Legal Feminist.

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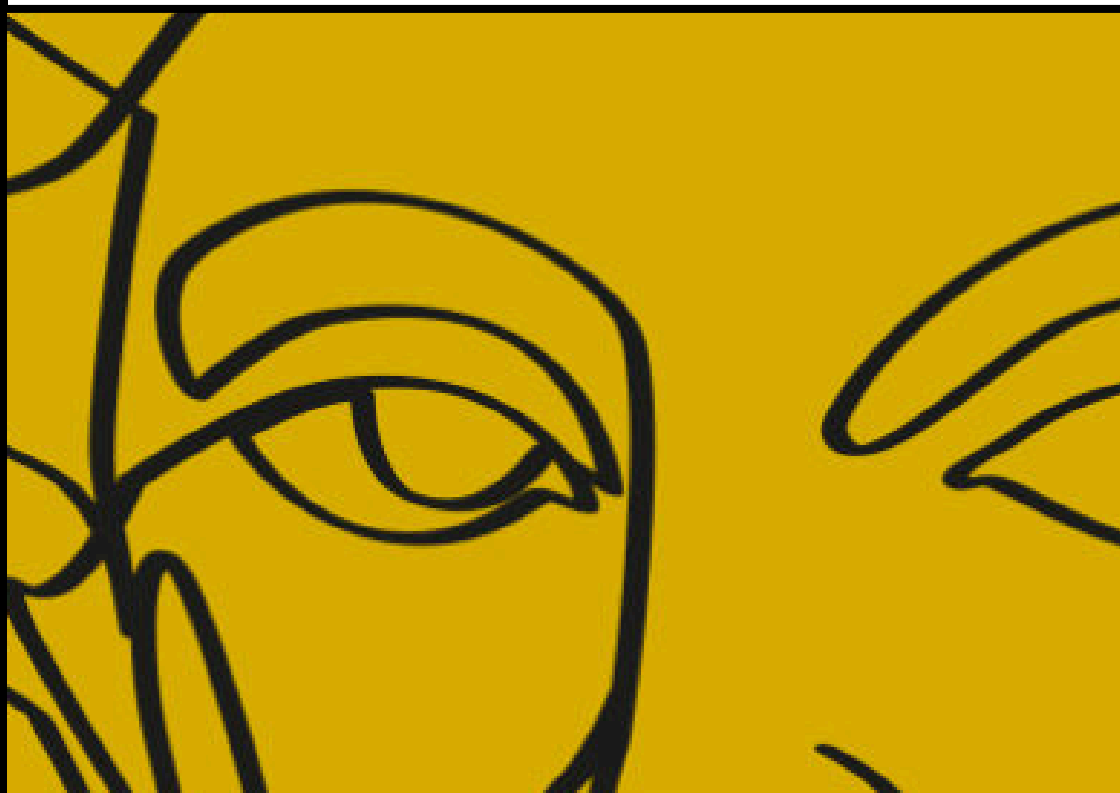
SOMETHING FOR EVERYONE

Navigating UK law on single-sex toilet, washing and changing facilities in workplaces and in services provided to the public



CONTENTS

Discrimination claims about single-sex facilities

1. If an employee thinks that her employer's practices or policies in relation to single sex facilities in the workplace are discriminatory, she can bring a claim in the Employment Tribunal under the Equality Act 2010 ("EqA"). Similar EqA claims about single sex facilities can be brought in the County Court by users of services which are open to the public, like swimming pools, libraries, hospitals and restaurants.

2. The types of EqA claim which are most likely to be brought in the Employment Tribunal or County Court about single sex facilities are claims for **indirect discrimination** and claims for **harassment related to sex**.[1]

Indirect discrimination

3. Indirect discrimination claims which might be brought by people who wish to access single sex facilities include:

   3.1. A claim by a female employee or service user for **indirect sex discrimination**[2] brought on the basis that women are more disadvantaged by having to undress, shower or use the toilet in the presence of males than the other way around.

