

**ON THE INSTRUCTION OF**

**TEIGNBRIDGE DISTRICT COUNCIL, LEGAL SERVICES**

**RE: SINGLE SEX SPACES**

---

**OPINION**

---

1. I am grateful to those instructing me for the kind brief to advise in this most interesting of matters.
2. Where appropriate I have translated statutory provisions and associated explanatory notes directly in to the main body of this opinion. The intention is that it is easier to navigate than reams of appendices.

**Background and Instructions**

3. I am instructed to advise ostensibly in respect of a provision criteria or practice (PCP) which is not of narrow application but has arisen specifically in the context of single sex spaces at the Broadmeadow Leisure/Sports Centre in Teignmouth.
4. This is a divisive issue and inevitably engages a range of competing agenda, not to mention competing rights and obligations – these are explored in detail below but by way of background discussed at abstract level here.
5. As a minimum, it is arguable that there is tension between the protections for the protected characteristic of sex, and the protected characteristic of gender reassignment. A birth woman is entitled to protection from discrimination by virtue of her sex. A transgender woman, who was male at birth, is entitled to protection from discrimination attributable to her acquired sex and her gender re-assignment. In practical terms, where a woman complains that she feels unsafe for example in sharing a changing room with a transgender woman (a birth man), but that transgender woman feels unsafe if required

to share a changing room with other men then there is an immediately apparent tension. It is also arguable that gender dysphoria is capable of amounting to a disability and is therefore also potentially a protected characteristic under the Act for this reason.

6. Further, it has been said that gender critical beliefs are philosophical beliefs which are also protected by the Equality Act. Gender critical philosophy may be put as having as its irreducible minimum the proposition that sex is biological, natal and immutable. This must attract the counterpoint that a rejection of gender critical beliefs is also a protected philosophical belief.
7. It is clear that disquiet has developed amongst residents of the TDC demographic and some TDC members (whether for themselves or for the residents) have taken exception to, or challenge, the suggestion that transgender people should be able to use changing and toilet facilities designated for single sex, other than by reference to their sex at birth.
8. There is plainly a practical issue in terms of managing single sex spaces and access to them. How is one to police access? If women in a single sex female only space were considered to be women by reference to their biological sex at birth, how is that checked? If those who acquired the female sex sufficiently as to hold a gender recognition certificate, how can that be checked? At what point is it legitimate for service users to feel uncomfortable? What if a woman does not look sufficiently feminine? Can that legitimate a challenge to that person using the single sex space? Where is the line? If a positive recruitment policy is in place to improve workplace diversity, such that under represented groups for example black and ethnic minority groups are particularly encouraged to apply<sup>1</sup>, how is that policed? It is difficult to imagine that we might ask if people are black enough to be considered black. It is difficult to imagine that someone who identifies as being of some particular origin or creed would be required to provide some proof that their bloodline is sufficiently intact or specific so as to warrant recognition as they identify. In a world where the most casual empiricism makes it clear that people are from multiple backgrounds and mixed and varied heritage, we do not consider the input of some new heritage into the gene pool to operate so as to dilute ethnic origin and nor do we arbitrarily determine at what

---

<sup>1</sup> For example, in pursuit of s.159 Equality Act 2010

point there is such dilution as to render the connection, or identification tenuous at best. Generally, it is surely right that where someone identifies their ethnic origin in one way or another, they are taken to be right.

9. There are cultural factors that might inform the ethnicity with which someone might align. Can it not be said that gender is in part socially constructed?<sup>2</sup>
10. The debate in respect of Broadmeadow has developed over time and has escalated recently.
11. At a full council meeting on 30 July 2024 there were various questions from members of the public (with varying degrees of traction from other members) which focussed on the provision and management of single sex spaces, such as toilets and changing facilities. Those questions deteriorated and many became speeches rather than questions. A good deal of them employed pejorative language, suggesting that transgenderism is a sexual fetish or a cult.
12. This language is problematic for a series of reasons:-
  - (i) It might be hate speech and is at least inflammatory and unhelpful to rational and balanced debate;
  - (ii) It is not supported by evidence;
  - (iii) Those expressing such views are entitled to hold them and to express them, and it is an immediate tension of other rights and liberties to seek to stifle the expression of them.
13. Fortunately, the third point is met in such meetings in that members of the public have an opportunity to ask questions in a carefully constrained and managed forum. It is not a public meeting for a public debate where any and all views can be expressed – the opportunity is to ask questions, not to pursue any particular view.

