other evidence to support claims made regarding the potentially negative consequences for other users arising from a trans woman accessing a single-sex service or shared accommodation. Reliance on an assumption that other service users may object to such access will not meet

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<sup>77</sup> CoP on Services, para 13.57. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>78</sup> CoP on Services, para 13.65. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>79</sup> (C170/84) [1986] 2 CMLR 701, ECJ.

the threshold. If making a claim that introducing a trans person to the service would impact on the effectiveness of the service, for example through a significant drop in the numbers of those using the service, the service provider would be required to produce evidence of the negative impact claimed. In such circumstances, exclusion would be based on the impact on the service, and not on the individual's trans status.

As would be expected in conformance with the case law relating to the proportionality test in other contexts, all of the guidance associated with these provisions of the Act emphasises the need to take a case by case approach with a focus on the specific circumstances. This means that the application of a blanket exclusion or of a 'one size fits all' approach to the exceptions will not be sufficient to meet the threshold required under the proportionality test. For example, the Core Guidance for service users states the following in relation to businesses which offer goods, facilities and services to the public,

A business may have a policy about providing its services to transsexual users, but this policy must still be applied on a case-by-case basis. It is necessary to balance the needs of the transsexual person for the service and the disadvantage to them if they are refused access to it, against then needs of other users, and any disadvantage to them, if the transsexual person is allowed access. To do this may require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice.<sup>80</sup>

### 3.6. The Public Sector Equality Duty

As well as the high threshold that is required in order to meet the proportionality test (discussed above), those providing services by or on behalf of the public sector are required to comply with the Public Sector Equality Duty (PSED)<sup>81</sup> which imposes certain obligations relating to the protected characteristics, including gender reassignment, covered by the Act. Under the general equality duty, the PSED requires public bodies to have due regard when making decisions to the need to:

- Eliminate unlawful discrimination, harassment and victimisation against trans people.
- Advance equality of opportunity between trans and non-trans people.
- Foster good relations between trans and non-trans people.

This places an obligation on public service providers to consider fully the particular vulnerabilities experienced by trans people and, wherever necessary, to withdraw, to amend or to not introduce particular policies.

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<sup>80</sup> See 'Core Guidance: Using Businesses that offer goods, facilities and services to the public', available at: <https://www.equalityhumanrights.com/en/advice-and-guidance/core-guidance-using-businesses-offer-goods-facilities- and-services-public>

<sup>81</sup> Equality Act 2010, Part 11, Chapter 1, Section 149. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

In addition, certain Scottish authorities have a specific duty imposed on them<sup>82</sup> in relation to assessing the impact of applying a proposed new or revised policy or practice against the needs of the general equality duty. The specific duty requires authorities to consider relevant evidence relating to equality groups and evidence received from equality groups themselves. Evidence includes in-house information such as monitoring data, external research or national data.

Not all public sector bodies in Scotland are covered by the specific duty but all are covered by the general equality duty as are private or third sector organisations which carry out public functions. Although the general duty does not explicitly impose a duty to assess impact, the collation and analysis of data will provide useful evidence of compliance with need to show 'due regard' for equality in decision-making.

### 3.7. The Exceptions in Practice

Notwithstanding the high threshold required in order to meet the legal test of proportionality and the application of the PSED, it is important to note that the exceptions provided by Schedules 3 and 23 are intended to enable organisations to provide services to individuals or groups who have a genuine need to access services or to use shared accommodation without the presence of a trans individual or individuals, as well as ensuring that the needs of trans individuals are met, for example in relation to access to services relating to the individual's birth sex which are otherwise provided only to people of that sex.<sup>83</sup> However, such circumstances must be assessed on a case by case basis with careful consideration given to the needs of all of those affected.

The exceptions can operate whether a trans person has a GRC or not. However, there are some areas of uncertainty which arise due to the lack of clear guidance and decided case law. For example, it is unclear whether, a trans woman who has been excluded from a service or from shared accommodation and who wishes to make a claim of sex discrimination would require a GRC.<sup>84</sup>

Schedules 3 and 23 have rarely been used in practice, particularly in the context of public sector service provision. There has not been any case law in this area which means that the boundaries of what might be permissible in practice remain largely untested. There are many possible explanations for the lack of litigation. For example, one reading might be that there have not, to date, been any issues worthy of litigation and that, where problems have arisen,

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<sup>82</sup> By the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 as amended.

<sup>83</sup> CoP Services, p. 198, para 13.58. Available at: <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

<sup>84</sup> Although, as noted above (at 3.2) the EHRC has provided a statement which says '...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.' See <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language> .

they have been resolved without recourse to law. This could indicate that in practice there have been few problems in regards to the inclusion or exclusion of trans people in regards to gender specific services. An alternative explanation could be that a lack of awareness of the law or a lack of clarity regarding its interpretation have prevented cases from being raised or pursued. Research which explored the reasons for the lack of case law in this context would be helpful.

