HART GABLES
EHRC CONSULTATION
RESPONSE

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UPDATED LEGAL DEFINITION OF SEX

It's important to emphasise that we are a service supporting some of the most vulnerable LGBTQ+ individuals in our local area, working to ensure they have equal life chances and fair access to the services they need. Our responses to all questions reflect the experience of our service, not only from our own operational standpoint but also shaped by the lived experiences of the LGBTQ+ people we support and engage with. Each month, we listen to and support hundreds of LGBTQ+ individuals through support groups, focus groups, community conversations, and one-to-one interactions. What we share here is informed by what they tell us about their needs, concerns, and the barriers they face in accessing local services.

Our perspective is also grounded in our ongoing work with dozens of local public, private, and third sector organisations who are striving to provide inclusive and effective support to LGBTQ+ service users.

While we understand that this policy is specifically tied to the Equality Act, we are concerned that defining legal sex solely in this narrow context may be misleading if not clearly situated within the wider legislative landscape. In practice, services must apply this policy in alignment with a broader legal framework, including the Human Rights Act 1998, the Care Act 2014, the Data Protection Act 2018, the Public Services Act 2012, and other sector-specific regulations. Within these frameworks, a Gender Recognition Certificate (GRC) continues to change a person's legal sex.

Our concern is that a narrow definition of legal sex, if not contextualised within the wider legal and ethical responsibilities of services, may lead organisations to overlook legal protections afforded to transgender people when implementing policy.

To avoid this confusion, we believe it would be clearer if the code of practice explicitly stated that for the purposes of the Equality Act, legal sex is the sex recorded at birth, but outside of the Equality Act, may also be the affirmed sex of a person through a GRC.

CHANGES WE MAY IMPLEMENT

Following the release of the EHRC's interim guidance on single-sex spaces and this draft code of practice, we have seen a significant rise in transgender and non-binary individuals and their families seeking emotional support and reassurance. Many are concerned about whether their privacy, dignity, and access to public spaces will be protected. We have also supported trans people who have faced intrusive and aggressive questioning about their biological sex from members of the public.

If services interpret this definition of sex as applying across all areas of law, there is a real risk that trans people will be excluded from services they are legally entitled to access. We anticipate that this policy change will result in increased barriers for trans and gender non-conforming individuals when trying to engage with essential services.

As an LGBTQ+ support organisation, we expect a growing need to expand our support for local LGBTQ+ communities. This will include providing emotional support for those whose dignity is undermined, addressing social isolation, and offering advocacy for individuals who face discrimination due to the misapplication of the policy's narrow definition of legal sex.
However, the funding landscape is already stretched, and meeting this rising demand will be challenging. Without additional support, we may struggle to widen our scope to respond effectively to the increased need.

NEW CONTENT ON GRCS

We are unclear about the intended meaning of terms such as 'biological sex', 'sex at birth', and 'birth sex'. While we understand this terminology is drawn from the recent Supreme Court ruling, it remains ambiguous. Specifically, it is unclear whether 'biological sex' refers to chromosomes, genitalia (external and/or internal), hormonal profile, or some combination of these factors, and what, if any, definitive criteria are being used.

For example, if 'biological sex' is defined by chromosomes, this may not always align with the sex recorded on someone's original birth certificate, particularly in the case of intersex people. This raises the question: where do intersex people fall within this legal framework?

Further complications arise when considering trans people who have undergone gender-affirming medical treatment. If someone has had lower surgery and now has external genitalia aligned with their affirmed gender, and/or is taking hormone replacement therapy that alters their hormonal profile, does their legal sex under the Equality Act remain classified as their sex recorded at birth, even though key aspects of their anatomy and biology have changed?

If the intention is to use 'biological sex' interchangeably with 'sex on the birth certificate', we know from experience that this is not always accurate. Still, if this is what is meant, using 'sex on the birth certificate' throughout might be clearer. However, this leaves considerable uncertainty about how the policy should practically apply to trans people who, after medical transition, are anatomically closer to their affirmed sex, or to intersex individuals whose bodies have never neatly fit into binary definitions of sex.