---

<sup>2</sup> In some respects, this question lies at the heart of the debate. The distinction between sex and gender and the treatment of this distinction in law. The very question, what is a woman (for the purposes of the legislative regime, plainly), lies before the Supreme Court at the moment.

14. If it were right that a transgender woman might experience sexual attraction to women who were women from birth, and that is to inform whether or not there should be access to single sex spaces, what are we to do with homosexual people? Should male single sex changing spaces be available only to heterosexual males, so that none could be worried about the prospect of a gay male experiencing same sex desire in the single sex space? It is easy to dismiss such a suggestion as an absurdity, but it is exactly the sort of complaint and rhetoric that was explored when the decriminalisation of homosexuality was explored, when the promotion of it in schools was considered, when other protections were developed to tackle discrimination against homosexual people and communities. How would it in any event be policed? Surely a gay male could simply hold out to identify as a straight male, use the facilities and be responsible for all the matters that trouble the gender critical debate.

15. Is the point not that any person of any gender who uses any space, single sex or otherwise, for the pursuit of sexual gratification, poses a risk of harm? Any such behaviour cannot be condoned, or tolerated, and is very likely to be criminal.

16. What do we learn about provision of facilities such as accessible toilets or changing or so called “disabled” facilities? What is the justification for that being gender neutral? Are disabled people not entitled to gender identification (whether by reference to birth sex or acquired sex)? Can it not be said that the degendering of disabled people is in fact a species of harassment contrary to the Equality Act 2010 by itself? Should those who do not need to use accessible facilities be prevented from using them?

17. To what extent does it matter to distinguish between male, female, trans-male and trans-female and non-binary or gender fluid identifying people?

18. Against this background, it is also unquestionably the case that women, or women who were biologically female at birth, are absolutely entitled to use public facilities without fear of harassment or discrimination. It is simply not realistic to say that once an individual has acquired a different sex, then for all purposes their birth sex is irrelevant. For example, in *R(App. McConnell) v Registrar general for England and Wales [2020] EWCA Civ 559* Mr McConnell, a trans-male, who held a gender recognition certificate, underwent artificial insemination and gave birth to a child.

19. For completeness, and whilst not strictly relevant to this advice, it is worth observing that it is not merely the use of single sex spaces that present a legitimate legal professional and public debate. For example, the well-known question of whether a transgender athlete should compete in sports by reference to their birth sex or acquired sex.<sup>3</sup>

## **The Law**

20. I caveat this at once with the warning that For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) UKSC 2024/0042 has been heard in the Supreme Court and that judgment is presently reserved. It is entirely likely that there will be changes to this opinion and those instructing me will of course be alive to the evolution of the jurisprudence in this area.

21. In fact, the law in terms of gender recognition has been developing in recent decades. Gender reassignment at the time of *P v S and Cornwall County Council* [1996] IRLR 347 was not recognised in domestic UK law as a freestanding protected characteristic – an issue pursued in the ECJ resulting in an amendment to s.2A Sex Discrimination Act 1975, which defined gender reassignment as a process which is undertaken under medical supervision for the purposes of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process.

22. Later, in *Bellinger v Bellinger* [2003] UKHL 21, the House of Lords concluded there were four typical steps or stages in, or of, gender reassignment, (i) psychiatric assessment, (ii) hormonal treatment, (iii) a period of living as a member of the opposite sex under professional supervision and (iv) surgery.