   3.2. A claim for indirect religion or belief discrimination[3] brought by:

   (a) an employee or service user who adheres to a religion, such as Islam or some forms of Judaism or Christianity, which prohibits or discourages undressing or being in intimate proximity with people of the opposite sex; or

   (b) an employee or service user with a protected philosophical belief, such as gender-critical belief, which recognises the importance and relevance of the differences between the biological sexes.

   3.3. A claim for **indirect age discrimination**[4] brought by an older employee or service user who abides by standards of modesty in relation to undressing, using the toilet or washing in proximity with people of the opposite sex which are more prevalent in older age groups.

[1] Other possible claims, which are not dealt with here, are for direct sex discrimination under EqA s.13 and for sexual harassment (which differs slightly to harassment related to sex) under EqA s.26(2).
[2] EqA ss.11 and 19
[3] EqA ss.10 and 19
[4] EqA ss.5 and 19

4. At the same time, people who wish to access single sex facilities provided for the opposite sex may bring **indirect gender-reassignment discrimination**[5] claims, if their employer or service provider requires trans people to use facilities according to their biological sex. Many (though not all) people who identify as the opposite sex have the protected characteristic of gender reassignment. A claim of this sort would be brought on the basis that (for example) it is more disadvantageous for a man who has the protected characteristic of gender reassignment to use the men's facilities than it is for a man who does not have the protected characteristic of gender reassignment.

5. In an indirect discrimination claim, if the employee or service user shows that the practice or policy relating to single sex facilities is, on the face of it, indirectly discriminatory, it is then open to the employer or service provider to show that the practice or policy is nonetheless justified because it is a proportionate means of achieving a legitimate aim[6] ("**the justification defence**").

[5] EqA ss.7 and 19
[6] EqA s.19(2)(d)

Harassment related to sex

6. This is unwanted treatment related to sex which causes the "proscribed effect". The proscribed effect is that the treatment violates the employee or service user's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for her[7]. It can be a one-off event, a series of events or an ongoing practice. Thus an employee or service user can complain either about one or more incidents in which she has encountered a male in the women's facilities or about a policy or practice of permitting this to happen, so long as she can establish that what she is complaining about is "conduct related to sex". At present there is no legal authority which says that allowing males to use women's facilities is "conduct related to sex", but the point is being argued in *Peggie v NHS Fife*. The test for whether conduct is "related to" a protected characteristic is a broad one.

7. It is not enough for the employee or service user simply to say that she feels the proscribed effect; it must be reasonable for her to have felt it[8]. This is usually the key issue in harassment claims. In considering this, the court or tribunal must take into account all the circumstances of the case[9].

[7] EqA s.26(1)(a)
[8] EqA s.26(4)(c)
[9] EqA s.26(4)(b)

Facilities required in workplaces by the 1992 Regulations

8. The law which mandates that single-sex facilities must be provided in workplaces is not contained in the EqA. It is contained in the Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Regs"), by which workplaces must have sanitary conveniences (toilets)[10] and washing facilities.[11] They must also have changing facilities if these are needed because of the type of work done in the workplace or for health reasons.[12] All these facilities must be both "suitable" and "sufficient".

9. The facilities must be for the use of all people who work in the workplace, not just employees. This includes any type of worker or self-employed contractor.[13]

10. Toilet, washing and changing facilities in workplaces will only be "suitable" for the purposes of the 1992 Regs if there is separate provision for men and women.[14]

11. The only exceptions to the single-sex rule for workplace facilities are:

    11.1. **Toilets**: toilets can be in separate lockable rooms[15] (not cubicles).

    11.2. **Washing**: if the only washing required is of hands, forearms and face, the washing facility may be shared between men and women.[16] Otherwise, washing facilities can be in individual lockable rooms that are intended for single-person use[17] (not cubicles).

    11.3. **Changing**: changing rooms can be shared between men and women if separate provision is not necessary for reasons of propriety.[18] Where separate provision is necessary for reasons of propriety, this can be in a single changing room as long as it can be used separately by men and women[19] (i.e. at different times).

