Submission to the Equality and Human Rights Commission's Consultation: Draft Strategic Plan, 2022-2025

For Women Scotland is a grassroots campaigning organisation whose aims include promoting the welfare of women and girls in Scotland, and protecting and strengthening our legal rights, and we welcome that the EHRC has launched a wide ranging consultation of what its strategic objectives should be for the next five years.

This is a momentous and challenging time for the continued protection of human rights - broadly read as civil, political and social rights - equality and non-discrimination across Britain. The COVID-19 Pandemic has had a pervasive and often devastating impact on the worldwide economy, changing how we work, we relate to one another as well as impacting on our relationship with public authorities and bodies.

Women have borne the brunt of the pandemic's effects on employment practices and access to basic services: a study conducted by the consultancy McKinsey in 2020 (COVID and gender equality: countering the regressive effects, 15/7/2020, URL: https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects) found that women's jobs are 1.8 times more vulnerable to dismissal and redundancy than men's jobs. Women constitute 39% of the workforce, and as a result of the pandemic women count for 54% of job losses. This is due to the fact that women bear the greatest share of caring responsibilities for children and young people and for the elderly. This is the price of inequality for women as a sex category.

As the EHRC considers what its strategic directions are going to be, we call upon the Commission to set levelling up the inequality between sexes as a central priority. This is not a new feature of society, in Britain and further afield: women as a sex category have been disadvantaged consistently vis-à-vis their male counterparts in accessing jobs, retaining them and progressing in their careers. For these reasons, we call upon the Commission to intensify its role as equality watchdog in a number of ways:

- Providing clear and consistent guidance for employers as to how they can meet their obligation not to discriminate against women on their basis of their sex, including the status of pregnancy and maternity in their working practices and employment relations with staff;

- Advocating vis-à-vis the UK and devolved parliaments for the purpose of establishing a right to ask for flexible working with a view to ensuring that women, especially mothers and those having caring responsibilities for elderly and disabled dependants, can fulfil these duties and at the same time thrive as workers in their places of employment;

- Intensifying its work vis-à-vis public bodies and bodies and agencies providing public services, with a view to ensuring that the latter meet their public sector equality duty obligations. This must involve ensuring that policies affecting how these services are provided and accessed are subject to Equality Impact Assessments and that the latter are kept in constant review.

Single Sex Exceptions and the Equality Act 2010

Sex is one of the nine protected characteristics identified by the EA 2010. However, in the past few years we have seen a slow and gradual erosion of its importance and with it, an increasing "clouding" of the notion of single sex exception as a means of balancing the right of dignity and privacy of women as a sex category vis-à-vis the rights of men who have undergone or are undergoing or propose to undergo gender reassignment processes. The concept of 'gender' which is a social construct with no factual evidence basis and, for individuals, is only a "feeling" has been replacing that of 'sex' as a biological fact in common parlance and public debate, for example. This has also occurred in the context of policy discussions and policy making, resulting in the disappearance of the word 'woman' even from contexts where this is the right, necessary word to use, as, for instance, in the context of maternity and sexual health services that are exclusively provided to those who are born female.

The recent Editorial published by the leading medical journal The Lancet (Davies, "Periods on Display", The Lancet, 1/9/2021, DOI: https://doi.org/10.1016/S0140-6736(21)01962-0, available at: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2821%2901962-0/fulltext?rss=yes) represents the most recent and in many ways most blatant example of this deletion to the extent that it refers to 'bodies with vaginas' and not to bodies of women as a natural reality that has been scarcely investigated. This is not just demeaning of women; it is also indicative of a perception of sex as no longer a meaningful category in law and society.

The erosion of the sex category from legislative practice is also clear from the recent Scottish legislation of free period products: the Period Products (Free Provision) Act, entered in force in January 2021, does not mention the word 'woman', 'girl', female' or 'feminine' once.

More worrying is the position concerning the reliance on single sex exceptions in the context of the provision of certain services which by their nature and by reason of demands of dignity and privacy, should be provided by women to women, as members of the same sex category. The Equality Act 2010 allows service providers to exclude someone who has the protected characteristic of gender reassignment from the provision of single-sex services, where single-sex provision meets and is proportionate to attaining a legitimate aim. There is a remarkable lack of clarity as to the meaning and scope of what a 'single sex exception' is, how it should be framed and how it must be understood in a variety of contexts. This is, in our view, linked to the erosion of sex as a legal category that has meaning, including as protected characteristic.