23. A good deal of the jurisprudence exists in the employment law field. In *Croft v Royal Mail Group plc (fly Consignia)* [2003] IRLR 59 an employee notified her employer that she wished to start living as a female. Discussion ensued about the use of female toilet facilities, initially offering her the disabled toilet and subsequently there being

---

<sup>3</sup> It is notable that this point is answered in part by reference to s.195 GRA 2004 which provides that it is not discriminatory, or more properly it is not a contravention of the Equality Act 2010 to do anything that is intended to ensure fair competition or safety of competitors in a gender affected activity.

discussion about whether a specifically lockable and separate cubicle could be provided.

24. I pause here to note that *Croft* was in part informed by, and which continues to be good and applicable law, regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 which provides that at paragraph *(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.* (emphasis added).

25. This regulation would seem to illuminate the discussion in part.

26. The current statutory regime may be found in the Gender Recognition Act 2004 and the Equality Act 2010.

27. Section 9(1) GRA provides that “*Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).*”

28. A GRC can be issued on an application by a person pursuant to s.1 GRA which provides

*(1)A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of—*  
*(a)living in the other gender, or*  
*(b)having changed gender under the law of a country or territory outside the United Kingdom.*

29. The GRC connotes the acquired gender.

30. The GRC will be granted (if it is granted) pursuant to section 2 which says in terms

*(1)In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant—*  
*(a)has or has had gender dysphoria,*

- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,*
- (c) intends to continue to live in the acquired gender until death, and*
- (d) complies with the requirements imposed by and under section 3.*

31. There is also provision for a GRC to be granted in other circumstances pursuant to s.3A et seq (for example with regard to a protected marriage) but this need not detain us here.
32. Evidence must be provided in support of such an application, which is set out in s.3. The requirements are detailed but essentially there must be (i) two reports, one of which must be by a registered medical practitioner in the field of gender dysphoria and the other which must also be a medical practitioner or registered psychologist but need not be in the field; and (ii) a statutory declaration dealing with matters such as how the application meets the criteria in s.2, details of marriage or civil partnership and the like.
33. I take the attention of those instructing me to s.22 GRA 2004 which section should be considered in its entirety for its full force and effect. This creates offences in terms of disclosure of information.
34. The Equality Act 2010 falls next to be considered.

35. I mention for completeness that those instructing me are subject to the Public Sector Equality Duty pursuant to s.149 EA 2010:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—*
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

36. The point is perhaps most relevant to the Council's careful and judicious management of the meeting on 30 July. Seeking to ensure that such meetings are not infected with pejorative and inflammatory language and ensuring that appropriate protocol and procedure is followed is an entirely appropriate and proportionate means of achieving that.

37. By s.4 EA 2010, Gender Reassignment and Sex are both protected characteristics.

38. Section 7 provides on terms:

*(1)A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*

*(2)A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*

*(3)In relation to the protected characteristic of gender reassignment—*

*(a)a reference to a person who has a particular protected characteristic is a reference to a transsexual person;*  
*(b)a reference to persons who share a protected characteristic is a reference to transsexual persons.*

39. Further, by section 11:-

### ***Sex***

*In relation to the protected characteristic of sex—*

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

40. It is important to note that the definition of Gender Reassignment for the purposes of the EA is significantly wider than simply those persons with a GRC. It is likely that someone with a GRC also has the protected characteristic of sex. A trans person without a GRC will not have the protected characteristic of sex, but will still potentially have the protected characteristic of gender reassignment.

41. Indeed, the explanatory notes to s.7 provide

*A person who was born physically male decides to spend the rest of his life living as a woman. He declares his intention to his manager at work, who makes appropriate arrangements, and she then starts life at work and home as a woman. After discussion with her doctor and a Gender Identity Clinic, she starts hormone treatment and after several years she goes through gender reassignment surgery. She would have the protected characteristic of gender reassignment for the purposes of the Act.*

*A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully 'passes' as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act.*

42. It is therefore very plain indeed that there is no requirement for there to have been any surgical or even medical aspects of gender reassignment engaged in order to enjoy protection. A change of attributes of sex<sup>4</sup> can be sufficient to manifest the characteristic.