## 4. INTERNATIONAL HUMAN RIGHTS LAW

The following section comprises a brief overview of the various provisions of international law which have application in relation to the concepts of non-discrimination and equality and the interplay between sex and gender in these contexts. These provisions can be taken account of by courts and tribunals when interpreting the Equality Act. In this way they serve as a source of guidance and they can also lead development and expansion of domestic law if it is found to be lagging behind in specific contexts. The overview provided here is not intended to be fully comprehensive but rather to summarise the provisions of international law and to signpost the reader to more authoritative sources.

The international framework includes a range of provisions in respect of the general principles of non-discrimination and equality in the specific context of sex discrimination. In relation to the application of the framework to discrimination on the grounds of trans status, although international human rights standards apply to trans people, the application of specific provision in this context is underdeveloped. Those states which commit or allow the most egregious breaches of human rights can be brought before the European Court of Human Rights (see 4.4 below). However, the lack of specific targeted activity, such as the adoption of a UN Convention on the rights of trans people, means that the framework cannot be said to provide much more than a set of guiding principles.

### 4.1. The Universal Declaration of Human Rights (UDHR)

Article 7 of the UDHR provides 'All are equal before the law and are entitled without any discrimination to equal protection'. Sex is one of the characteristics explicitly provided for under Article 2 which provides a right to non-discrimination attaching to all other human rights recognized in the UDHR.<sup>85</sup> Explicit recognition of the application of the protections provided by the UDHR and associated instruments to discrimination on the ground of gender identity has been a slow process. The application of Article 2 has been difficult to realise in practice in relation to LGBT communities in general due to the absence of any specific instrument which applies the provisions directly to gender identity and sexual orientation.

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<sup>85</sup> The others being race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. The latter could presumably be interpreted as encompassing LGBTI rights to non-discrimination.

Trans status was not subject to any focused attention by the UN until 2011 when the Human Rights Council adopted the first Resolution on human rights, sexual orientation and gender identity.<sup>86</sup> Acknowledging discriminatory laws and practices at the national level, the Resolution set out the obligations of states under international human rights law to address these through legislative and other measures. In June 2011, it was followed by the first UN report on the same subject, prepared by the Office of the High Commissioner for Human Rights (OHCHR)<sup>87</sup> which presented evidence of a pattern of systematic violence and discrimination directed at people in all regions because of their sexual orientation and gender identity.

In 2012 the OHCHR published a set of recommendations concerning how international human rights standards should be applied to the LGBT communities<sup>88</sup> stating,

The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBT people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights.<sup>89</sup>

## 4.2. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Adopted in 1979 by the UN General Assembly, CEDAW is often described as an international bill of rights for women. In line with its 1970s origins, CEDAW's text refers to 'sex' rather than 'gender'. However, as the CEDAW Committee has made clear in some of its Concluding Observations,<sup>90</sup> its interpretation of the Convention rights is inclusive of trans women. One of CEDAW's goals is to challenge gender stereotypes,<sup>91</sup> changing ideas of what constitutes masculinity and femininity. Furthermore, although CEDAW is focused on discrimination experienced by women on the grounds of sex, there is an understanding by the CEDAW Committee that women experience disadvantage and discrimination by way of their intersecting identities on grounds of 'race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity'.<sup>92</sup> CEDAW can, thus, be interpreted as applying to trans women.

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<sup>86</sup> Human Rights Council Resolution 17/19, U.N. Doc. A/HRC/RES/17/19 (June 17, 2011). It should be noted that support for the Resolution was by no means resounding, with 23 votes in favour, 19 against, and 3 abstentions. A further Resolution was adopted in 2014 in which the Human Rights Council expressed grave concern at human rights violations and requested the High Commissioner to produce an updated report with a view to sharing good practices and ways to overcome violence and discrimination by applying existing human rights standards - UN Human Rights Council Resolution 27/32, UN DOC A/HRC/RES/27/32, adopted 26 September 2014.

<sup>87</sup> Report of the United Nations High Commissioner for Human Rights (2015) *'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity'* (A/HRC/19/41)

<sup>88</sup> UN Office of the High Commissioner for Human Rights (2012), *'Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law'* Available at:

<https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>

<sup>89</sup> *ibid.* Page 10.

