

IN THE MATTER OF

THE PROVISION OF  
SEPARATE AND SINGLE-SEX SERVICES  
BY MANCHESTER CITY COUNCIL

---

ADVICE

---

AKUA REINDORF KC

CONTENTS

INTRODUCTION & INSTRUCTIONS.....	2
KEY FACTS.....	4
RELEVANT LAW .....	5
The Gender Recognition Act 2004.....	5
The Equality Act 2010 .....	6
<i>Relevant protected characteristics</i> .....	7
<i>Direct discrimination</i> .....	10
<i>Indirect discrimination</i> .....	13
<i>Exceptions for direct and indirect discrimination</i> .....	17
<i>Harassment</i> .....	18
<i>The Public Sector Equality Duty &amp; Equality Impact Assessments</i> .....	19
The Human Rights Act 1998 .....	20
ADVICE.....	23
The Resolution .....	23
Policies & services .....	28
Single sex exceptions.....	42
Philosophical belief discrimination.....	43

## **INTRODUCTION & INSTRUCTIONS**

1. I am instructed by Women's Rights Network ("WRN") and Labour Women's Declaration ("LWD") to advise as to the lawfulness of a resolution passed by Manchester City Council ("MCC") on 2 February 2022 and as to its implications for the provision of separate and single-sex services by the Council. The key part of the Resolution is an affirmation to the effect that "trans men are men, trans women are women, non-binary people are non-binary and trans rights are human rights". The concerns of WRN and LWD relate principally to the provision of services for women and girls.
  
2. I am asked to address the following questions in particular:
  - I *What is the legal position of the motion passed by MCC on 2 February 2022?*
  - II *What is the impact of the lack of consultation / equality impact assessment before or since passing the motion?*
  - III *What is the legal standing of the application of this position into MCC policies and service provision, i.e. using a definition of women which includes males self-identifying as women, to services including (but not limited to) leisure provision, single sex personal care, domestic violence and rape crisis support, homeless shelters, children's social care, education and youth services, as well as safeguarding of women and girls within these services?*
  - IV *The only such policy we are currently aware of is MCC's decision not to have a blanket policy not to refuse trans women to women's swimming sessions. Would it be unlawful to have a blanket policy preventing trans women accessing women's single sex services? What are the legal or practical difficulties arising from refusing to have a blanket policy for access to women's swimming sessions?*
  - V *What is the impact of your advice on III and IV above for biological men with a GRC?*
  - VI *Does the motion comply with the Equality Act 2010? Is it unlawful sex discrimination?*

- VII *Does the decision to adopt the motion, and any application of the motion to women only service provisions, comply with the Public Sector Equality Duty?*
- VIII *When would there be a breach of Article 8 ECHR as result of allowing males into women's single sex spaces (including without informing the women using those spaces about this practice)?*
- IX *MCC will not apply the single sex exemptions under the Equality Act 2010 since the motion was adopted, in reliance on section 13.57 of the EHRC Statutory Code of Practice on services, public functions and associations. Can MCC lawfully refuse to follow the ECHR 2022 guidance on single sex spaces, in favour of the 2011 Statutory Guidance?*
- X *What are the risks to MCC of acting in breach of any legal duties by (a) adopting the motion and (b) making policy and service decisions based on the motion?*
- XI *What is the relevance for MCC of the situation in South Oxfordshire and Bristol that their motions are not legally binding? If the result is the same, i.e. that the motion is not legally binding, what is the lawfulness of policies made pursuant to it?*
- XII *As MCC are defining trans women as women, would this apply to children, i.e. are 'transgirls' girls?*
- XIII *Is MCC at risk of discrimination against gender critical staff (ie staff who believe biological sex is real and matters in specific situations) on the grounds of Religion and Belief with its statements to staff, lack of transparency of what is included in trans inclusion training and the linking of transphobic views with women's safety by Councillors in Council Meetings?*
- XIV *What is the legal position of MCC in relation to its approach to data collection and monitoring e.g. (1) 'gender & gender identity' data is reported and lack of clarification if data is reported by sex, and (2) they are asking residents of Manchester 'Which of the following describes how you think of yourself? and an option is 'Female (includes trans woman)''?*
- XV *Does MCC's contradictory and unclear messaging e.g. around provision of same sex care and lack of communication to staff or service users about the*

*change in definition of woman, which potentially misleads the public, create any legal or safeguarding risks for MCC?*

3. In my advice from §39 below I have reordered and consolidated these questions under broad headings for ease of reference.
4. Note further that in this Advice I have used the words “trans”, “transwoman” and “transman” to refer to people who have the protected characteristic of gender reassignment. It should be borne in mind that not all people who identify as trans will fall within this category (see further §19 below). I use the terms “biological woman” and “biological man” to refer to those born female and male respectively.

## **KEY FACTS**

5. At a meeting of MCC on 2 February 2022 a motion was carried to:
  1. *Affirm trans men are men, trans women are women, non-binary people are non-binary and trans rights are human rights.*
  2. *Facilitate and strongly encourage all councillors to attend relevant training to learn of the challenges faced by trans people.*
  3. *Write to the Secretary of State for Health and Adult Social Care to call for the government to:*
    - *Provide the funding and resources necessary to increase the capacity of and improve access to trans and non-binary healthcare, including expanding gender identity services and reducing waiting times.*
    - *Develop strategies to recruit more clinicians to become gender identity specialists across all relevant disciplines and train staff across the NHS on issues affecting trans and non-binary people.*
    - *Commit to effectively and regularly consulting trans and non-binary people and groups in the design and delivery of trans and non-binary healthcare.*
  4. *Continue working to promote and extend our Pride in Practice provision, delivered with the LGBT Foundation, to all healthcare providers in Manchester to make sure that our hospitals, GPs, and pharmacies are accessible for trans and non-binary people.*

5. *Conduct an audit of Council services to ensure they are as accessible as possible to trans and nonbinary people.*
  6. *Look into what we can do as a Council as an employer to further support those who identify as trans and non-binary.*
  7. *Refresh our Gay Village Review in-light of Covid and publish it by the end of 2022, setting up a working group that is representative of our whole community and looks to work towards its recommendations.*
  8. *Declare that our city is a welcoming, tolerant and progressive city that will not let hate divide our communities.*
6. Once carried, the motion became a resolution (“the Resolution”).
7. The Resolution was passed without discussion of countervailing interests or the potential consequences on MCC’s provision of separate and single-sex services. No Equality Impact Assessment (“EIA”) had been conducted relating to the impact of the motion and nor had consultation been undertaken.
8. WRN and LWD subsequently raised numerous concerns by correspondence, attended meetings and submitted Freedom of Information Requests relating to the Resolution and associated issues, the details of which are set out in my instructions. Where necessary or appropriate I refer to these details in my advice below.

## **RELEVANT LAW**

### **The Gender Recognition Act 2004**

9. Under the Gender Recognition Act 2004 (“GRA”) a person over the age of 18 may acquire a Gender Recognition Certificate (“GRC”) which changes their sex for some legal purposes. A GRC may be granted, on application, by the Gender Recognition Panel in circumstances where the applicant has or has had gender dysphoria, has lived in the “acquired gender” for two

years or more, and intends to continue to live in the acquired gender until death. No medical intervention is required to obtain a GRC.