43. Conduct prohibited pursuant to the EA 2010 may be found in chapter 2 of the act and is concerned with matters such as direct discrimination, indirect discrimination, harassment and victimisation. I consider the key points below.

---

<sup>4</sup> Perhaps an unfortunate term, given it is the more socially constructed concept of gender that lends itself to outward or even stylistic changes, such as clothing, hair styling, one's name.

44. S.13 EA 2010 provides:

**13 Direct discrimination**

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*

45. S.19 EA 2010 provides:

**19 Indirect discrimination**

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim*

46. Since January 2024, S.19A provides:-

**19A Indirect discrimination: same disadvantage**

*(1) A person (A) discriminates against another (B) if—*

*(a) A applies to B a provision, criterion or practice,*

*(b) A also applies, or would apply, the provision, criterion or practice to—*

*(i) persons who share a relevant protected characteristic, and*

*(ii) persons who do not share that relevant protected characteristic,*

*(c) B does not share that relevant protected characteristic,*

*(d) the provision, criterion or practice puts, or would put, persons with the relevant protected characteristic at a particular disadvantage when compared with persons who do not share the relevant protected characteristic,*

- (e) the provision, criterion or practice puts, or would put, B at substantively the same disadvantage as persons who do share the relevant protected characteristic, and
- (f) A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

47. Harrassment is dealt with in s.26 on terms:-

### **26 Harassment**

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

*(a) the perception of B;*

*(b) the other circumstances of the case;*

*(c) whether it is reasonable for the conduct to have that effect.*

48. Section 27 then addresses victimisation:-

### ***27 Victimisation***

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

*(4) This section applies only where the person subjected to a detriment is an individual.*

*(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

49. There are various examples (many of which are speculative – it is necessarily fact and case specific) within the literature of acts which might contravene these legislative provisions.

50. Refusing a trans applicant a job role because they intend to dress differently to the gender assigned at birth. Failure to alter photographs on an employee ID badge after a

person has undergone gender reassignment. Requiring a trans person to use disabled toilets.

51. It is worth pausing to remember the working definition of a trans person, by reference to s.7 and the associated explanatory notes.
52. The question this immediately admits then, is the position as to gender fluid or non-binary identification. On one analysis, the wording in s.7 is focused on a proposal to move away from birth gender (or, in fact, from an acquired gender). It requires a change in an attribute, or an intention to undergo a change, it does not require a complete change, it does not require an adoption of a new gender.
53. Indeed, this view can be distilled from the decision in *Taylor v Jaguar Land Rover Ltd* (ET/1304471/2018). This case however is not a binding authority, and certainly not as to wider principle. It has been the subject of criticism but the question remains at large.
54. That said, the word “reassigning” connotes, if it does not entail, the move from one thing to another. If that is so, then for the purposes of the act there remains only a binary distinction. Male, or female. The law recognises the possibility of reassignment from one to the other. That is a process and the law recognises as much. Protection therefore is engaged whether the process is intended, is in progress, or is complete.
55. We are left, nevertheless, with some issues of a practical if not theoretical nature. For example, dressing in a way incongruous with ones birth sex might be protected by s.7 if it is for the purposes of reassigning a person’s gender. It is not likely to be protected if it is transvestitism or sexual in nature. It is not likely to be protected either if it is part of gender fluidity.
56. The problem is at once apparent, particularly for those instructing me. In the context of public users of changing spaces, for example, how can it possibly be determined whether or not there is an outward expression of gender reassignment such as to be protected by the act, or a temporary manifestation of gender fluidity.<sup>5</sup>

---

<sup>5</sup> Notably in *Taylor v Jaguar Land Rover*, the complainant was essentially exploring life in a new gender. It might be said that represents part of a process, it might not. It was plainly not on a whim but whilst the outcome of reassignment is binary, the personal journey associated with that is surely far from binary.