ASKING ABOUT SEX AT BIRTH

We cannot find sufficient information in the draft policy on how services are expected to objectively determine someone's birth sex, or what would constitute a 'genuine concern' about the accuracy of someone's response to a question about 'biological sex'. There is no reliable way to determine birth sex by sight. Human bodies vary widely in terms of primary and secondary sex characteristics, and individuals, whether trans or not, express their gender in diverse ways. Assessing someone's sex based on visual cues such as facial hair, voice pitch, height, or shoe size is inherently subjective. Given the natural diversity among cisgender women, we believe this approach is not only unreliable but also deeply sexist. It also risks placing trans people in humiliating and invasive situations, compromising their dignity and sense of safety.

Many trans people already face this kind of scrutiny in public settings; experiencing it from a service that is supposed to support them could have an even more damaging impact.
Point 2.2.1 acknowledges that questions about birth sex can be distressing. Point 2.2.2 further recognises that mishandling such questions may expose services to legal risk. Despite this, the draft lacks clear, practical guidance on how to ask about birth sex sensitively and what constitutes a necessary or proportionate context for doing so.

We are particularly concerned by the only example given of how to ask this question in a sensitive manner. As a service with over two decades' experience supporting vulnerable LGBTQ+ people, we feel this example demonstrates behaviour that not only discourages both trans and cis women from using a service but may also violate their right to privacy.

In the example, a woman gives no indication that she wishes to attend a single-sex group. Yet the receptionist assumes otherwise, seemingly based on her appearance, and moves her to a private space to ask an intimate question, without first clarifying what group the woman is interested in. This approach treats the woman with suspicion from the outset and undermines her dignity.

A more appropriate and respectful approach would be for the receptionist to provide a list of groups, clearly stating which are trans inclusive. This would allow the service user to self-select appropriately. There is no evidence, locally or nationally, that trans people try to access single-sex services under 'false pretences'. We would hope that policy recommendations are grounded in evidence, not assumptions.

There are further practical concerns. What if a person does not have access to their birth certificate? Would they need to apply for it before accessing a service, causing unacceptable delays? Would they even return after being asked such a question? Would it now be advisable for all people who feel they may be questioned to carry their birth certificate when accessing a public service for the first time?

For trans people, this issue becomes even more complex. Their birth certificate may not reflect their affirmed name or gender. They may need to carry a deed poll, if they have one, and some may not have the necessary documentation at all, making identity verification difficult.

Privacy is another serious concern. If someone is questioned before using a toilet, and then proceeds to use a facility that doesn't match their gender presentation, or an alternative toilet following a conversation with staff, their privacy may be compromised if others witness this change.

Additionally, if someone is asked for a birth certificate and is revealed not to be trans, the service may be open to legal challenge. A butch lesbian, a woman with PCOS, or who is perceived by a member of staff to have 'masculine' characteristics based on stereotypes, who is judged to be 'biologically male', could experience emotional harm or even grounds for discrimination claims based on sexuality.

Trying to mitigate discrimination claims by checking every service user's sex might appear to be a neutral workaround, but in reality it is impractical and resource-heavy. It would require additional staff time and is likely to discourage people, both cis and trans, from accessing services.

Would existing service users also be subject to these checks once the policy is implemented? If so, changes in their facility use or sudden exclusion would be noticeable by other service users and staff, potentially breaching their privacy and trust.

DEFINING SEX AT BIRTH

Once again, the definition of 'biological sex' remains unclear, both in this draft and in the court ruling it draws from. Does 'biological sex' refer to chromosomes, external and/or internal genitalia, hormonal profile, or some combination of these? And if so, what takes precedence? How will this apply to intersex individuals, whose biological characteristics may not fit neatly into binary categories - where do they fall within the legal framework?

Similarly, for trans people who have undergone gender-affirming lower surgery, and therefore have external genitalia aligned with their affirmed sex, or who are on hormone replacement therapy that has altered their hormonal makeup, does their legal sex under the Equality Act remain the sex on their birth certificate, despite these significant anatomical changes?

