

GENDER RECOGNITION REFORM BILL - EQUALITY ACT SINGLE-SEX EXCEPTIONS

We wrote to the Cabinet Secretary, Shona Robison, after her statement to Parliament on 3rd March 2022 on Gender Recognition Reform regarding a number of inaccuracies it contained about the single-sex exceptions in the Equality Act 2010 as they apply to toilets and changing rooms. A copy of our letter is provided as an annex.

Amongst other things, the Cabinet Secretary said:

“the 2010 act does not apply exceptions specifically to toilets and changing rooms. Trans people can and do use those now, whether they have a GRC or not, and they have been using them for many years.”

“trans people do not need to have legal gender recognition or a certificate in order to access facilities that align with their gender.”

“On what Ruth Maguire outlined could be said of the current process—which trans people have used for years, with no evidence of widespread harm—although we may refer to facilities such as toilets and changing rooms as single-sex spaces, they are not legally defined as such under the Equality Act 2010 and, of course, GRCs are not necessary to access them.”

Ms Robison is wholly mistaken that exceptions in the Equality Act are not specifically applicable to toilets and changing rooms. Schedule 3, Part 7, Para 27(6) of the Act provides for **any** service or space to be single-sex where it is used by more than one person at the same time and where people might reasonably object to the presence of members of the opposite sex. The Equality and Human Rights Commission (EHRC) confirms that protecting women’s and girls’ privacy, dignity and safety are eminently legitimate aims for providing single-sex spaces such as toilets and changing rooms, and indeed, paragraph 738 of the Explanatory Notes to the Act gives the example of “separate male and female changing rooms to be provided in a department store”.

Women campaigned long and hard for public toilets and they only started to become more commonplace when women entered munition factory work to support the war effort in 1915, although women were still denied work due to employers lack of facilities in the 1950s.¹ From Victorian moral objections to current day campaigns by UNESCO to boost girls' access to education, women’s public toilets have always been political, but for Ms Robison to suggest they are not necessary, legal, or that women have never really had them or are no longer entitled to them is as absurd as it is offensive.

The Cabinet Secretary’s statement also disregards specific legislation for workplaces, non-domestic buildings and schools which mandate separate single-sex provision of toilets, and is, unquestionably, in complete opposition to the judgment in *For Women Scotland v Lord Advocate and Scottish Ministers (2022) CSIH 4*² which states any exception in the Equality Act relating to the inclusion of women, as having a protected characteristic of sex, is

¹ <https://www.historic-uk.com/CultureUK/History-of-Womens-Public-Toilets-in-Britain/>

² <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

limited to allowing provision to be made in respect of a “female of any age”. **Provisions in favour of women, in this context, by definition exclude those who are biologically male.**

We were extremely disappointed that the Cabinet Secretary declined our request to correct the Official Record and nor did the EHRC, who had also been sent the same letter, step in to provide a correction.

Since that date there have been two important developments. First, the EHRC’s *Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions*,³ which was published in April. This clarifies that, of course, toilets and changing rooms are covered by the single-sex exceptions, gives examples of where they legally occur, and advises on the need to take into account other legislation that stipulates single-sex provision such the Workplace Regulations 1992.

Secondly, Aidan O’Neill QC provided legal advice⁴ on the provision of single-sex toilets for school pupils which set out how failing to use the single-sex exceptions in the Equality Act for toilet provision leads to a breach of a school’s duty, under the same Act, to prohibit harassment related to the pupils’ sex and which can be perceived by pupils as having the effect either of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This advice has been sent to all local councils and, while some councils have said they will ensure compliance, it may be the case that enforcement legal action will be necessary for others.