57. It is worth recording section 29 which provides:-

**29 Provision of services, etc.**

(1) *A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.*

(2) *A service-provider (A) must not, in providing the service, discriminate against a person (B)—*

- (a) as to the terms on which A provides the service to B;*
- (b) by terminating the provision of the service to B;*
- (c) by subjecting B to any other detriment.*

(3) *A service-provider must not, in relation to the provision of the service, harass—*

- (a) a person requiring the service, or*
- (b) a person to whom the service-provider provides the service.*

(4) *A service-provider must not victimise a person requiring the service by not providing the person with the service.*

(5) *A service-provider (A) must not, in providing the service, victimise a person (B)—*

- (a) as to the terms on which A provides the service to B;*
- (b) by terminating the provision of the service to B;*
- (c) by subjecting B to any other detriment.*

(6) *A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.*

(7) *A duty to make reasonable adjustments applies to—*

- (a) a service-provider (and see also section 55(7));*
- (b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.*

(8) *In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic—*

- (a) religion or belief;*
- (b) sexual orientation.*

58. So much for the framework of protections. The tensions and competing rights are set out above. The legislation recognises, at least to some degree, and attempts to provide a route through in the form of Part 7 of Schedule 3 to the EA 2010.

59. The index provisions are paragraphs 26, 27 and 28 and are as follows:-

***Separate services for the sexes***

*26(1)A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—*

*(a)a joint service for persons of both sexes would be less effective, and*

*(b)the limited provision is a proportionate means of achieving a legitimate aim.*

*(2)A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—*

*(a)a joint service for persons of both sexes would be less effective,*

*(b)the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and*

*(c)the limited provision is a proportionate means of achieving a legitimate aim.*

*(3)This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.*

***Single-sex services***

*27(1)A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—*

*(a)any of the conditions in sub-paragraphs (2) to (7) is satisfied, and*

*(b)the limited provision is a proportionate means of achieving a legitimate aim.*

*(2)The condition is that only persons of that sex have need of the service.*

*(3)The condition is that—*

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

### ***Gender reassignment***

*28(1)A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within subparagraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.*

*(2)The matters are—*

*(a)the provision of separate services for persons of each sex;*

*(b)the provision of separate services differently for persons of each sex;*

*(c)the provision of a service only to persons of one sex.*

60. I also set out the explanatory notes which support the legislation:-

*Part 7: Separate and single services.*

#### ***Separate services for the sexes: paragraph 26***

##### ***Effect***

*729.This paragraph contains exceptions to the general prohibition of sex discrimination which allow the provision of separate services for men and women.*

*730.A provider can deliver separate services for men and women where providing a combined service would not be as effective. A provider can deliver separate services for men and women in different ways or to a different extent where providing a combined service would not be as effective and it would not be reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex. In each case such provision has to be justified.*

731. *The exceptions also cover the exercise of public functions in respect of the “back-room” managerial, administrative and finance decisions which allow separate services to be provided.*

### ***Background***

732. *This paragraph replaces similar provisions in the Sex Discrimination Act 1975 that only cover public functions. The exceptions have been extended to cover all services, whether privately or publicly provided.*

### ***Example***

- *It would not be unlawful for a charity to set up separate hostels, one for homeless men and one for homeless women, where the hostels provide the same level of service to men and women because the level of need is the same but a unisex hostel would not be as effective.*

### ***Single-sex services: paragraph 27***

#### ***Effect***

733. *This paragraph contains exceptions to the general prohibition of sex discrimination to allow the provision of single-sex services.*

734. *Single sex services are permitted where:*

- *only people of that sex require it;*
- *there is joint provision for both sexes but that is not sufficient on its own;*
- *if the service were provided for men and women jointly, it would not be as effective and it is not reasonably practicable to provide separate services for each sex;*
- *they are provided in a hospital or other place where users need special attention (or in parts of such an establishment);*
- *they may be used by more than one person and a woman might object to the presence of a man (or vice versa); or*