THE PROTECTED CHARACTERISTIC OF SEXUAL ORIENTATION

While it is technically correct under the Equality Act that gender identity and sexual orientation are distinct protected characteristics, this distinction does not fully reflect lived experience. In practice, the two are closely connected, which is why the acronym 'LGBTQ+' is used to describe our community. Discrimination based on gender identity and sexual orientation often overlaps and can stem from similar motivations. For example, a trans person may be perceived as gay and become the target of a homophobic hate crime, or vice versa.

Intersectionality is a key reality within our community. Many people hold more than one of these identities: there are lesbian trans women, bisexual trans men, gay trans men, and bisexual trans women. Our sexual orientation is rooted in our gender identity, for example, a trans woman who is attracted to women identifies as a lesbian. The vast majority of cisgender lesbians we know affirm the womanhood of trans women. A 2023 YouGov survey supports this, showing that 84% of cisgender lesbians and 84% of bisexual cisgender women view trans women positively.

[Source: https://yougov.co.uk/society/articles/45983-what-do-lesbian-gay-bisexual-and-transgender-brito]

We understand that this policy must adhere to the framework of the Equality Act, and that the EHRC must advise services accordingly. However, we are concerned and confused as to why the EHRC, an organisation tasked with upholding human rights, equality, and dignity, is approaching this issue so narrowly, without reflecting the broader social realities faced by marginalised groups. We would hope to see the EHRC guiding services not just on legal compliance, but on how to implement the law in a way that actively protects and promotes equality and human rights.

LGBTQ+ people are not simply "grouped" together; we come together in solidarity, shaped by shared history, culture, identity, and the common experience of facing hostility. It is our right to associate and advocate as a community.

As an organisation that has worked with thousands of LGBTQ+ people from diverse backgrounds over two decades, we can say with confidence: those who seek to divide our community, or frame the rights of different groups as being in conflict, do not represent the views of the majority of LGB people. In fact, this kind of rhetoric often makes people in our community feel unsafe.

SEX DISCRIMINATION BASED ON PERCEPTION

We are concerned that enforcing this approach would rely heavily on subjective perceptions of sex and gender. This could lead to inconsistent treatment, where some trans people receive legal protection while others do not, despite having taken the same social, medical, or legal steps to affirm their gender. Such a system risks creating a 'two-tier' structure, where protection is based on whether a trans woman appears 'feminine enough,' which undermines the principle of equality.

We are also unclear whether cisgender women who present in a more masculine way will remain protected under sex discrimination provisions, particularly if appearance becomes a factor in how sex is judged. If this sets a precedent where sex discrimination is linked to how someone looks, the implications could be far-reaching and deeply problematic.

There also appears to be a lack of consistency. On the one hand, services are asked to apply protections to trans women based on how others perceive them; on the other hand, they are instructed to treat her as male for other purposes under the Equality Act. This contradiction is confusing and risks misapplication of the law.

More detailed guidance is needed on how to determine whether discrimination has occurred, especially in cases where someone, when accused of sex discrimination, claims they assumed the person was trans. How should services differentiate between discrimination based on sex and discrimination based on gender reassignment in these cases? Without clearer direction, there is a real risk that protections will be applied inconsistently and unfairly.

HARASSMENT BASED ON SEX

In the 2011 Code of Practice, deliberate, repeated, and unwanted misgendering of a trans person was clearly recognised as harassment related to sex. We are unclear whether this will still apply under the new guidance.

Will unwanted comments about a trans woman's body still constitute harassment related to sex? Some of our service users have experienced such comments, and it has often been difficult to determine whether the perpetrators were aware the person was trans. If someone makes crude or objectifying comments about a trans woman's body, would this be considered harassment of a woman, or of a man, given that 'sex' is now being defined in this guidance and the Supreme Court ruling as 'biological sex'?

We are particularly concerned that this could open a loophole: could individuals accused of sex-based harassment evade accountability simply by claiming they believed the person was trans? If so, this would significantly undermine protections against harassment, particularly for trans women, and contradict the principles of dignity and equality that the Equality Act is meant to uphold.