10. Confusingly, the GRA uses the words "sex" and "gender" interchangeably but provides a definition of neither. The phrase "gender identity" is not used in the GRA, other than where the medical condition gender identity disorder is referred to.
11. Although the GRA states that a GRC changes a person's sex<sup>1</sup> "for all purposes"<sup>2</sup>, the Act itself contains certain express exceptions, such as that relating to peerages<sup>3</sup>, and also provides that the effect of a GRC can be displaced by other legislation<sup>4</sup>. The Employment Appeal Tribunal has held that "for all purposes" means "for all legal purposes", and that the effect of a GRC "is not to erase memories of a person's gender before the acquired gender or to impose recognition of the acquired gender in private, non-legal contexts"<sup>5</sup>.
12. Currently, it is understood that a GRC has effect for the purposes of the Equality Act 2010 ("EqA"), so that a person born male who has a GRC becomes a woman for the purposes of that Act (and vice versa<sup>6</sup>) (see further §§18, 21, 24 and 26 below).

### **The Equality Act 2010**

13. The EqA requires employers, service providers, associations and other organisations ("duty-bearers") not to subject various categories of

---

<sup>1</sup> The Act uses the word "gender" here

<sup>2</sup> GRA s.9(1)

<sup>3</sup> GRA s.16

<sup>4</sup> GRA s.9(3)

<sup>5</sup> *Forstater v CGD Europe* [2022] ICR 1 EAT at §97

<sup>6</sup> *For Women Scotland v The Scottish Ministers* [2023] CSIH 37. This case is currently under appeal to the Supreme Court on this specific point.

individuals to discriminatory treatment. Depending on the type of duty-bearer and the circumstances, these categories may include employees and workers, service users and members of associations (“rights-holders”).

14. Duty-bearers may also be liable for discriminatory treatment committed against rights-holders by their employees or workers<sup>7</sup>, people who are their agents<sup>8</sup> or people who the duty-bearer has instructed, caused, induced or aided to contravene the EqA<sup>9</sup>. Otherwise, duty-bearers are not liable for discriminatory acts done by third parties.
15. Discriminatory treatment under the EqA is unlawful treatment which has a connection to a protected characteristic (the degree of connection required depends on the particular type of discriminatory treatment, explored further below).
16. The protected characteristics include gender reassignment, religion or belief, sex and sexual orientation.
17. The types of discriminatory conduct which are connected to the protected characteristics are harassment, direct or indirect discrimination and victimisation<sup>10</sup>.

*Relevant protected characteristics*

18. The protected characteristic of sex covers only men and women<sup>11</sup>. Under the EqA a man is a male of any age and a woman is a female of any age<sup>12</sup>. Holders of GRCs are to be recognised in the sex stated on the certificate, so

---

<sup>7</sup> EqA s.110

<sup>8</sup> EqA s.110

<sup>9</sup> EqA ss.111 & 112

<sup>10</sup> As relevant for present purposes

<sup>11</sup> EqA s.11

<sup>12</sup> EqA s.212

that a transwoman with a GRC is a woman for the purposes of the EqA and a transman with a GRC is a man for those purposes<sup>13</sup> (although this is subject to exceptions: see §29.2 below).

19. The protected characteristic of gender reassignment applies to people who are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex<sup>14</sup>. There is no need for the person to be under medical supervision or to have a GRC issued pursuant to the GRA. The protected characteristic is widely drawn and will encompass a large number – although not all – of people who identify as trans. An Employment Tribunal has held that the protected characteristic encompasses non-binary and gender fluid people as well as trans people<sup>15</sup>. However this is not a binding authority and, in my view, it is probably wrongly decided. Beyond this, there is very little guidance in case law or otherwise as to what is actually meant by “reassigning sex” or “other attributes of sex”.

20. The protected characteristic of religion or belief includes:

20.1. any religion; or

20.2. a religious or philosophical belief which (broadly) has sufficient substance, relevance, cogency, seriousness, cohesion and importance and is worthy of respect in a democratic society<sup>16</sup> - gender critical beliefs have been held to meet this test, and it has

---

<sup>13</sup> Gender Recognition Act 2004 s.9; *For Women Scotland v The Scottish Ministers* [2023] CSIH 37 (currently under appeal to the Supreme Court)

<sup>14</sup> EqA s.7

<sup>15</sup> *Taylor v Jaguar Land Rover Ltd* (Case 1304471/2018 (30 November 2020, unreported) ET

<sup>16</sup> *Grainger plc v Nicholson* [2010] ICR 360 EAT



been conceded that a belief in “gender identity” also meets the test<sup>17</sup>;

20.3. a lack of religion or belief<sup>18</sup>; and

20.4. manifestations of religion or belief<sup>19</sup> such as the wearing of symbols or particular clothing, so long as this has a close and direct nexus with the underlying belief and it is not justifiable in the particular circumstances to restrict or limit it<sup>20</sup>.

21. The protected characteristic of sexual orientation covers people who have a sexual orientation towards people of the opposite sex, people of the same sex or people of both sexes<sup>21</sup>. There is currently some confusion in the interpretation of the EqA as to what is meant by “sex” in this provision. The current position is that “sex” for the purposes of the EqA generally has the meaning explained at §18 above; i.e. that, due to the operation of the GRA, “women” covers biological women and transwomen who have GRCs, and “men” covers biological men and transmen with GRCs. When applied to the sexual orientation provisions, this appears to result in the unlikely outcomes that:

21.1. Everybody’s sexual orientation is capable of depending upon the GRC status of those to whom they are attracted. For example, a person with a sexual orientation towards women – i.e. a heterosexual man or a lesbian – is someone who is attracted both to

---

<sup>17</sup> *Forstater v CGD Europe* [2022] ICR 1 EAT

<sup>18</sup> EqA s.10

<sup>19</sup> See *Page v NHS Trust Development Authority* [2021] EWCA Civ 255

<sup>20</sup> See *Eweida v United Kingdom* (2013) 57 EHRR 8 ECtHR; *Higgs v Farmor’s School* [2023] ICR 1072 EAT (currently under appeal to the Court of Appeal)

<sup>21</sup> EqA s.12

biological women and to those transwomen who have GRCs, but not to transwomen who do not have GRCs.

21.2. The sexual orientation of people with the protected characteristic of gender reassignment changes according to their GRC status. For example, a transwoman who has a GRC and is attracted to women is a lesbian for the purposes of the EqA, but a transwoman without a GRC who is attracted to women is a heterosexual man.

21.3. There are no discrete categories within the protected characteristic for people whose sexual orientation is defined by biological sex – i.e. women who are attracted to biological women or to biological men and men who are attracted to biological men or biological women.

22. The question of whether these are sensible propositions – and indeed whether their result is that the protected characteristic of sexual orientation is empty of effective meaning – is likely to be considered by the Supreme Court later this year<sup>22</sup>.

#### *Direct discrimination*

23. The direct discrimination provisions<sup>23</sup> in the EqA are structured around a comparative exercise. The complainant must show that, in being subjected to a detriment, he or she was treated less favourably than another person (“the comparator”) was or would have been treated, and that the reason for the treatment was a protected characteristic. The comparator may be a real or hypothetical person, and must be a person who is in materially similar

---

<sup>22</sup> In the appeal against the decision of the Inner House of the Court of Session in *For Women Scotland v The Scottish Ministers* [2023] CSIH 37

<sup>23</sup> EqA s.13

circumstances to the complainant<sup>24</sup> other than that he or she does not have the protected characteristic.

24. In relation to the protected characteristics of sex and gender reassignment, the comparative exercise works as follows:

24.1. For direct sex discrimination, the only material difference between the complainant and the comparator should be their sex<sup>25</sup>. Therefore a woman must not be treated less favourably because she is a woman than a man was or would have been treated in materially similar circumstances (and vice versa). For these purposes:

(a) A transwoman who has a GRC is legally a woman, and therefore must not be treated less favourably because of sex than a man was or would have been treated in otherwise materially similar circumstances.