[10] Reg 20 of the 1992 Regs
[11] Reg 21 of the 1992 Regs
[12] Reg 24 of the 1992 Regs
[13] Note that there are also various Regulations about single-sex facilities in schools.
[14] Regs 20(2)(c) (sanitary conveniences), 21(2)(h) (washing facilities) and 24(2) (changing facilities) of the 1992 Regs
[15] Reg 20(2)(c) of the 1992 Regs
[16] Reg 21(3) of the 1992 Regs
[17] Reg 21(2)(h) of the 1992 Regs
[18] Reg 24(2) of the 1992 Regs
[19] Reg 24(2) of the 1992 Regs

12. The 1992 Regs do not say how many facilities must be provided in a workplace to be "sufficient", other than in the case of old, unmodernised factories, where there must be at least one suitable toilet for use by females only for every 25 female workers, and the same for males.[20]

13. Employment Tribunals do not have jurisdiction to determine complaints about breaches of the 1992 Regs. The principal method of enforcement is via the Health and Safety Executive ("HSE"), which has powers to impose sanctions on employers.

14. In theory it might be possible for an individual to bring a claim in the County Court on the basis that the employer has failed to comply with a statutory duty, but since the 1992 Regs do not themselves provide for a civil remedy it would be difficult to persuade a court to permit such a claim to proceed, particularly where an enforcement mechanism is provided through the HSE.

[20] Sch 1 §§4 & 5 of the 1992 Regs. Note that here the 1992 Regs use the terms "female" and "male" rather than "women" and "men"

Equality Act complaints about single-sex facilities in workplaces

Indirect discrimination

15. Although the 1992 Regs cannot be relied on directly in an Employment Tribunal claim (see §13—14 above), they are pivotal in Employment Tribunal claims for indirect discrimination under the EqA[21] about the provision of single sex facilities in the workplace.

16. If an employee brings an indirect discrimination claim about a failure to provide single sex facilities such as one of the types of claim described in §3 above, the existence of the 1992 Regs makes it very difficult – probably impossible – for the employer successfully to invoke the justification defence (see §5 above). To be successful, the employer would have to show that it had a legitimate reason for contravening the mandatory statutory duty in the 1992 Regs and that it did so in a proportionate way. It is difficult to see how this argument could conceivably work.

17. Similarly, if an employee brings an indirect gender-reassignment discrimination claim about an employer's refusal to allow him or her to use the facilities provided for the opposite sex (as described at §4 above), the fact that the 1992 Regs mandate single sex facilities in workplaces means that the employer's justification is virtually watertight.

Harassment related to sex

18. The existence of the 1992 Regs is also significant in relation to claims of harassment related to sex which are about the provision or use of single sex facilities in workplaces (as described at §6—7 above), even though employees cannot rely on the 1992 Regs directly in the Employment Tribunal.

19. In a claim of this sort, one of the "circumstances" that will have to be taken into account by the Employment Tribunal (see §7 above) is the fact that the 1992 Regs mandate single sex facilities in the workplace. It is very likely that an employee would be able to persuade a Tribunal that it was reasonable for her to experience a breach of this law as a violation of her dignity, since the law itself recognises that single sex facilities can be necessary for reasons of "propriety".

[21] EqA s.19

The meaning of “woman” and “man” in the 1992 Regulations

People without Gender Recognition Certificates

20. There is no law which allows people to self-identify into the opposite sex for the purposes of the 1992 Regs, or indeed for the purposes of any other UK legislation.[22] The protected characteristic of gender reassignment in the EqA[23] protects most trans people from discrimination, but it does not mean that trans people must be treated as though they are the opposite sex, whether under the 1992 Regs or for any other legal purpose. Only a Gender Recognition Certificate (“GRC”) can have this effect. Thus under the 1992 Regs a woman is, at least, anybody who was born female and does not have a GRC and a man is, at least, anybody who was born male and does not have a GRC.

21. This means that the 1992 Regs do not allow employers to provide toilet, washing or changing facilities only on a self-ID basis. If an employer allows males who do not have GRCs to use a women’s facility, it will no longer be providing a facility which is for women only. This will amount to a failure to comply with the 1992 Regs unless there are suitable and sufficient alternative women’s facilities available elsewhere in the workplace which are not open to any males who do not have GRCs.