SINGLE-SEX SERVICES

We are unsure whether we can continue running our LGBTQ+ women's group, which is inclusive of trans women, in the same way we have done, according to this policy. We are a proudly trans-inclusive service and have never encountered issues with cisgender women feeling uncomfortable or disadvantaged by the presence of trans women in the group. The group's inclusive nature is essential to meeting the needs of our service users, as they themselves have expressed. Both cis and trans women who use our service want a safe, welcoming space to connect, socialise, and support one another. Trans women often feel anxious about accessing other local women-only spaces, or find those spaces inaccessible. Meanwhile, cisgender lesbians, bisexual, and pansexual women value the opportunity to build community with their trans peers in a respectful, inclusive environment.

However, now that the Supreme Court ruling and this guidance define 'woman' as 'biological woman,' we are unclear whether we would be required to rebrand this group as a mixed-sex group, or as a 'single-gender group for cisgender and transgender women.' We feel such a label would fail to communicate the group's purpose clearly to local people who might benefit from it and could create confusion. More importantly, it would not reflect the group's core objective: to enable LGBTQ+ women to freely associate with one another, something they have a right to do.

We are also concerned about the impact on mainstream women's services, such as domestic violence services, that have historically been trans-inclusive without issue. These organisations may now face difficult choices: rebrand and risk losing funding (because they are funded as women's services), spend time and resources restructuring their constitution, policies, and objectives to become 'mixed-sex' services, or exclude trans women entirely. The latter would have particularly serious consequences - trans women who are excluded may be forced to travel long distances for support, or, if unable to travel, go without vital services altogether.

We would welcome clearer guidance on how organisations can remain trans-inclusive while still complying with the Equality Act. This should take into account the real-world pressures services face, including funding limitations, staffing capacity, and the barriers that vulnerable individuals often encounter when trying to access support, such as poor mental or physical health, low income, or lack of transport.

SINGLE-SEX SERVICES – PROPORTIONATE MEANS OF MEETING A LEGITIMATE AIM

For services that only offer single-sex options, such as domestic violence counselling groups separated by gender, this policy will inevitably disadvantage trans people, who may find themselves unable to access either group. Long-established services that have always been quietly trans-inclusive, with no recorded issues, will be placed in an impossible position.

These services will either have to exclude trans people, leaving them with no support, or restructure to create additional mixed-sex groups, which many lack the funding, capacity, or legal framework to do. If they are funded and constituted as single-sex services, rebranding as mixed-sex could jeopardise their funding and sustainability altogether.

This guidance risks seriously disrupting well-functioning, inclusive services in response to an issue that, in practice, has rarely or never occurred. It requires providers to conduct a 'balancing exercise' based on hypothetical risks, rather than real-world evidence.

A likely real-world scenario might look like this:

A trans woman in a small town in the North East of England seeks support as a survivor of historical domestic violence. She has a Gender Recognition Certificate and has lived as a woman for decades. After decades of building resilience, her mental health has declined after her employer, citing new guidance, prohibited her from using the women's toilets at work. This led to gossip, scrutiny, and transphobic remarks from colleagues, undermining her confidence, leading her to seek additional support. She turns to a local domestic violence support group. The group is women-only and does not run mixed-sex sessions. Men's groups in the area are for perpetrator rehabilitation, which she would not feel safe attending. The service, funded as a women's organisation, cannot rebrand or expand provision due to funding and staffing constraints. Though they have previously supported three trans women without issue, they are now forced to turn her away. She goes without support.

This scenario is not hypothetical. It is rooted in our lived experience of service provision and decades of work supporting some of the most vulnerable LGBTQ+ people. We are deeply concerned that the real impact of this guidance will be to isolate those already marginalised, while disrupting services that have operated inclusively and effectively for years.

SINGLE SEX FACILITIES

We are concerned that section 13.5.3 places pressure on services to enforce toilet use based on 'biological sex'. Aside from the practical and ethical issues involved in determining and policing someone's sex, this approach assumes all services can provide alternative facilities, such as those described in example 13.3.11. In reality, many services do not have the funding, space, or planning permission to do so.
For example:

A service has standard single-sex toilets (not individually enclosed) and a separate accessible toilet, which is in frequent use. It is not appropriate or fair to expect trans people to use this space, as doing so would reduce provision for disabled users. There is no room or planning permission to build additional toilets.