(b) However a transwoman who does not have a GRC is legally a man, and therefore must not be treated less favourably because of sex than a woman was or would have been treated in otherwise materially similar circumstances.

24.2. For direct gender reassignment discrimination, the only material difference between the complainant and the comparator should be that the complainant has the protected characteristic of gender

---

<sup>24</sup> EqA s.23

<sup>25</sup> There may also be discrimination by perception in which the complainant is discriminated against because she or he is perceived to have the protected characteristic, or discrimination by association in which the complainant is discriminated against because of his or her association with a person who has the protected characteristic.

reassignment<sup>26</sup> and the comparator does not. Their legal sex should be the same, as this is part of being in materially similar circumstances. Thus:

- (a) A transwoman who has a GRC (and is therefore legally a woman) must not be treated less favourably because of the protected characteristic of gender reassignment than a woman who does not have that protected characteristic was or would have been treated in otherwise materially similar circumstances. A situation in which this complainant was excluded from a women-only service would, on the face of it, give rise to a good claim of direct gender reassignment discrimination, if the reason for the exclusion was the protected characteristic of gender reassignment. This is because the comparator – as a woman – would not have been excluded from the service. However, there are exceptions in the EqA which allow the service provider to exclude transwomen (with or without GRCs) from women-only services in certain circumstances. These are dealt with in §29 below.
- (b) A transwoman who does not have a GRC (and is therefore legally a man) must not be treated less favourably because of the protected characteristic of gender reassignment than a man who does not have that protected characteristic was or would have been treated in materially similar circumstances. One reason why this complainant could not win a direct gender reassignment discrimination complaint about being

---

<sup>26</sup> As above

excluded from a women-only service is that the comparator – a man – would also have been excluded. Another reason why this claim would fail is that the reason for the complainant's exclusion from the service would (probably) not be the protected characteristic of gender reassignment; it would be the fact that the complainant is a man.

*Indirect discrimination*

25. Indirect discrimination occurs where a person is subject to an unjustifiable provision, criterion or practice ("PCP") which is apparently neutral but which puts or would put people who share a protected characteristic at a particular disadvantage by comparison to those who do not share it, and which puts the complainant at that disadvantage<sup>27</sup>.
26. Thus indirect discrimination does not depend on the same individual comparative exercise as direct discrimination. The comparative exercise in indirect discrimination is at the group level: it must be shown that those with the protected characteristic are disadvantaged by comparison to those without it. The same rules apply to this group comparison exercise as apply to the individual comparison exercise in direct discrimination<sup>28</sup>. That is, the circumstances of the two groups for comparison must be materially similar, other than the protected characteristic<sup>29</sup>. Therefore:
  - 26.1. If it is argued that transwomen with GRCs (who have the legal status of woman for the purposes of the EqA) are placed at a group disadvantage by a PCP, that disadvantage must be demonstrated by comparison to the position of women generally.

---

<sup>27</sup> EqA s.19

<sup>28</sup> see §23

<sup>29</sup> EqA s.23

- 26.2. If it is argued that transwomen without GRCs (who are men for the purposes of the EqA) are placed at a group disadvantage by a PCP, that disadvantage must be demonstrated by comparison to the position of men generally.
27. Other key differences between direct and indirect discrimination are that:
- 27.1. In indirect discrimination there is no need to show that the protected characteristic is the reason why the PCP causes a disadvantage. It is only necessary to show that people with the protected characteristic are put at the disadvantage by the PCP.
- 27.2. Indirect discrimination can be justified. Thus even if the complainant shows that he or she was subjected to an indirectly discriminatory PCP, the complaint is defeated if the PCP is shown to have been a proportionate means of achieving a legitimate aim.
28. The way in which the indirect discrimination provisions work in relation to transwomen who are not permitted to use a women-only service is as follows:
- 28.1. A rule that a service is for women only is a PCP. It is apparently neutral because it applies to everybody who might use the service rather than being an exclusion targeted at an individual<sup>30</sup>.
- 28.2. Because transwomen who do not have GRCs are men for the purposes of the EqA, the starting point should be that they are not entitled to access the service (otherwise it would not be a women-only service). However, because transwomen who do have GRCs

---

<sup>30</sup> Note that a single sex service must meet the conditions in Sch 3 Part 7 §§26–27 EqA or it will not be lawful: see §29.1 below.

are women for the purposes of the EqA, the starting point for them should be that they are permitted to access the service.

28.3. Because of the different starting points, if all transwomen are excluded from the service along with men generally, then the arguments relating to group disadvantage are different depending on whether the complaint is about those with GRCs or those without:

- (a) For those without GRCs, the group comparison would have to be with men generally. These complainants would need to show that they are put at a particular disadvantage by being subject to the PCP, for example on the basis that they are placed at increased danger of violence if they are required to use the alternative men's provision, whereas men generally would not be put at that disadvantage<sup>31</sup>.
- (b) Showing group disadvantage would be easier for those with GRCs, since their group comparison would be with women generally. They would argue that the PCP means that they are excluded from the service whereas women generally are not.

28.4. If group disadvantage is shown, and the complainant can also demonstrate the same disadvantage at an individual level, then on the face of it the PCP is indirectly discriminatory because of the protected characteristic of gender reassignment.

---

<sup>31</sup> This is a contested assertion, and is used here merely as an example of the sort of argument which might be made.

- 28.5. It would then be open to the service provider to try to show that the PCP is justified as a proportionate means of achieving a legitimate aim despite its discriminatory effect. A legitimate aim in the context of a women-only service might be something like privacy, dignity and safety for women. The question of whether the rule is proportionate to meet the aim is context-specific. The rule must be both appropriate and reasonably necessary to achieve the aim, and the service provider should have considered whether there were less discriminatory ways of achieving the aim. It should have balanced the discriminatory effect of the rule against the reasonable needs or legitimate interests of others<sup>32</sup>. The PCP must be a genuine attempt to achieve the aim, and it will be difficult to show this if the PCP is not applied in a consistent and systematic manner<sup>33</sup>. Thus it is easier to prove that the PCP is justified if it is applied as a general rule rather than as a series of individual responses to particular circumstances. It is not necessary to justify the rule on every occasion that it is invoked, since to do that would be to undermine the consistency and the systematic nature of the rule itself<sup>34</sup>.
- 28.6. That is not to say that exceptions cannot be made to the rule. In general a mechanism for making exceptions to a blanket rule may undermine the coherence of the rule and render it unjustified, particularly if the exceptions are broad and appear to run counter

---

<sup>32</sup> See for example *Rosenblatt v Oellerking GmbH* (C-45/09) [2011] 1 CMLR 32; *Fuchs v Land Hessen* (C-159/10) [2012] ICR 93

<sup>33</sup> *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalenlippe* (C-341/08) [2010] 2 CMLR 31 §68

<sup>34</sup> *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 SC per Lady Hale at §§65–66; *Reference by the Attorney General for NI - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 per Lord Reed PSC at §29



to the aims pursued by the rule<sup>35</sup>. However in some circumstances an exception mechanism may “mitigate the rigidity” of the rule, particularly if it actually furthers the aims of the rule<sup>36</sup>.

- 28.7. If the service provider successfully justifies the PCP, the complaint is defeated. If it does not, then in theory it is still open to the service provider to rely upon the exceptions dealt with in the section below.