Given this new information it was, therefore, inexplicable for the Cabinet Secretary to repeat her earlier false claims when giving evidence to the Committee on 28th June, re-asserting that:

“Of course, GRCs are not necessary for accessing areas such as toilets, changing rooms and other spaces that are not restricted as they would be for exceptions under the 2010 Act. As I said earlier, trans women and trans men will have been using these spaces for many years”

As pointed out in our separate correspondence, this is one of many statements that contradicts the Scottish Government’s current stated position in response to our petition for a further judicial review on the Gender Representation on Public Boards Act where they claim a Gender Recognition Certificate (GRC) is required for a man to be classed as a woman for the purposes of the Equality Act (and hence access women-only provision).

The Attorney General for England and Wales, Suella Braverman, spoke at length earlier this month about the Equality Act and single-sex spaces⁵ during which she clarified that schools and other organisations are expected to comply with her legal guidance on single-sex toilets.

³ <https://www.equalityhumanrights.com/sites/default/files/guidance-separate-and-single-sex-service-providers-equality-act-sex-and-gender-reassignment-exceptions.pdf>

⁴ <https://forwomen.scot/12/06/2022/schools-must-provide-single-sex-toilets/>

⁵ <https://policyexchange.org.uk/pxevents/keynote-speech-by-rt-hon-suella-braverman-mp/>

Concurring with the *For Women Scotland* Inner House ruling she re-stated that the Equality Act exceptions operate on the basis of sex as a biological term:

“In law, single sex services are intended for one sex only: that is the very thing permitted by Schedule 3. It follows that it is not possible to admit a biological male to a single-sex service for women without destroying its intrinsic nature as such: once there are XY chromosome adults using it, however they define themselves personally, it becomes mixed-sex.”

And speaking specifically of schools but in terms which apply equally to all services, she said:

“Yes, it is lawful for a mixed school to refuse to allow a biologically and legally male child, who identifies as a trans-girl, from using the girls’ toilets. This does not constitute direct sex discrimination and is not unlawful indirect discrimination on grounds of gender reassignment. Indeed, if the school did allow a trans-girl to use the girl’s toilets this might be unlawful indirect discrimination against the female children. Further, in law, there is a duty to provide separate single sex toilets, a breach of which would be unlawful under the School Premises (England) Regulations 2012 and the Education (Independent School Standards) Regulations 2014.” The comparable law in Scotland is the School Premises (General Requirements and Standards) (Scotland) Regulations 1967.

The Attorney General agreed with Aidan O’Neill’s legal opinion that once the legitimate and proportionate tests have been met to justify a space or service excluding the opposite sex, it is deemed legal at that point and there is no additional need to repeat the exercise for any other protected characteristic, including gender reassignment. This clarifies there is no indirect discrimination on gender reassignment (which encompasses those who hold a GRC as well as those who do not). As Ms Braverman said: “This would be to risk the Equality Act giving with one hand, and promptly taking away with the other”.

We feel it is important that this clarifying information is included in the Committee’s public record for the Bill and perhaps the Cabinet Secretary will now take the opportunity, particularly given the Attorney General’s keynote speech on the correct operation of the UK-wide Equality Act, to offer a correction to the Official Record.

Annex - Letter from For Women Scotland to Cabinet Secretary Shona Robison and the Equality and Human Rights Commission, dated 4th March 2022

Dear Ms Robison,

We note that in your statement to Parliament on 03 March 2022 you made the following comments:

“the 2010 act does not apply exceptions specifically to toilets and changing rooms. Trans people can and do use those now, whether they have a GRC or not, and they have been using them for many years.”

“trans people do not need to have legal gender recognition or a certificate in order to access facilities that align with their gender.”

“On what Ruth Maguire outlined could be said of the current process—which trans people have used for years, with no evidence of widespread harm—although we may refer to facilities such as toilets and changing rooms as single-sex spaces, they are not legally defined as such under the Equality Act 2010 and, of course, GRCs are not necessary to access them.”

Contrary to your statements, the Equality Act does define and apply single-sex exceptions at [Schedule 3, Part 7, Para 27\(6\)](#) which encompasses the provision of toilets and changing rooms where they are used by more than one person at the same time and where people might reasonably object to the presence of members of the opposite sex. This section of the Act is applied as an everyday norm and such provision of single-sex toilets has been commonplace for over a hundred years. Service providers opting to use these exceptions provide two separate facilities, with distinct signage for male and female service users. Para 29 confirms this is not discrimination on grounds of gender reassignment.