- *they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex.*

735. *In each case, the separate provision has to be objectively justified.*

736. *These exceptions also cover public functions in respect of the “back-room” managerial, administrative and finance decisions which allow such single-sex services to be provided.*

### ***Background***

737. *This paragraph replaces some similar provisions that only covered public functions and some that applied to services in the Sex Discrimination Act 1975. These exceptions have been extended to cover both services and public functions.*

### ***Examples***

738. *These exceptions would allow:*

- *a cervical cancer screening service to be provided to women only, as only women need the service;*
- *a fathers’ support group to be set up by a private nursery as there is insufficient attendance by men at the parents’ group;*
- *a domestic violence support unit to be set up by a local authority for women only but there is no men-only unit because of insufficient demand;*
- *separate male and female wards to be provided in a hospital;*
- *separate male and female changing rooms to be provided in a department store;*
- *a massage service to be provided to women only by a female massage therapist with her own business operating in her clients’ homes because she would feel uncomfortable massaging men in that environment.*

### ***Gender reassignment: paragraph 28***

#### ***Effect***

739. *This paragraph contains an exception to the general prohibition of gender reassignment discrimination in relation to the provision of separate- and single-sex services. Such treatment by a provider has to be objectively justified.*

### ***Background***

740. *This paragraph replaces a similar provision in the Sex Discrimination Act 1975.*

#### *Example*

- *A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.*

61. This illuminates (or at least partly de-casts the shadows otherwise shrouding) the legislation. We can distil a series of principles.

- 61.1 It is legitimate to provide separate male and female changing facilities;
- 61.2 It is legitimate, potentially, that a service provided for women should be limited in its availability to women only.
- 61.3 The reference is to “sex” which means that those with a GRC are *prima facie* entitled to use a facility designated for the sex they have acquired.
- 61.4 There is an exception in the case of conduct otherwise amounting to gender reassignment discrimination in the context of provision of separate services for separate sexes.
- 61.5 It might therefore be legitimate to provide the service of changing facilities to women only who are women by reference to the sex assigned to them at birth.
- 61.6 This applies whether or not a person has a GRC.
- 61.7 The conduct must be a proportionate means of achieving a legitimate aim.
- 61.8 Such conduct must be capable of being objectively justified.
- 61.9 Even if that is right, the interests of a trans person must be similarly protected and upheld. Whilst it might be that a trans woman could be excluded from a women only changing facility, it cannot be the case that she should be required

to use the men only changing facility, or a disabled changing facility – that in itself might amount to discrimination or harassment.

62. The Equality and Human Rights Commission provides guidance on. Separate and single sex service providers in the context of the Equality Act sex and gender reassignment provisions.

63. Ultimately, following such guidance is not a sure way of ensuring compliance with the law. Such decisions are for courts and tribunals. However, paying heed to the guidance and demonstrating engagement with it (as a minimum) will certainly insulate those instructing me from criticism and potentially from litigation and liability.

64. The EHRC helpfully suggest that a policy for the treatment of trans people should be developed if it would be helpful to develop it, and should make provisions for circumstances where the policy should be started from. With great respect to the regulator, that is a meaningless tautology and hopelessly inadequate in terms of guidance.

65. Nevertheless, there is some analysis proffered by the regulator which is quite helpful.

66. A single sex service, such as single sex changing rooms, might be provided legitimately on the basis that women might reasonably object to the presence of a man in the facility, and vice versa.

67. Proportionality and legitimacy of aim is pervasive and, much as it might appear obvious, those instructing me need to demonstrate consideration of the proportionality of providing separate and single sex spaces.

68. Protection of the privacy, dignity and safety of others is likely to be regarded as a legitimate aim.

69. Impact on all service users must be balanced.

70. The EHRC refers to a gym with separate-sex communal changing rooms and suggests that where there is a concern for the safety and dignity of trans men changing in an

open plan environment, there might be a decision to introduce an additional gender neutral changing room with self contained units.

