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# GEO consultation on reform of the Gender Recognition Act 2004

## Response from the Employment Lawyers Association

**19 October 2018**

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In responding to the government's consultation on reform of the Gender Recognition Act 2004 (GRA) ELA recommends repeal of section 22 of the GRA for practical reasons set out in this paper. These include the risk of accidental criminalisation of those trying to help and consistency with other employment and criminal legislation.

## Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a working party which was co-chaired by Paul McFarlane of Weightmans LLP and Elizabeth Drake of the Metropolitan Police's Directorate of Legal Services to respond to this consultation paper. The working party has responded to only those questions which it considers apply to employment issues surrounding this subject.

A list of the members of the ELA working party is at the end of this paper.

# ELA response to GEO consultation on reform of the Gender Recognition Act 2004

## *Question 9:*

***Do you think the privacy and disclosure of information provisions in section 22 of the Gender Recognition Act are adequate? If no, how do you think it should be changed?***

1. In short, "no". They are inadequate for two key reasons:

    a. first, breach of section 22 Gender Recognition Act ('GRA') 2004 should not be a criminal offence. It is wholly unjustified and may explain the lack of prosecutions;

    b. second, as currently drafted, section 22 GRA 2004 is not workable in practice and is likely to have unintended consequences.

2. These responses are set out in further detail below.

**A. It is inappropriate for the disclosure of information to amount to a criminal offence and as such section 22 as currently in place is in adequate**

3. The consultation appears to be premised on the basis that it is in the first place appropriate for a breach of section 22 GRA 2004 to amount to a criminal offence.

4. ELA are of the view that it is wholly inappropriate for a breach of section 22 GRA 2004 to amount to a criminal offence. The inappropriateness of such a criminal offence may well be the reason for the lack of prosecutions.

5. It is submitted that it is inappropriate for a breach of section 22 to amount to a criminal offence for a number of reasons, namely:

    a. the mental element (or *mens rea*) is lacking from section 22 GRA 2004 in order to properly constitute a criminal offence. Normally in criminal offences require some mental element, i.e. some need do to something intentionally. Section 22 contains no such requirement. Section 22 may therefore have the result of criminalising the innocent;

b. making disclosure a criminal offence is inconsistent with other areas of the law and leads to gross inconsistencies within the law as regards:

   i. different acts towards [trans people];

   ii. differences between different protected characteristics;

   iii. differences between the impact of sharing information in different situations.

c. the existence of a breach of section 22 as a criminal offence may harm the progress of acceptance of and equal treatment of trans people;

d. there are other ways obtaining the same (or indeed better) protection without the above problems.

***Lack of mental element / mens rea and risk of criminalising the innocent***

6. Whilst there are acts which are properly characterised as criminal (violent hate crime being an obvious example) it is disputed that a disclosure of information properly so amounts.

7. This is particularly because of the lack of mental element required in order for there to be a breach of section 22: there is no need for the disclosure to be malicious or in any way intended to harm the trans person. Indeed the disclosure may be with the express intention of helping the trans person (and indeed may in fact help them) but would still amount to a criminal offence. For example:

   *B, a trans woman, applies for a job where they are required to bring to the job interview evidence of their qualifications, such as a degree certificate. B contacts a junior HR manager at the prospective employer and explains that her degree certificate has her previous (male) name on it but that she now has a Gender Recognition Certificate ('GRC'). B does not want the interview panel to know her transgender history. The junior HR manager is keen to help and has a possible solution (namely the HR manager checks all degree certificates herself and produces a table of results for the interview panel but not the certificates themselves for the panel). The HR manager then speaks to her supervisor to check that her supervisor is happy with this approach.*

*In doing so she reveals to her supervisor that B has a GRC. She did not obtain B's consent before doing so. She has therefore committed a criminal offence.*

8. In the above scenario the junior HR manager was simply seeking to help B apply for the job. It may be that her actions enabled B to apply for and obtain the job (e.g. because B felt confident enough to apply knowing her gender history would not be disclosed to the panel). Even if it assisted B and even if the junior HR manager and her supervisor disclosed the information to no one else, the junior advisor would still, as section 22 is currently drafted, be guilty of a criminal offence.