*Exceptions for direct and indirect discrimination*

29. There are two types of separate or single-sex exceptions in the EqA:

- 29.1. The sex discrimination exceptions (“the SD exceptions”)<sup>37</sup>, which relieve a service provider of liability for unlawful sex discrimination when it provides a service for only one sex. The provision of the service only to women or only to men (or separately to women and men) must be objectively justified. Note that this is the same objective justification test which appears in the indirect discrimination test (see §28.5 above above) although the relevant factors to take into account may be different. A transwoman with a GRC, as a legal woman, could not be excluded from a women-only service using these exceptions. A transwoman without a GRC is legally a man, so in principle should be excluded if these exceptions are invoked<sup>38</sup>. The SD exceptions can be invoked only in relation to the actual provision of single sex services and are subject to various conditions.

---

<sup>35</sup> *Petersen*

<sup>36</sup> *Fuchs v Land Hessen (C-159/10) [2012] ICR 93* at §§88-91

<sup>37</sup> Sch 3 Part 7 §§26–27 EqA

<sup>38</sup> Although see *AEA v EHRC [2021] EWHC 1623 (Admin)*, a non-binding first instance permission judgment in which this position was doubted by the judge for reasons that are too complex to explore here and which I consider to be of highly doubtful merit.

29.2. The gender reassignment discrimination exceptions (“the GRD exceptions”)<sup>39</sup>. These exceptions may be invoked by a service provider to justify excluding transwomen (whether or not they have GRCs) from a women-only service which has already been constituted in a way which is lawful under the SD exceptions. The GRD exceptions are broader than the SD exceptions, since they relieve service providers of liability for gender reassignment discrimination in relation to “anything done” in connection with the provision of single sex services, where that thing would otherwise be an act of direct or indirect gender reassignment discrimination. Again, these exceptions are subject to an objective justification test which is the same basic test that applies to indirect discrimination and to the SD exceptions (see §28.5 above) , although the relevant factors may be different.

### *Harassment*

30. Harassment under the EqA<sup>40</sup> consists of engaging in unwanted conduct related to a protected characteristic which has the purpose or effect of violating a person’s dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment<sup>41</sup>.

31. In order to amount to harassment the conduct need only be “related to” a protected characteristic; it need not be “because of” the protected characteristic (as it does in direct discrimination). This means that conduct which is not deliberately or even unconsciously motivated by bigotry or

---

<sup>39</sup> Sch 3 Part 7 §28 EqA

<sup>40</sup> Harassment is also unlawful under the Protection from Harassment Act 1997 (“PHA”). This relates to conduct like stalking. The test for harassment under the PHA is different to that under the EqA.

<sup>41</sup> EqA s.26(1)

prejudice may amount to unlawful harassment. In this respect, harassment under the EqA is a broad concept.

32. However, in another respect harassment is narrower than is commonly understood. In cases where the conduct complained of had the effect (rather than the purpose) of violating the victim's dignity etc, it does not amount to harassment unless it was reasonable in the circumstances for the conduct to have had that effect, taking into account the perception of the purported victim and the other circumstances. This is a mixed subjective and objective test<sup>42</sup>. The objective element is vital: harassment can never be defined solely by reference to the purported victim's feelings about the alleged conduct<sup>43</sup>.
33. The wider circumstances which are to be taken into account in this analysis will always include the nature of the environment in which the conduct took place and may also include other legal duties which have effect<sup>44</sup>. Thus, conduct which amounts to unlawful harassment in a workplace might not do so in a service provision setting.

*The Public Sector Equality Duty & Equality Impact Assessments*

34. The PSED<sup>45</sup> is a duty placed on public authorities to have due regard to:
  - 34.1. The need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EqA.
  - 34.2. The need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not.

---

<sup>42</sup> See *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151 EAT

<sup>43</sup> See *Land Registry v Grant* [2011] ICR 1390 CA per Elias LJ at para 47

<sup>44</sup> *Pemberton v Inwood* [2018] ICR 1291 CA

<sup>45</sup> EqA s.149

- 34.3. The need to foster good relations between persons who share a relevant protected characteristic and persons who do not<sup>46</sup>.
35. This is a duty to have “due regard” rather than to achieve a particular outcome<sup>47</sup>. The three aims must be consciously considered in a way which is meaningful, rigorous and substantial, and not a tick box exercise<sup>48</sup>. Equality should be at the centre of policy making, side by side with all other pressing circumstances of whatever magnitude<sup>49</sup>. The public authority should pay reasonable regard to any countervailing factors<sup>50</sup>.
36. It is good practice for a public authority which is subject to the PSED to undertake an EIA when introducing new policies, practices or decisions, and to keep records and gather relevant information.

### **The Human Rights Act 1998**

37. The Human Rights Act 1998 (“HRA”) incorporates the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) into domestic law. Under the HRA, Convention rights are enforceable against public authorities or those exercising public functions<sup>51</sup>. This includes local authorities. A person who is the victim of a breach of a Convention right by a local authority may bring proceedings against it directly under the HRA. Furthermore, courts and tribunals must, so far as

---

<sup>46</sup> See further the EHRC’s Technical Guidance on the PSED

<sup>47</sup> *R (Rahman) v Birmingham City Council* [2011] EqLR 705; *R (Williams) v Surrey County Council* [2012] EqLR 656

<sup>48</sup> *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158

<sup>49</sup> *Stuart and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at §60

<sup>50</sup> *Williams*

<sup>51</sup> HRA s.6(1)

possible, apply all other legislation in a way which is compatible with Convention rights<sup>52</sup>.

38. Relevant Convention rights are:

38.1. Article 8, which contains the right to respect for private and family life. This is a qualified right, so it can be interfered with by public authorities if the interference is prescribed by law and is necessary in a democratic society in pursuit of a legitimate aim. The specified legitimate aims are the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others<sup>53</sup>. Art 8 encompasses:

- (a) The right of post-operative “transsexuals” to “personal development and to physical and moral security in the full sense enjoyed by others in society” by way of the right to legal gender recognition<sup>54</sup>. In the UK, this right has been held to be satisfied by the GRA (see §§9–12 above)<sup>55</sup>.
- (b) Aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world<sup>56</sup>.

---

<sup>52</sup> HRA s.3

<sup>53</sup> See *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 per Lord Reed JSC at §74 for the principles relevant to determining whether it is proportionate to interfere with a qualified Convention right.

<sup>54</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 18 ECtHR at §90

<sup>55</sup> *In the matter of an application by JR111 for Judicial Review* [2021] NIQB 48

<sup>56</sup> *Evans v United Kingdom*, 2007

(c) The right for individuals (especially children) to be free from violence by third parties<sup>57</sup>. This is a duty which the State must discharge by maintaining and applying an adequate legal framework to afford protection against acts of violence<sup>58</sup>.

38.2. Article 9, which provides that everyone has the right to freedom of thought, conscience and religion. The right to hold a religion or belief is absolute, but the right to manifest it is qualified. Manifestation includes outward expressions which have a close and direct nexus with the underlying of religious or philosophical belief<sup>59</sup>. The qualifications in Art 9.2 are similar to those in Art 8.2 (above).

38.3. Article 10, which guarantees the right to freedom of expression. This is a qualified right. The qualifications in Art 10.2 are similar to those in Arts 8.2 and 9.2 (above). Art 10 cannot be relied upon to protect the gravest forms of "hate speech"<sup>60</sup>, but it does protect speech which is offensive, shocking, disturbing, dangerous or irresponsible<sup>61</sup>. It protects "the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative" – otherwise it would not be a freedom worth having<sup>62</sup>. Under the HRA, courts and tribunals must have "particular regard" to the importance of freedom of expression<sup>63</sup>.