In this situation, is it lawful for the service to allow trans people (who are not disabled) to use the single-sex toilets that match their gender identity? If not, what options does the service have to remain legally compliant? We are deeply concerned that some services will be left without viable solutions. They may lack the resources to adapt their premises, be forced to train staff to enforce sex-based restrictions, risking staff discomfort and alienation of service users, or face legal challenges on grounds of discrimination. In effect, some services may become inaccessible to trans people altogether.

Section 13.5.3 states:

If a service provider... allows trans people to use the service intended for the opposite biological sex, the service will no longer be a separate or single-sex service under the Equality Act 2010. It is also very likely to amount to unlawful discrimination against others (see paragraph 13.3.19).

Does this mean that by allowing trans women to use women's toilets, we are likely to be discriminating against cis women? In over 20 years of service delivery, we have never had an issue with a trans woman using women's facilities. In fact, using the toilet aligned with one's gender is often a crucial part of social transition, something NHS gender specialists may discuss with patients as part of treatment. For many, being able to integrate into society as a man or woman is vital for dignity and mental wellbeing. Trans people do not transition to become 'other'; they transition to belong. Being excluded from both men's and women's spaces reinforces feelings of alienation and can have serious emotional consequences.

We are further confused by the inconsistency in examples. One section notes that a young boy may be allowed to use women's toilets if there is no indication he poses a risk. Yet trans women are often assumed to be a risk by default, despite no evidence supporting this. In other EHRC guidance on public toilets, it says toilets should be separated by sex in schools, but in this example, a young boy is judged to be no risk in a women's toilet. If examples are meant to be evidence-based, this inconsistency is troubling.

Section 13.5.7 says:

The service provider should consider whether there is a suitable alternative service for the trans person to use. In the case of services necessary for everyone, such as toilets, it is very unlikely to be proportionate to deny a trans person access where no alternative is available.

In the example above, what does 'very unlikely to be proportionate' mean in practice? If there is no viable alternative, is it more likely that we are discriminating against cis women by allowing trans women access, or discriminating against trans women by excluding them? The ambiguity makes it difficult for services to feel confident in their legal compliance.

Finally, we question why services are being asked to perform a 'balancing act' on issues that have not arisen in decades of operation. Local services that once felt clear and confident in their inclusive policies are now uncertain and confused.

FURTHER COMMENTS

We believe this policy fails to fully consider its practical impact on some of the most vulnerable members of minority communities. It reflects a limited understanding of how services must operate strategically to remain sustainable while meeting the needs of those they support. Implementing this policy will be costly, time-consuming, and in some cases, unworkable. The greatest cost may be the loss of support for those who need it most.

We are particularly concerned that the policy appears to use the Supreme Court's clarification of a single term in the Equality Act to justify sweeping changes, without sufficient regard for real-world implications or the basic rights, dignity, and equality of protected groups.

The EHRC states on its website that it is 'using our powers to defend your freedom and promote a fairer England, Scotland and Wales.' We rely on the EHRC to uphold this promise, yet this draft contains only further restrictions on people's freedom.

We also see no clear evidence that the views of a diverse range of women, including trans women, were meaningfully considered in developing this guidance. If they were, many voices appear to have been overlooked or ignored. As a service whose mission is to listen to unheard voices in the LGBTQ+ community, we can say confidently that this draft does not reflect what they are telling us.

Trans people already face significant barriers when accessing public services. They want empathy, understanding, and access to support, or at the very least, to live their lives without new obstacles to social integration. The cis women we work with, including lesbians, are clear: trans women are women, and trans men are men.

Since the consultation comes after the release of this draft, we now face the added burden of managing the distress and anxiety it has caused in the communities we support. We urge the EHRC to ensure that the final draft reflects the voices, needs, and dignity of the most marginalised.