<sup>90</sup> See, for example, CEDAW Committee, 2016, Concluding observations on Argentina, para 20(e). Available at: <https://www.refworld.org/docid/583862e94.html>

<sup>91</sup> See Article 5(a) and 10(c). Available at: <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

<sup>92</sup> CEDAW Committee, 2010, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 18. Available at: <https://www.refworld.org/docid/4d467ea72.html>

### 4.3. The Council of Europe (CoE)

The CoE is an international organisation which seeks to protect human rights, democracy and the rule of law in Europe. The CoE sets legal standards and provides policy guidance and has actively engaged in the advancement of women's rights, for example, through Resolutions,<sup>93</sup> Declarations<sup>94</sup> and specific Recommendations.<sup>95</sup> Such instruments use the terms 'sex' and 'gender' interchangeably.

In 2015 the Council of Europe's Parliamentary Assembly passed Resolution 2048 on discrimination against transgender people in Europe.<sup>96</sup> The Resolution noted the Assembly's concerns regarding 'the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition' and referred specifically to the need in some states for a diagnosis of mental illness and surgical interventions and other medical treatments as preconditions.<sup>97</sup> It called on member states to adopt a number of laws and policies aimed at improving the realisation of trans peoples' fundamental human rights.

Although Council of Europe Resolutions are not legally binding they can be influential in setting policy agendas within member states.

### 4.4. European Court of Human Rights<sup>98</sup>

The European Court of Human Rights is an international court which provides adjudication in cases concerning alleged breaches of provisions of the European Convention on Human Rights, Article 14 of which prohibits discrimination on 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' Article 14 does not provide a self-standing right but must be invoked with at least one other of the Convention's provisions. The Court's jurisprudence in relation to sex discrimination has been largely focused on Article 8 which provides a right to respect for private and family life and Article 3 which prohibits inhuman and degrading treatment.<sup>99</sup>

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<sup>93</sup> Such as the Resolution and Action Plan adopted at the 7th Council of Europe Conference of Ministers Responsible for Equality between Women and Men, 'Bridging the gap between de jure and de facto equality to achieve real gender equality' (25 May 2010). Available at: <https://eurogender.eige.europa.eu/posts/bridging-gap-between-de-jure-and-de-facto-equality-achieve-real-gender-equality>

<sup>94</sup> For example, the Declaration of the Committee of Ministers 'Making Gender Equality a Reality', adopted on 12 May 2009. Available at: [https://eige.europa.eu/library/resource/aleph\\_eige000002524](https://eige.europa.eu/library/resource/aleph_eige000002524)

<sup>95</sup> For example, Recommendation No R(85)2 on Legal Protection against Sex Discrimination. Available at: [https://eige.europa.eu/library/resource/AMZ\\_NET3788](https://eige.europa.eu/library/resource/AMZ_NET3788)

<sup>96</sup> Following an Assembly debate on 22 April 2015 (15th Sitting) (see Doc. 13742, report of the Committee on Equality and Non-Discrimination, rapporteur: Ms Deborah Schembri). The text was adopted by the Assembly on 22 April 2015. Available at: <https://www.refworld.org/docid/55b242e94.html>

<sup>97</sup> Resolution 2048 on discrimination against transgender people in Europe. Para 3. Available at: <https://www.refworld.org/docid/55b242e94.html>

<sup>98</sup> For a comprehensive digest of the relevant decisions of the ECHR, see: [https://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf)

<sup>99</sup> For a useful digest of the relevant cases, see Compilation of Case Law of the European Court of Human Rights on Gender Equality Issues: <https://rm.coe.int/16806da342>



Cases brought before the Court on the grounds of alleged violations of the Convention against trans people have also been based on the provision of Article 8 as well as on Article 12 which provides the right to marry and the right to found a family.

In *Goodwin v UK*<sup>100</sup> the Court held that it was not a disproportionate burden on society for the State to accommodate the right of a trans person to legal recognition of their acquired sex by issuing a birth certificate and permitting marriage. The Court's finding of a violation of Article 8 recognised the need for states to keep pace with social progress as it noted a clear and continuing international trend towards 'increased social acceptance of transsexuals' and towards 'legal recognition of the new sexual identity of post-operative transsexuals'.<sup>101</sup>

Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant.<sup>102</sup>

In finding a violation of Article 12, the Court noted that it was 'not persuaded that it [could] still be assumed that [the terms of Article 12] must refer to a determination of gender by purely biological criteria'<sup>103</sup> The Court held that it was for the State to determine the conditions and formalities of marriages for trans people but it could find 'no justification for barring the transsexual from enjoying the right to marry under any circumstances'.<sup>104</sup> This led to the introduction of the GRA. Case law has continued to develop post-GRA, including with the significant decision in *AP, Garçon and Nicot v France*<sup>105</sup> where it was held that making medical treatment compulsory for the legal recognition of gender identity is a violation of Article 8.