---

<sup>57</sup> See *C v Romania*, 2022, §§ 62-66

<sup>58</sup> See *Sandra Janković v. Croatia*, 2009, §45

<sup>59</sup> *Eweida v United Kingdom* (2013) 57 EHRR 8 ECtHR

<sup>60</sup> I.e. those which fall within Art 17 of the Convention

<sup>61</sup> *R v Central Independent Television plc* [1994] Fam 192 per Hoffmann LJ at 202-203

<sup>62</sup> *Redmond-Bate v DPP* (1999) 7 BHRC 375 per Sedley LJ at §20

<sup>63</sup> HRA s.12(4)

- 38.4. Article 14, which provides that the other Convention rights must be enjoyed without 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”. Note that:
- (a) “Other status” here is a very broad concept, and certainly capable of including sexual orientation or gender identity.
  - (b) A successful complaint involving Art 14 does not require there to be a violation of another Convention right; it requires only that another Convention right is engaged.
  - (c) Art 14 can impose positive obligations to prevent or stop discrimination. A failure on the part of the State to attempt to correct inequality through different treatment may in give rise to a breach of Art 14.

## **ADVICE**

### **The Resolution**

*Question I: What is the legal position of the motion passed by MCC on 2 February 2022?*

*Question XI: What is the relevance for MCC of the situation in South Oxfordshire and Bristol that their motions are not legally binding? If the result is the same, i.e. that the motion is not legally binding, what is the lawfulness of policies made pursuant to it?*

39. It is my view that the MCC Resolution is not binding upon the MCC Executive, essentially for the same reasons as those set out in the documentation relating to the similar resolutions made by South Oxfordshire and Bristol Councils and stated at the MCC meeting of 11 April 2023 attended by Cath Dyson of WRN and Mary Curran of LWD.

40. A local authority may express political opinions or make a “political gesture” by way of a resolution<sup>64</sup>. A resolution of this sort does not bind its Executive. Although the MCC Resolution does contain some substantive matters, such as a commitment to write to the Government seeking funding and to conduct an audit, it does not seek to oblige the MCC Executive to make particular decisions in relation to the contested wording “trans women are women [etc]”. I think it likely that a court would find that at least this element of the Resolution was a political gesture. See §§51ff below for the legality of policies or service provision based on the Resolution.

*Question II: What is the impact of the lack of consultation / equality impact assessment before or since passing the motion?*

*Question VII: Does the decision to adopt the motion, and any application of the motion to women only service provisions, comply with the Public Sector Equality Duty?*

41. Although the Resolution is not strictly binding, in passing it MCC was exercising a “function” for the purposes of the PSED in s.149 EqA<sup>65</sup>. MCC was therefore required to comply with the PSED when passing the Resolution, whether or not the Resolution has had or will have any substantive effect on the practical conduct of MCC’s affairs.
42. In considering whether MCC complied with the PSED, a court can draw inferences from the materials placed before MCC at the meeting when it was passed, from the terms of the Resolution and from the minutes (or in this case the video) of any debate. It is not necessary for there to be any explicit mention of the PSED in order for a court to be satisfied that the duty has been complied with, so long as there is evidence that the Councillors addressed their minds to the relevant factors as a matter of substance<sup>66</sup>.

---

<sup>64</sup> *R (Jewish Rights Watch) v Leicester City Council* (2018) EWCA Civ 1551

<sup>65</sup> *R (Jewish Rights Watch) v Leicester City Council* (2018) EWCA Civ 1551 and see §§34–36

<sup>66</sup> As above



43. I do not think that a court would find that MCC complied with the PSED in passing the Resolution. No EIA was conducted and neither the debate nor the body of the Resolution contained mention of the sorts of factors that are relevant to the PSED. Nor does the Resolution appear to have been the subject of any consultation or monitoring. There is no acknowledgement of any countervailing considerations such as the possibility of any conflicts of rights, despite the fact that at the time the public conversation about conflicts between trans rights and the rights of women, children, LGB people and others was heated and vociferous.
44. It is now much too late to challenge MCC by way of an application for judicial review in respect of its failure to consider the PSED before passing the Resolution. Judicial review is subject to a strictly enforced three month time limit – even an application for judicial review made in less than three months can be rejected for undue delay. That is not to say, however, that the failure is of no consequence. It is a matter that may be referred to in other legal proceedings as background evidence. In EqA cases, background evidence is often the basis upon which inferences of unlawful discrimination are made. In this matter, it may be of significance given that the Resolution has been referred to as the basis for some level of decision-making. See for instance the Communities and Equalities Scrutiny Committee of 6 February 2024, at which the Committee Chair refused to answer questions about the consequences of the Resolution for the provision of single-sex services, amongst other things.

*Question VI: Does the motion comply with the Equality Act 2010? Is it unlawful sex discrimination?*

45. The Resolution does not appear to me to be capable of amounting to unlawful sex discrimination in itself. A claim of direct sex discrimination

under the EqA requires an individual to identify a detriment to which she has been subjected, which amounts to less favourable treatment than that to which a man was or would have been subjected in similar circumstances and which was done to her because of sex (see §§23–24 above). I cannot identify a basis upon which an individual could credibly claim that the Resolution is itself a detriment in this sense. However, as discussed below, there may be arguments that the manner in which MCC implements the Resolution is unlawful under the EqA

*Question XIV: What is the legal position of MCC in relation to its approach to data collection and monitoring e.g. (1) 'gender & gender identity' data is reported and lack of clarification if data is reported by sex, and (2) they are asking residents of Manchester 'Which of the following describes how you think of yourself? and an option is 'Female (includes trans woman)'*?

46. MCC collects data in order to plan its service provision and to monitor its compliance with the PSED. As stated by MCC in one of its emails on the subject: "Monitoring is an invaluable tool that gives organisations such as ours the evidence base to determine whether they are effective in turning their good intentions into tangible outcomes".
47. Whilst it is, of course, open to a local authority to collect whatever demographic data it thinks is most appropriate and useful for its purposes, if the data is to be used in an effective manner for the purposes of PSED compliance monitoring, it is necessary to collect it according to the protected characteristics in the EqA.
48. In an email exchange in early March 2023, Cath Dyson and Mary Curran raised concerns with the Chair of MCC's Resources and Governance Scrutiny Committee, Cllr Simcock, about the Council's approach to surveys and consultations. The examples given in their emails were:

- 48.1. The demographic data collected for the purposes of MCC's 2024/2025 budget consultation results. This consultation had posed questions about resource allocation and Council priorities to Manchester residents. The results were analysed according to demographic characteristics which did not map onto the protected characteristics in the EqA. Amongst other things, Ms Dyson and Ms Curran asked what was meant by the characteristic "gender and gender identity" and by the categories "female" and "male" referred to in the demographic analysis.
- 48.2. A survey called "Our Manchester 2025–2035: The city's future, shaped by you", which appeared to conflate sex and gender reassignment, failed clearly to define "gender identity" and failed to disaggregate "gay" and "lesbian". For example, question 11 asked "Which of the following describes how you think of yourself?". The options given were "Male (including trans man)", "Female (including trans woman)", "Non-Binary" and "In another way". In the sexual orientation question, "Gay or lesbian" was a single option, whereas "Bisexual" and "Pansexual" were alternatives.
- 48.1. MCC's Communities and Equalities Scrutiny Committee document entitled "How we met our Public Sector Equality Duty in 2023–24", which stated "Across the 138,709 active participants accessing leisure facilities, 48% have declared themselves as female, and 52% male". Ms Dyson and Ms Curran pointed out that this data should relate to sex and not self-identified gender.