71. The EHRC also gives an example where a community centre conducts a survey and determines that some service users would not use the centre if facilities were open to members of the opposite biological sex, and so it introduces a policy of inviting all users to either use the toilet for their biological sex or the gender neutral facilities.
72. Availability of resources is relevant. A small facility where all changing rooms are lockable and individual (or where there are perhaps only two cubicles available) might not need to consider exclusion of any individuals because privacy and decency can be protected, irrespective of sex or gender, through the provision of separate cubicles.
73. Decision making must be evidence based, reasoned, and be very clearly a balanced exercise, taking in to account the needs of all affected groups.

### **Discussion**

74. This is an intractable and high profile problem. It is also plainly case specific. The development of a new leisure facility presents different challenges to the management of other parts of TDCs estate and portfolio.
75. Aside from the logistical point that building or constructing a facility is likely to admit more flexibility than considering a policy with respect to an existing facility, any part of the estate which is a work place is subject to the Workplace (Health, Safety and Welfare) Regulations 1992 in addition to the Equality Act 2010.
76. TDC might be regarded as being a well resourced party (compared, for example, to a small independent high street shop) but the resources are not unlimited, there are budgetary constraints and an obligation to manage public financial resources properly and proportionately.
77. In the particular context of Broadmeadow, I have considered the development plans carefully and it is plain that the facilities provided are, male facilities, female facilities, village facilities and accessible facilities.

78. Notably, these facilities are largely constitutive of individual lockable cubicles. The male WC (as so titled on the plan) consists of two closed toilet cubicles, and one single occupancy locked shower and changing room. There are three sinks and a range of lockers in the open area.

79. The Female WC (as so titled on the plan) mirrors this save that there appears to be one additional lockable shower and changing room with baby change facilities.

80. Both facilities are accessed from a main hallway.

81. There is then a village changing facility. There are no facilities in the open space, apart from lockers. There are five combination shower/changing cubicles, which are each self contained. There is then a total of 12 changing cubicles which again are each lockable and self contained.

82. There a family changing room accessed off the village changing facility.

83. My instructions are that an Equality Impact Assessment was undertaken in the design of the Broadmeadow facility. No doubt that EIA was undertaken with vigour and care.

84. A good deal of rhetoric that has attended any controversy about this proposal suggests that these facilities do not protect trans people but also, and perhaps more ardently put, it exposes women and children to the risk of abuse and attack.

85. There are two matters that flow from that. Firstly, whether or not the village changing facilities should be replaced with single sex spaces and secondly who should be admitted to those single sex spaces. Those matters are inherently self defeating.

86. I make the following observations:-

86.1 Each of the facilities, male, female, accessible or village, include separate self contained changing cubicles.

86.2 Members of the public can self select. If they are uncomfortable using single sex spaces (for whatever reason) they can use the village changing space. If they are uncomfortable using the village changing space they can use the single sex changing space. There should be no risk to dignity and privacy in any space,

least of all the village changing space, because the cubicles and showers are all entirely self contained. These are not the open changing spaces and showers either of old or as particularly anticipated by the guidance given by the EHRC.

- 86.3 Simply saying "*I do not wish to use a space that a male has used before me*" is not objectively a good enough reason to inform decision making by TDC.
- 86.4 Two out of the six available toilets (all of which are in locked cubicles) are available to all sexes and genders.
- 86.5 There is simply no evidence I have seen that there is a risk posed to members of the public or to any individual member or group of members, above and beyond that which presents anyway. That is of course not to decry or dismiss the risk or the devastating and catastrophic impact of abuse of women and children (or anyone else, for that matter). It is also not to overlook the point that those who pursue paraphilic fetishist or other sexually motivated behaviour should not be regarded as the same, or sharing the same protected characteristics, as members of the LGBTQ+ community. The question is whether the approach to the balancing of the interests of those with protected characteristics is a proportionate means of achieving a legitimate aim. The protection of individuals or groups of individuals from abuse is plainly a legitimate aim. But it is unsustainable to say, against the evidence presently available to me in any event, that the Broadmeadow design is such as to expose women and children (or any others) to an unacceptable degree of risk.
- 86.6 There have not been complaints within the remainder of the TDC portfolio about inappropriate behaviour by any person.
- 86.7 There has been consultation with bodies such as the police to ensure risk management has been accounted for in the design process.