Furthermore, the [Building Standards Handbook](#) recommends separate male and female sanitary accommodation in non-domestic buildings, and both the [Workplace \(Health, Safety and Welfare\) Regulations 1992](#) and the legislation covering toilet provision in schools [School Premises \(General Requirements and Standards\) \(Scotland\) Regulations 1967](#) mandate separate single-sex provision.

It is quite clear that single-sex toilet provision is covered by numerous laws and is the standard throughout schools, workplaces and public buildings. These are provided on the basis of the protected characteristic of “sex” in the Equality Act which the recent court ruling in [For Women Scotland v The Scottish Ministers](#) has clarified that where provisions are made for women they, by definition, exclude those who are biologically male.

It is unclear why you would confusingly state that although we may refer to toilets and changing rooms as single-sex spaces, trans people can access the facilities that align with their gender - as this would clearly mean the spaces are no longer single-sex. There is no legal basis to provide facilities for “gender”, however that may be defined. Gender has no place in the Equality Act and where the single-sex exceptions are justifiably used they are on the basis of sex: those of the opposite sex, including those with the additional protected

characteristic of gender reassignment, are legally excluded. The vast majority of trans people respect the application of this law.

The societal change we discussed in our meeting of 18 January referred to the erosion and undermining of women's and girls' services as exemplified by your statement, whereby providers follow the messages from the Scottish Government that perhaps single-sex services can be based on self-identification of sex or "gender". This has led to worrying policy changes by public bodies and even signs appearing in women's toilets and changing rooms with instructions not to challenge anyone who looks like they do not belong there. This inevitably leads to women feeling unable to speak up or seek support in challenging the presence of somebody who is very obviously male, and ultimately results in women and children self-excluding from these spaces.

By way of contrast we were pleased that some single-sex services are supported by the Government, namely those around intimate and trauma related care. You quite rightly pointed out that the Equality Act Explanatory Notes give an example of a group counselling session for female victims of sexual assault whereby trans people can be legally excluded. However, [para 738](#) of the Explanatory Notes also specifies the example of "separate male and female changing rooms to be provided in a department store" which makes your statement that trans people can use these spaces in line with their gender erroneous.

With regard to the misinformation given to Parliament on the use of the single-sex exceptions for toilets and changing rooms, we would be grateful if the public record is corrected accordingly. It is important to women that the Government indicates it is fully supportive of all our rights in the Equality Act.

A further comment made to Parliament has astounded many women with its absurdity, namely: "There is no evidence that predatory and abusive men have ever had to pretend to be anything else to carry out abusive and predatory behaviour."

We would hope it is self-explanatory that this is clearly false; all predatory men pretend to be trustworthy members of society in order to gain access to victims. Predatory men will do absolutely anything, including train to be priests, teachers or charity workers, etc, just to be in a position to abuse women and girls.

In their evidence to a Westminster committee the [British Association of Gender Identity Specialists](#) said "It has been rather naïvely suggested that nobody would seek to pretend transsexual status in prison" and cited "a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard". Indeed, it was very recently [reported](#) in The Times that trans inmates in Scottish prisons "reverted back" to male after serving sentences in female prisons.

When you made the identical comment at our meeting in January we suggested it was an incredibly naive view. We pointed out that when the UK Government are proposing to limit the ability of sex offenders to change their name it is extraordinary that Scotland is moving in the opposite direction by providing such men with birth certificates recording a new name and sex, and with additional privacy protections to prevent disclosure of previous identity.

Once again, we note that women's well-evidenced concerns have not been listened to, and we request that the inaccuracy in the official record be corrected on this point.

A copy of this letter has also been sent to Baroness Falkner and EHRC Scotland.

Kind regards,

Trina Budge
Co-director, For Women Scotland