[22] For Women Scotland Ltd v The Scottish Ministers [2023] CSIH 37
[23] EqA s.7

People with Gender Recognition Certificates

22. For people who do have GRCs the position is unclear. Under the Gender Recognition Act 2004 ("GRA") the consequence of a person being awarded a GRC is that his or her sex changes to the opposite sex "for all [legal] purposes".[24] However, there are some exceptions to this principle,[25] so there are some laws under which males with GRCs do not have to be treated as women (and vice versa). It is arguable that the 1992 Regs should or must be treated as an exception. If they are, then men with GRCs should be treated in the same way as men without GRCs in relation to single sex facilities in the workplace (see §§20—21 above).

23. In the For Women Scotland case the Supreme Court is currently deciding whether the principle in the GRA applies to the EqA. The Court is not deciding whether the principle applies to the 1992 Regs, so the judgment will not bring certainty about whether employees with GRCs should have access to opposite-sex facilities in workplaces. However, it is likely to give a steer as to how "woman" and "man" should be defined for the purposes of legislation other than the EqA, such as the 1992 Regs.

24. If it can clearly be inferred from the Supreme Court judgment that a GRC does not change a person's sex for the purposes of the 1992 Regs, then the position for employees with GRCs will be the same as it is now for those without GRCs (see §20—21 above).

25. If it can clearly be inferred from the Supreme Court judgment that a GRC does change a person's sex for the purposes of the 1992 Regs, then an employer will have to ensure that there are sufficient women's facilities in the workplace which can be used by males with GRCs and sufficient men's facilities which can be used by women with GRCs. However, that does not mean that there will be no legal route for complaint from employees who wish to have access to single sex facilities on a biological sex basis. These employees might still bring complaints arguing that it amounts to indirect discrimination or harassment related to sex (see §§3—7 above) for the employer not to also provide single sex facilities on a biological sex basis.

[24] GRA s.9(1) read with Forstater v CGD Europe [2022] ICR 1
[25] See e.g. GRA s.9(3)

Facilities permitted in services by the Equality Act

26. There is no equivalent to the 1992 Regs for members of the public who use services such as hospitals, swimming pools, restaurants etc. Instead the position is governed entirely by the EqA, and is considerably more complicated.

27. The starting point is that under the EqA it is usually unlawful direct sex discrimination to exclude service users of one sex from a facility. However, there are exceptions to this rule which allow a service provider to provide single sex facilities for one of five permissible reasons.[26] These reasons include that "the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex".[27] Another permissible reason is that the service is a hospital or a similar setting.[28]

28. It is not enough for one of these five reasons to apply. It must also be justifiable in the particular circumstances for the facility to be provided only to women or only to men. The service provider must be able to show that having a facility only for women or only for men is a proportionate means of achieving a legitimate aim.[29]

Equality Act complaints about single-sex facilities in services

Indirect discrimination

29. There is no equivalent to the 1992 Regs for members of the public who use services such as hospitals, swimming pools, restaurants etc. Instead the position is governed entirely by the EqA, and is considerably more complicated.

[26] EqA Sch 3 §27
[27] EqA Sch 3 §27(6)(b)
[28] EqA Sch 3 §27(5)
[29] EqA Sch 3 §27(1)(b)

30. Here there is no mandatory statutory duty which strengthens the service user's case, as there is for employees under the 1992 Regs (see §22 above). Nonetheless, depending on the facts and evidence in the case, the strong societal tradition in favour of single sex facilities mean that it will still be difficult for the service provider successfully to invoke the justification defence (see §5 above). If the complaint is of indirect sex discrimination, other factors favouring the complainant should include the overwhelming evidence of the dangers that men as a class statistically pose to women and the evidence of increased risk to women in unisex facilities. For similar reasons it will be difficult for a service user to succeed in an indirect gender-reassignment discrimination claim based on a wish to access the facilities provided for the opposite sex.

Harassment related to sex

31. Again, depending on the facts and evidence, it is likely to be difficult for a service provider to defend a claim of harassment related to sex (see §§6—7 above) by arguing that it was not reasonable for a female service user to feel that her dignity was violated by having to share facilities with males. As above, compelling factors include the societal tradition in favour of single sex facilities, the overwhelming evidence of the dangers that men as a class statistically pose to women and the evidence of increased risk to women in unisex facilities.