In the context of employment law, this is manifest in hiring practices and in particular in the equality and diversity monitoring practices used by many employers, who use 'gender' as synonymous, and often as substitute for sex as biological reality. This has on occasion led to trans-identified individuals being employed by organisations providing services, such as counselling to victims of rape or sexual assault, that by their nature should be provided separately to female victims. A well-known case is that of the Edinburgh Rape Crisis Centre, whose CEO is a trans-identified male who is not in the possession of a gender recognition certificate and who has been allowed to provide these services despite the scope of the exception itself.

The lack of clarity around the legal nature and impact of the notion of single-sex exception is also visible in public debate, where 'exception' is often replaced by the terms 'exemption' or, in some cases, 'exclusion'. This is not correct and risks weakening, if not altogether eliminating one of the key features in the Equality Act 2010 as a means of protecting dignity and privacy of women as a sex category. 'Exception' means that a certain provision, namely the duty not to discriminate against those bearing the protected characteristic of gender reassignment, does not apply to the provision of specific services. In this case, it is incumbent on the service provider to assess the nature of the service and to determine how the objectives of protecting the privacy and dignity of women, especially in view of their vulnerability, can be met in a way that is proportionate to the aim being pursued. Should there be a challenge to this decision, it is incumbent on the person challenging the legality of the exception to demonstrate that either the aim pursued is not 'legitimate' or that the exception is disproportionate to this aim. An 'exemption', instead, presupposes the existence of a preliminary authorisation being given to the provider, as a result of which the latter can exclude the bearers of the protected characteristic of gender reassignment without the legal consequences attaching to an infringement of Section 7 of the Act being triggered by it. This is not what the Equality Act 2010 provides: there is no regime of prior authorisation for the application of para. 26, Part 7 to the Act, nor is it for the provider to make a case for the application of the exception. If the latter is challenged, as explained, it is for the applicant to show that the requirements illustrated above are not fulfilled.

It is therefore indispensable that the nature, impact and effects of a single sex exception are made clear. This is especially imperative in light of the pressure to which public bodies and private employers have been subjected by a several campaigning organisations. Stonewall, with its Diversity Champion scheme, represents perhaps the most visible example of how the views of a campaigning organisation as to how the law "should be" have come to replace the actual meaning and scope of the law as it is in many contexts and situations. In this respect, we wish to remind the EHRC of the independent report produced by Ms Akua Reindorf QC upon request from the University of Essex and concerning the episodes of "no-platforming" of academics who hold "gender-critical" views, in other words, the view that sex as a biological fact matters and that it is sex, and not the indefinite notion of gender, that matters in determining and enforcing safeguards for women. In that report, Ms Reindorf found that there was a culture of fear in the institution, where those holding views departing from gender ideology felt undermined. She took the view that the restating the law as it is did not represent hate speech against trans and non-binary people and that, being a defence of the law as it is, is part of a general debate that could be undertaken to drive a change in the law, in the direction that Stonewall and other organisations would wish the law to become.

Importantly, the report called for the termination of the participation of the University of Essex into the Stonewall Diversity Champion scheme: Ms Reindorf took the view that adherence to the scheme means, in effect, to endorse the view of the law as Stonewall "would like the law to be" as opposed to what the law merely is. In this context, she singled out Stonewall's view of 'gender identity' as a protected characteristic under the EA 2010 as erroneous and reiterated that the concept of 'gender reassignment' is more narrowly defined. In our view, the position of Stonewall on this specific issue is consistent with and demonstrative of the drive, pursued by Stonewall and other organisations such as Engender, toward a conflation of sex and gender, thereby denying the existence of a conflict of rights, in certain circumstances, between the rights of women and those of trans people. This is contrary to

the letter and purpose of the Equality Act 2010 and to the extent that it reduces significantly the scope of the notion of ‘single sex exception’, can lead to a disproportionate interference with the right to privacy of women and girls.

In light of the above, we call upon the EHRC to make it a priority in its work for the next five years to clarify and provide guidance for service providers on the meaning, requirements and legal effects that are attached to the concept of ‘single sex exception’. This process must be conducted on the basis of a clear restatement of the notion of ‘sex’ as protected legal characteristic, in accordance with Article 11 of the Equality Act, as opposed to the notion of ‘gender’ which has neither evidence base nor legal status in the Act, and in that context of the notion of ‘woman’ and ‘man’ under the Act. We acknowledge that this is an area of the law that is controversial and that has been subject to a number of legal challenges. Nonetheless, as women are bearing the consequences of challenging economic and social circumstances—such as a rise in sex-based violence, including homicide, and greater incidence of unemployment and career progression discrimination—it is essential that the concept of single sex exception, that has been used as a means of, inter alia, increasing the presence of women in politics (e.g. via female only shortlists) and ensuring that their out-of-work responsibilities do not impinge upon career prospects, is upheld and clarified.

For Women Scotland
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