49. These errors and problems in data collection are capable of causing MCC legal difficulties insofar as its compliance with the PSED is concerned.

*Question XII: As MCC are defining trans women as women, would this apply to children, i.e. are 'transgirls' girls?*

50. It seems to me to be likely that MCC intends the Resolution to relate to children as well as adults. That would be consistent with the position usually taken in these matters, and to a certain extent with the EqA which defines "woman" as including females of any age<sup>67</sup>.

### **Policies & services**

51. My response to these questions is premised on my assumption that the intended meaning of the Resolution is that all people who self-identify as women should be treated for all purposes as women and all people who self-identify as men should be treated for all purposes as men, and that the consequence of this should be that services are provided on a self-ID basis (it is not clear to me what consequences, if any, are intended to flow from the Resolution in respect of those who identify as non-binary). This interpretation appears to be supported by MCC's communications, such as the statement entitled "Our commitment to being a trans and non-binary inclusive workplace".

*Question XI: What is the relevance for MCC of the situation in South Oxfordshire and Bristol that their motions are not legally binding? If the result is the same, i.e. that the motion is not legally binding, what is the lawfulness of policies made pursuant to it?*

*Question III: What is the legal standing of the application of this position into MCC policies and service provision, i.e. using a definition of women which includes males self-identifying as women, to services including (but not limited to) leisure provision, single sex personal care, domestic violence and rape crisis support, homeless shelters, children's social care,*

---

<sup>67</sup> EqA s.212(1)

*education and youth services, as well as safeguarding of women and girls within these services?*

*Question V: What is the impact of your advice on III and IV above for biological men with a GRC?*

*Question X: What are the risks to MCC of acting in breach of any legal duties by (a) adopting the motion and (b) making policy and service decisions based on the motion?*

52. I take these four questions together because they all relate essentially to the question of whether it is lawful for MCC to provide services on a self-ID basis (whether in reliance on the Resolution or at all).
53. MCC's current policy as regards transwomen in women-only swimming sessions is to be inclusive on a "case by case" basis. A trans person may be excluded "when it is proportionate to rely on one of the exemptions in the Act" and a person who appears to be pretending to be trans in order to cause trouble may be refused entry. To date no EIAs have been provided relating to this policy. Historical EIAs relating to leisure provision have been provided which are inadequate and inaccurate as to basic details, although notably they include explicit mention of the need for single-sex provision for women (and especially Muslim women). MCC has informed WRN and LWD that it is developing a "refreshed approach" with guidance and training on conducting EIAs.
54. It is of note that the MCC document 'How We Met Our Public Sector Equality Duty In 2023-24' (dated 6 February 2024) contains an "LGBTQIA+ 'Deep Dive' report" within which it is stated that "Public services in the broadest possible sense should be LGBTQIA+ inclusive and acceptable" and that "Social inclusion requires dismantling all structural policies, processes and procedures that excludes sexual orientation and gender identity or expression, and that negates a person's identity". These statements would seem to indicate a clear intention to drive forward the

trans inclusivity sentiment expressed in the Resolution, and there is no mention of consideration having been given to possible conflicts of rights.

55. Against that background WRN and LWD are concerned that MCC are applying the Resolution to other separate or single-sex services, such as personal care, residential services for youth groups, refuges, homeless hostels and so on. A Freedom of Information Request for clarification of MCC's position in these areas remains outstanding (and significantly overdue).
56. If MCC has operationalised the Resolution in those of its policies and practices which relate to separate and single-sex services as it appears to have done in swimming sessions, then in my opinion it is acting unlawfully.
57. As explained above, the EqA permits service providers to discriminate against men or against women by excluding them from services which are provided for the exclusive use of the opposite sex, as long as the conditions in Sch 3 Part 7 §§26 or 27 EqA (the SD exceptions) are met (see §29.1 above). Thus in circumstances where treating the sexes differently is justifiable, the SD exceptions displace the presumption that women should be treated the same as men (and vice versa).
58. As the EqA is currently interpreted<sup>68</sup>, for these purposes a "woman" is a person with the legal status of woman: that is, a biological girl or woman or a transwoman who has a GRC, and a "man" means a biological boy or man or a transman who has a GRC (see §18 above). Note that the minimum age at which a person can obtain a GRC is 18, so trans-identifying children cannot have the legal status of the opposite sex for the purposes of the EqA.

---

<sup>68</sup> *For Women Scotland v The Scottish Ministers* [2023] CSIH 37 (currently under appeal to the Supreme Court)

Therefore a women-only service which relies upon the SD exceptions should be open to girls, women and transwomen who have GRCs. The only other options for the service are:

- 58.1. To operate on a unisex basis, without invoking any of the exceptions in the EqA.
  - 58.2. To operate on a biological sex basis by invoking the GRD exceptions in Sch 3 Part 7 §28 EqA. These permit service providers to exclude people who are legally women but are biologically men from a women-only service (or vice versa), so long as the statutory conditions are met, thus displacing the presumption that people with GRCs should be treated the same as people of the opposite biological sex (see §29.2 above).
59. If, instead of any of these three options, the service provider admits into a women-only service anybody who claims the identity "woman", regardless of biological sex or GRC status, the service will fall foul of the requirements of the SD exceptions. It will not be a lawfully constituted separate or single-sex service and it will therefore be vulnerable to legal challenge. Specifically, a man could bring a complaint of direct sex discrimination on the straightforward basis that he had been subjected to a detriment (exclusion from the service) because he was a man, and that in excluding him the service provider had treated him less favourably than it treated or would have treated a woman in the same circumstances (see §24.1 above). The service provider would not be able to rely on the SD exceptions to defeat the claim because the service would be open to some people who are legally men, and there are no other statutory defences available for direct sex discrimination in these circumstances.

60. In short, therefore, in my opinion it would not be lawful for MCC to operate its separate or single-sex services on a self-ID basis. The legal position reflects the fact that there is no way to acquire all the legal rights of the opposite biological sex and the only way to acquire some of them is to obtain a GRC. The EqA provides (broadly) that people with the protected characteristic of gender reassignment must not be treated badly because of (or in relation to) the protected characteristic, but it does not of itself grant access to services which are justifiably provided for the exclusive use of the opposite sex. A GRC shifts the balance so that there is a presumption in favour of using services which are provided for the opposite biological sex, but this presumption can be displaced by the use of the GRD exceptions.
61. A significant practical problem emerges from the legal position, however. This is that in many types of service it is difficult to see how service providers can sensibly be expected to find out who has a GRC and who does not, or to create and implement policies accordingly. It is not (as commonly thought) unlawful to ask a person to confirm whether they have a GRC, but in many types of service it will be impracticable to do so, and it will very often be felt to be undesirable to intrude on the privacy of service users in this way. If a service provider cannot or does not wish to check the GRCs status of service users, then on the face of it the only lawful options are to operate the service on a biological sex basis or to make the service unisex.
62. However, if a service provider chooses the unisex option it must be careful that this does not result in indirect discrimination against other service users. For example there are some circumstances in which a failure to provide a separate or single-sex facility or service could amount to indirect discrimination against people with other protected characteristics. Thus if a



leisure facility provides only unisex changing rooms without any separate provision for women only, this is likely to put Muslim women at a particular disadvantage because, for a considerable number of Muslim women, it is a core tenet of their faith that they should not undress in the presence of men. It would be difficult for the leisure facility to justify indirect discrimination of this sort if it could not show that no less discriminatory alternative was available. If the leisure centre is run by a public authority, a failure to provide separate or single-sex services on at least a legal sex basis may evidence a breach of the PSED, especially if it did not conduct a proper EIA (see §§9–12 above).