The meaning of “woman” and “man” in the Equality Act

People without Gender Recognition Certificates

32. Under the EqA a woman is, at least, anybody who was born female and does not have a GRC and a man is, at least, anybody who was born male and does not have a GRC.[30] There is no law which allows people to self-identify into the opposite sex for the purposes of the EqA or for the purposes of any other UK legislation. The protected characteristic of gender reassignment in the EqA[31] protects most trans people from discrimination, but it does not mean that trans people must be treated as though they are the opposite sex, whether under the EqA or for any other legal purpose. Only a GRC can have this effect.

33. Thus if a service provider allows males who do not have GRCs to use the women’s facilities:

    33.1. The facilities will no longer qualify as single sex facilities under the exceptions in the EqA (see §§26—28 above).

    33.2. Therefore the service provider will have no permission in law to exclude any other men from that purportedly single sex facility.

    33.3. The service provider would be vulnerable to indirect discrimination claims of the types described in §3 above or harassment claims of the type described in §6—7 above from service users who wish to have access to single sex facilities. These will be harder to defend if there are no suitable single sex facilities available anywhere else in the service.

[30] For Women Scotland Ltd v The Scottish Ministers [2023] CSIH 37
[31] EqA s.7

People with Gender Recognition Certificates

34. Under the GRA a person who has a GRC becomes the opposite sex "for all [legal] purposes"[32] except in the situations where that principle does not apply.[33] The Supreme Court is currently deciding in For Woman Scotland whether the principle applies to the EqA.

35. If the Supreme Court decides that a GRC does not change a person's sex for the purposes of the EqA, then trans people with GRCs will be in the same position as those without GRCs. That is, as service users they should be treated according to their biological sex when using single sex facilities (see §33 above).

[32] GRA s.9(1) read with Forstater v CGD Europe [2022] ICR 1
[33] See e.g. GRA s.9(3)

36. If the Supreme Court decides that a GRC does change a person's sex for the purposes of the EqA, then in principle a service provider is entitled to allow males with GRCs to use facilities provided for women (and vice versa). However:

    36.1. The EqA contains a further set of exceptions which allow service providers to exclude trans people with GRCs from single-sex facilities where it is a proportionate means of achieving a legitimate aim to do so.[34] In this way, service providers may provide facilities on a single biological sex basis.

    36.2. A service provider which does not invoke these exceptions might face complaints of indirect discrimination such as those in §3 above or of harassment of the type described in §§6—7 above from service users who wish to have access to single sex facilities on a biological sex basis.

    36.3. A service provider which does invoke these exceptions might face a complaint of indirect gender-reassignment discrimination of the type described at §4 above. Claims of this sort will be easier for the trans service user to win than they would be if the Supreme Court had decided that a GRC does not change a person's sex for the purposes of the EqA.

[34] EqA Sch 3 §28

What employers and service providers should do

37. The current state of the law on single sex facilities is clearly unsatisfactory. Quite apart from anything else, it seems that employers and service providers should distinguish between trans people who have GRCs and those who do not. In services in particular this will almost always be impossible to do. Furthermore in both workplaces and services, it makes no difference to other users of the facilities whether a trans person has a GRC or not; they remain a person of the opposite sex.

38. The upshot of this mess is that the safest (although not risk-free) option for service providers and employers is to offer some "unisex" or "gender neutral" facilities for the use of people who do not wish to use facilities according to their sex, and to provide sufficient single sex facilities on a biological sex basis for everybody else, if it is possible to do so.[35] Neither the 1992 Regs nor the EqA prohibits the provision of unisex facilities in addition to single sex facilities.

39. This solution will not be available to all employers or service providers because of the burden of cost and/or a lack of physical space. Where it is not possible, employers and service providers are caught between the prospect of discrimination claims brought by people who want single sex facilities and those brought by trans people who want to use facilities in their acquired gender. It can only be hoped that the Supreme Court will clarify the position, and that if it does not, the Government will step in and amend the relevant legislation so that employees and service users can understand their rights and employers and service providers can understand their obligations.

[35] This should not be done be repurposing accessible facilities.

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