## 4.5. Yogyakarta Principles<sup>106</sup>

The Yogyakarta Principles were developed in 2006 by a group of 29 experts from the International Commission of Jurists and the International Service for Human Rights from 25 countries. They are a set of legal principles which apply binding international human rights standards to violations based on sexual orientation and gender identity including provisions on extrajudicial executions, violence and torture, access to justice, privacy, non-discrimination, rights to freedom of expression and assembly, employment, health, education, immigration and refugee issues and public participation.

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<sup>100</sup> *Goodwin v. United Kingdom*, Application no. 28957/95, ECHR, 11 July 2002.

<sup>101</sup> Paragraph 85 of the judgment. Available at: [https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22goodwin%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-60596%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22goodwin%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-60596%22]})

<sup>102</sup> *ibid.* Paragraph 93.

<sup>103</sup> *ibid.* Paragraph 100

<sup>104</sup> *ibid.* Paragraph 103

<sup>105</sup> *AP, Garçon and Nicot v. France*, Application nos. 79885/12, 52471/13 and 52596/13, ECHR, 6 April 2017.

<sup>106</sup> In 2017 the Principles were supplemented by the plus 10 Principles (YP+10) which provided an opportunity for the UN, national governments, and other stakeholders to re-affirm their commitment to universal human rights in relation to the rights of LGBTI communities. Available at: <https://yogyakartaprinciples.org/>



The Principles recognise the widespread abuse and discrimination faced by trans people and attempt to remedy it through the targeted adoption of pre-existing international human rights laws. For example, Principles 12-18 highlight the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, education and health.

Although the Principles are accompanied by detailed recommendations to states, they emphasise the responsibilities of all actors in the promotion and protection of human rights by addressing additional recommendations to the UN, national human rights institutions, the media, non-governmental organisations, and others.

# 5. CONCLUDING THOUGHTS AND OBSERVATIONS

This Report has set out the legal provisions relevant to the protection against discrimination available to individuals on the grounds of sex and gender reassignment under the Equality Act 2010. In stating the Act's wider interpretation, beyond its 'black letter' provision, consideration has been given to the relevant Codes of Practice and case law as well as to the international human rights context within which the domestic legislation operates.

In general terms the Act is fairly clear and comprehensive, although it is by no means perfect. Whilst continuing interpretation in line with progressive social norms will help to ensure a dynamic legislative framework which takes an inclusive approach to providing adequate protection against discrimination on the grounds of both sex and trans status, there are a number of areas in which it is suggested improvements could be made. These are set out in the following observations:

- 1. Updated terminology:** The terminology used in the Act and accompanying guidance should be amended to clarify the available protection of trans, non-binary and intersex identities under its provisions along with some clarification around appropriate (non-restrictive) definitions. In this respect some updated and more specific guidance could be included in the relevant CoPs.<sup>107</sup> The Equality and Human Rights Commission has articulated the need to improve the definitions relating to gender identities under the Act.<sup>108</sup>

Definitions of 'sex' and 'gender' could be clarified. Careful regard would have to be taken to ensure no reduction in the levels of protection against discrimination applicable to non-trans women in respect of both their biological difference from men and in regard to gender roles and stereotypes, whilst clarifying and thus strengthening protections afforded to trans people.

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<sup>107</sup> It is recognised that, due to the statutory nature of the Codes of Practice, such changes are dependent on political will and are subject to the time constraints of legislative reform.

<sup>108</sup> Equality and Human Rights Commission (2015) *Written evidence submitted by EHRC to the Transgender Equality Inquiry*. Paragraph 1.3 Available at: <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19337.html>, para 1.3.

- 2. The Act's application and interpretation:** The dearth of decided case law or attempted litigation which demonstrates the Act's failure either to provide adequate safeguards for non-trans users of relevant services or to include trans women in the provision of services could be interpreted as showing that the current provisions are working satisfactorily. Research exploring the reasons for the lack of case law would be extremely helpful in ascertaining the nature and extent of unlitigated issues. As well as providing the basis for recommendations for possible amendments to the legislation, this could assist in the identification of test cases, for example, through strategic litigation.
  
- 3. The EHRC's guidance including the statutory Codes of Practice:** As this report has highlighted, the current guidance on the Equality Act provided by the statutory Codes of Practice and associated guidance would benefit from updating.<sup>109</sup> The lack of clarification on some key issues means that public bodies, women's sector organisations and legal advisers may be applying contradictory approaches and providing conflicting advice to those directly affected. Review and revision of the guidance would thus enhance legal certainty.

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<sup>109</sup> *ibid.*