63. One less discriminatory alternative in this sort of situation might be to open the accessible facilities to transwomen or to Muslim women (or indeed to anybody who wishes to get changed in private). In my view this would be unlikely to be a justifiable solution, not least because it would reduce the availability of the accessible facilities for people with disabilities. A more justifiable less discriminatory alternative might be to provide women-only and men-only changing rooms on a biological sex basis and unisex changing rooms in addition to the accessible facilities. Whether this is a justifiable solution in a particular service will depend on the circumstances.
64. Another problem for service providers opting to provide unisex or self-ID services only is the possibility that this will contravene laws other than the EqA. For example:
  - 64.1. Where facilities are used by members of staff, Regulations 20, 21 and 24 of the Workplace (Health, Safety and Welfare) Regulations 1992 require employers to provide toilets and changing rooms either on a single-sex basis or in individual lockable rooms.

- 64.2. Many service providers will be subject to safeguarding duties under the Children Act 1989 and the Safeguarding Vulnerable Groups Act 2006. Where services or facilities have been designated as single-sex in order to protect women and girls from sexual violence and harassment (which are perpetrated overwhelmingly by men) the satisfaction of these duties may be undermined by allowing access to male people on a self-ID basis.
- 64.3. MCC is a public authority and therefore has duties directly under the HRA: see §§78—86 below.
65. Note also that the legal position as regards services provided for the benefit of lesbians and / or gay man is particularly complex. Offering a service of this sort on a self-ID basis might in some circumstances give rise to a complaint of indirect sexual orientation discrimination. See §21 above for a summary of the difficulties inherent in the current interpretation of the EqA for the meaning and practical effect of the protected characteristic of sexual orientation.

*Question IV: The only such policy we are currently aware of is MCC's decision not to have a blanket policy not to refuse trans women to women's swimming sessions. Would it be unlawful to have a blanket policy preventing trans women accessing women's single sex services? What are the legal or practical difficulties arising from refusing to have a blanket policy for access to women's swimming sessions?*

66. By email on 30 August 2023, the City Solicitor stated in response to a query that "The Council does not consider that it is necessary or proportionate to operate any blanket bans on trans women accessing women only services". This caused some consternation amongst a handful of Councillors, who stated that when they passed the Resolution they had understood it was on the grounds that separate or single-sex services would be maintained.

67. Applying a “blanket” rule is well-established as the conventional approach to providing services and facilities on a single sex basis. The overwhelming majority of women’s and men’s facilities are not subject to case-by-case decision making, not least because it would be wholly impracticable if an assessment had to be made in respect of every potential user of a public toilet or changing room.
68. The legal mechanism which permits these familiar services to be provided in this way is the SD exceptions in the EqA (see §29.1 above). The GRD exceptions (see §29.2 above) build on the SD exceptions, and allow service providers to exclude people with the protected characteristic of gender reassignment from separate or single-sex services in their acquired gender (i.e. to exclude all transwomen from women-only services). The two sets of exceptions are structurally similar, and both are subject to a justification test which requires the service provider to show that the separate or single-sex rule is a proportionate means of achieving a legitimate aim. In my view there is no reason on the face of the EqA why a different approach should be taken to applying the justification test to the GRD exceptions than is taken to applying it to the SD exceptions, although different factors may have to be taken into consideration in each case.
69. Where a rule has to be justified by the “proportionate means of achieving a legitimate aim” test, it is settled law that it is strongly advisable – and in many cases necessary – to take a systematic approach to applying it. This is because it must be shown that the rule is a genuine attempt to achieve the legitimate aim (see §28.5 above). Thus a service provider will struggle to satisfy the justification test if it cannot show that a separate or single-sex rule is a coherent and consistently applied policy rather than a series of case-by-case decisions.

70. Furthermore, where the legitimate aim which the rule seeks to achieve is, for example, the privacy and dignity of women, the fact that women can depend on the single-sex rule might be an important factor in its justification. For example, when accessing a one-to-one rape crisis support service it may be essential for a woman to know in advance that she will not be counselled by a man. If she cannot be sure of that because the rule is administered case-by-case, her dignity may be undermined because she is unable to use the service without that certainty.
71. However, it is also a general principle that decision-makers should not fetter their discretion, since this can lead to irrational results. It should usually be possible to depart from a policy on an exceptional basis. Where exceptions are made to the rule these should be such that they do not undermine the coherence of the rule and, ideally, that they contribute to the achievement of the legitimate aim (see §28.6 above). An example is allowing pre-pubertal boys to use the women's changing room with their adult female carers. Arguably, this does not undermine the separate sex rule because the focus of the rule is keeping adult men away from women and girls. It may also be seen to contribute to the achievement of the aim of providing safety, privacy and dignity for women because it allows women who are carers of children to use the facilities, which in many cases they would not be able to do if they could not bring their male children with them.
72. It should be noted that the justification test may also arise in this context through various other routes, such as:
- 72.1. Where a person with the protected characteristic of gender reassignment complains that the separate or single-sex rule is

indirectly discriminatory and the service provider invokes the justification test in the indirect discrimination provisions of the EqA (see §§27.2–28.5 above).

72.2. Where another service user complains that a failure to implement a separate or single-sex rule is indirectly discriminatory because of a different protected characteristic, such as religion (see §62 above).

72.3. Where the service provider is a public authority (like MCC) and is therefore subject directly to the HRA. In a case brought under the HRA the public authority may be required to satisfy a full proportionality assessment, which is a more robust version of the justification test.

73. Accordingly, my opinion is that MCC is likely to be placing itself in legal jeopardy if it is refusing to apply a consistent policy to its separate or single-sex services such as swimming sessions and is instead insisting on adopting a case-by-case approach. I would not necessarily describe the requisite policy as a “blanket rule”, since it should be capable of exceptional relaxation, but it should be a logical, consistent, systematic and reliable approach which genuinely seeks to achieve a legitimate aim.

*Question VII: Does the decision to adopt the motion, and any application of the motion to women only service provisions, comply with the Public Sector Equality Duty?*

74. I have addressed at §41ff above the question of whether the decision to adopt the Resolution was a breach of the PSED.

75. As stated at §56 above, it is my view that if the Resolution is operationalised in such a way as to result in the establishment of a separate or single-sex service which purports to be accessible on a self-ID basis, this will be unlawful because the service will not comply with the SD exceptions in the

EqA. Whether this will amount to a breach of the PSED or not is a somewhat different question, although I think it arguable that it is likely to do so.

76. The PSED is a duty to “have due regard” to the factors set out at §34 above, rather than a duty to achieve any particular outcome. The sorts of matters which are usually examined to see whether a decision or policy of a public authority complies with the PSED include whether active attention was given to equality considerations, whether an EIA was conducted, whether consultation was carried out, whether monitoring is conducted and so on. The analysis focusses on the process by which a decision or policy has been arrived at. Thus, on a hypothetical basis:

76.1. If MCC adopts a policy or practice of running a self-ID service merely because this accords with the terms of the Resolution it seems to me highly unlikely that it could demonstrate compliance with the PSED, given the lack of attention it appears to have paid to the PSED when passing the Resolution (see §41ff above).