87. The question then, is what is to be done.

88. It seems to me that TDC should consider an attitude survey of some description. There should, as far as possible, be a representative sample taken of service users, including some contributions from trans identifying service users. Careful thought will need to be given to how that is managed so as to ensure that there is a reliable data sample – there is an inherent and obvious problem with participants being self selecting resulting in wild distortion in data set with wholly inadequate confidence intervals.

89. Any considerations should facilitate qualitative as well as quantitative outcome. The danger is subjectivity but on balance it seems to me important for qualitative dimensions to be considered. That a majority of women object to sharing spaces with trans women without more would be no more legitimate than the majority of women insisting on there being no single sex service provision. The quality (ie the detail, not the standard) of the views and preferences expressed need to be explored.

90. If the prevailing view were to be fear of harm or abuse, then the question is whether there is a less drastic, or more proportionate means of achieving the aim. For example, a raising of awareness about the consultation with the police and other steps taken in respect of safety at the design stage.

91. Procedure might be introduced for dealing with people who are concerned about behaviour – for example “go to the reception desk and ask for Karen” and similar schemes which are designed in an entirely anonymous fashion to alert staff to the fact that someone feels uncomfortable or there is inappropriate behaviour.

92. Proportionately must surely admit other considerations such as there being no restrictions on intersex/intergender groups being in lifts and other such spaces which might be confined. The changing facilities are individual locked cubicles.

93. Training staff to deal with the situation and guiding customers/service users clear represents a key activity. TDC might decide to limit single sex spaces at Broadmeadow to those of biological sex and invite everyone to use the village facilities. That might well represent a reasonable balance of competing interests. Such a conclusion can only be reached if it is considered to be a proportionate means of achieving a legitimate aim. I cannot answer that in this opinion – that is for TDC to consider when its has taken in

to account the factors I have discussed and suggested. In all likelihood, it will be an extension of the equality impact assessment undertaken.

94. Staff should be aware if that is the policy (and I do not there suggest a standalone policy for the treatment of trans people is an essential step) and training can and should be provided on how to manage that, and records be kept of the delivery of such training.
95. I do not see that the availability of village changing facilities poses a problem under the Equality Act in the context of Broadmeadow.
96. Examples of public bodies falling foul of the legislation no doubt may be found. Anecdotally, it is frequently the case that where this happens important steps have been overlooked. For example, an equality impact assessment might not have been done. This would inevitably expose an authority to criticism. The quality of an EIA is less likely to attract immediate criticism, unless it is manifestly unreasonable or overlooks some obviously important criteria – safety as an example. This is mitigated with careful and considered discharge of responsibilities – something which seems to have attended the actions taken by those instructing me in this particular context.
97. As to wider implications for the balance of the TDC estate, I think it is likely that consideration should be given to the labelling of accessible toilets as being facilities specifically for the disabled. They should be promoted as both accessible and as gender neutral. Consideration should be given to realistic and proportionate means of reassigning some facilities as gender neutral or village – particularly those which have entirely self contained facilities/individual cubicles.
98. In all other respects the fundamental question for those instructing me when making decisions against the current legislative framework is whether or not the conduct pursued or proposed is a proportionate means of achieving a legitimate aim, balancing the interests of all service users. The law does not ask the impossible, you are required to do what you reasonably assess to be right in all the circumstances.

**Jonathan Ward**

**Magdalen Chambers**