76.2. If, on the other hand, MCC undertakes an EIA and pays attention to the relevant equality considerations, it is hard to see how it could then proceed to establish a separate or single-sex service on a self-ID basis, since this would (in my opinion) be unlawful. It seems to me likely that any decision-making process which results in a self-ID service would be vulnerable to a charge of inadequacy and thus difficult for a public authority to defend.

*Question XV: Does MCC's contradictory and unclear messaging e.g. around provision of same sex care and lack of communication to staff or service users about the change in*

*definition of woman, which potentially misleads the public, create any legal or safeguarding risks for MCC?*

77. In the papers provided to me I have seen numerous examples of legally incorrect communications or statements made by MCC. Most striking is the EIA documentation, which has been carefully analysed by WRN and LWD. This contains errors such as the conflation of protected characteristics, the use of "gender" as a protected characteristic and the omission of "sex". If these errors lead to unlawful service provision or policy creation, they are likely to cause problems for MCC in defending legal action. I do not think that it would be fruitful for me to hypothesise further about the possible consequences of this approach to messaging without knowledge of the facts of a particular case.

*Question VIII: When would there be a breach of Article 8 ECHR as result of allowing males into women's single sex spaces (including without informing the women using those spaces about this practice)?*

78. In my view, it is arguable that a failure by a public authority to provide single-sex facilities on a biological sex basis in certain circumstances could amount to a violation of Art 8 of the Convention, perhaps in combination with Art 14, and thereby to an actionable breach of s.6 HRA.

79. So far as I am aware, Art 8 has not yet been relied upon in reported case law to support an argument that women are entitled to be provided with a particular service separately from or away from men. However, the building blocks for such an argument to be made – in the right circumstances – are in my opinion identifiable in the Art 8 jurisprudence.

80. It is beyond doubt that men are disproportionately responsible for violence, including sexual violence, against women. I would think it likely also to be beyond doubt that this fact is central to the rationale for the customary

division of the sexes in public facilities where women and girls are in a state of undress or otherwise physically vulnerable. Other considerations which play a part are the dignity and privacy of women and men, rooted in the physical differences between the sexes. For some, those considerations may originate in or be connected to religious beliefs.

81. For those reasons, a failure to provide single-sex facilities may inhibit women's ability safely or confidently to exercise their personal autonomy (by using public facilities) or to enjoy their freedom to establish relationships with the outside world and/or their freedom from violence by third parties. Those are freedoms which are encompassed by Art 8 (see §38.1 above).
82. The more vulnerable a woman may be in a particular situation, the stronger the argument that her Art 8 rights have been breached by a failure to provide a separate or single-sex service or facility. A woman seeking one-to-one rape crisis support is likely to have a stronger argument for single-sex provision than a woman using leisure centre toilets with lockable cubicles.
83. Stronger still, in my view, would be the case in which the service has been labelled as single-sex and it is not made clear that this does not mean biological sex but rather legal sex or even self-identified gender identity. Here it could be argued that the element of realistic choice and control over personal autonomy, privacy and dignity is denied to women, such that their Art 8 rights are more seriously jeopardised.
84. However, I think it arguable that Art 8 would be engaged even in a case where the risk to women was lower. If so, the right under Art 14 not to suffer discrimination in the enjoyment of Convention rights could be



invoked on the basis that women are disadvantaged in the exercise of their Art 8 rights by comparison to men because of their vulnerability to male sexual violence. It is not necessary to demonstrate an actual breach of Art 8 in order to succeed in a claim based on a combination of Art 8 and Art 14 (see §38.4 above), and both Art 8 and Art 14 can impose positive obligations on public authorities.

85. Other possibilities might include:

85.1. A woman whose religion prohibits her from undressing in the presence of men might bring a claim on the basis that a failure to provide single-sex services or facilities amounts to a breach of her Art 9 right to freedom of religion, whether alone or with Art 14.

85.2. A lesbian seeking to access a service intended specifically for the benefit of lesbians might complain that the admission of biological men to the service amounts to a breach of her Art 8 rights taken in conjunction with Art 14.

86. I stress that the analyses above are hypotheses from first principles. Furthermore there is a considerable volume of Art 8 case law relating to the right to manifest gender identity, and a balance must be struck between that right and the interests of women discussed above. It is, however, important to note that the Convention jurisprudence relating to gender identity focusses heavily on the rights of “post-operative transsexuals” to recognition in official State records (and the consequences of that for entitlement to benefits, pensions and so on) and does not on any sensible account support the proposition that self-ID in society at large is a human right.

## **Single sex exceptions**

*Question IX: MCC will not apply the single sex exemptions under the Equality Act 2010 since the motion was adopted, in reliance on section 13.57 of the EHRC Statutory Code of Practice on services, public functions and associations. Can MCC lawfully refuse to follow the ECHR 2022 guidance on single sex spaces, in favour of the 2011 Statutory Guidance?*

87. The Equality and Human Rights Commission's ("EHRC") [Statutory Code of Practice on Services, Public Functions and Associations](#) ("the Code") was published in April 2011. Its status is explained in §1.5 as follows:

*The Code does not impose legal obligations. Nor is it an authoritative statement of the law: only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Courts and tribunals must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

88. It is worth emphasising that when the Code is taken into account by a court or tribunal its status is as evidence and not as legal authority, and that it expressly states that it is not authoritative as regards the law. Thus neither MCC nor any service provider should approach the Code as though it were definitive proof of the proper interpretation of the EqA.

89. The EHRC's [Guidance on Separate and Single Sex Services](#) ("the Guidance") was published in April 2022. It does not have legal effect and courts and tribunals are not obliged to take it into account in legal proceedings where it is relevant. However there is no reason why a service provider should not seek to rely on it as evidence in legal proceedings on the basis that it is the EHRC's most recent statement as to how separate and single-sex services should be provided. Thus there is no reason in law why MCC should insist on following the Code rather than the Guidance.

## **Philosophical belief discrimination**

*Question XIII: Is MCC at risk of discrimination against gender critical staff (ie staff who believe biological sex is real and matters in specific situations) on the grounds of Religion and Belief with its statements to staff, lack of transparency of what is included in trans inclusion training and the linking of transphobic views with women's safety by Councillors in Council Meetings?*

90. I have been provided with examples of communications published by MCC and comments made in a Council meeting which are heavily skewed towards expressing support for a belief in gender identity (see §20.2 above).
91. These are certainly the sorts of materials which could be used in evidence in a complaint brought by a gender critical member of MCC staff who suffered detrimental treatment in connection with her or his belief, whether by way of direct discrimination, indirect discrimination or harassment. On their face, these documents would appear to be compelling evidence on the basis of which an Employment Tribunal could draw an inference of discrimination or harassment, but I am not able to assess the prospects of success of any such case on a hypothetical basis derived from these documents alone.
92. As to MCC's refusal to disclose details of the trans inclusion training provided to it by Gendered Intelligence, I am not persuaded that this would be likely to amount to helpful evidence in a religion or belief discrimination or harassment complaint. The refusal was made in the context of a Freedom of Information request and the reasons for it related to the commercial interests of Gendered Intelligence. In my experience this is not an unusual basis for refusing disclosure of documents and I think it unlikely that an Employment Tribunal would draw an adverse inference from it.

93. I hope that this Advice is of assistance to those instructing me. If I can be of further assistance they should not hesitate to contact me in Chambers.

25 June 2024



AKUA REINDORF KC

Cloisters | 1 Pump Court | Temple | London EC4Y 7AA  
020 7827 4000 | ar@cloisters.com