9. Similarly, the junior HR manager may mistakenly have believed that she had B's consent to share the information with her supervisor. Again, that would not prevent her from having committed a criminal offence, on the basis of section 22 as currently drafted.

10. If this is the sort of scenario in which section 22 may apply, then it is understandable that it has not been seen as being in the public interest to prosecute those who have breached it.

11. In addition, the disclosure could be accidental, e.g. accidentally omitting to remove a reference to a person's trans history from a document that is shared. Despite being accidental, a criminal offence would still have been committed, on the basis of section 22 GRA 2004 as currently drafted.

12. Another example concerns hospital doctors who included in a patient's care plan (used only within the hospital) that the patient (a trans woman) had a GRC certificate. The aim of the care plan was to assist in providing appropriate medical care of the patient and to ensure that she was properly treated as a woman. Upon finding this out, the patient reported the hospital to the police. The police did not take any action. It is unclear what purpose would have been served by the police taking action and criminalising those medical professionals who drew up the care plan whose sole intention was to provide appropriate care to the patient (who, in that case, continued to seek and receive care from the same professionals even after reporting them to the police).

13. If section 22 is to remain, then it must contain some sort of mental element / mens rea, such as disclosing the information maliciously / with the intention of causing harm or

distress to the trans person and in situations where a disclosure cannot be justified. However, for the reasons set out below, ELA considers unauthorised disclosures about a person's gender history are better dealt with by and within existing discrimination law, as contained in the Equality Act ('EqA') 2010. This is set out further below.

***Inconsistency with discrimination law / protection afforded to those with other protected characteristics***

14. ELA are similarly concerned that the existence of section 22 as a criminal offence is inconsistent with the UK's longstanding approach to discrimination. The UK has, since the Sex Discrimination Act was passed in 1975, focussed on discrimination as a civil wrong, with remedies including declarations, recommendations and orders for compensation. That protection has been expanded since then to all the protected characteristic now contained in section 4 EqA 2010, of which "gender reassignment" is one.

15. The anomaly that is section 22 means that a different approach is taken as regards one specific protected characteristic as compared with others. For example:

    *A, a gay man, has told HR that he is gay but has decided not to share his sexuality with his work colleagues. A member of the HR team accidentally discloses this fact to a colleague. The colleague tells others in the office. This causes A a great deal of upset. A is, eg, likely to have a claim under section 26 Equality Act 2010 for harassment. A could receive compensation and recommendations may be made by the Employment Tribunal as to how such incidents can be prevented. However, no criminal offence has been committed.*

    *B, a trans woman, has notified HR that she is trans but has decided that she does not want this known amongst the wider workforce. A member of HR accidentally discloses this fact to a colleague. The colleague tells others in the office. This causes B a great deal of upset. B is, eg, likely to have a claim under section 26 Equality Act 2010 for harassment. B could receive compensation and recommendations may be made by the Employment Tribunal for how such incidents can be prevented. However, in*

*addition a criminal offence is likely to have been committed under Section 22 GRA 2018 if B has a GRC.*

16. ELA are of the view that there is no justification for the differential treatment between one protected characteristic (gender reassignment) and another (sexual orientation).

***Inconsistencies with the law in respect of other disclosures of information***

17. Section 22 GRA 2004 is also inconsistent with other legislation, such as the Data Protection Act 2018 (DPA 2018). With some limited exceptions (that are not relevant here) breach of the DPA 2018 does not have criminal consequences.

18. For example: a disclosure of sensitive medical data may constitute a breach of the DPA 2018 but would not be a criminal offence. However, it would become a criminal offence if that disclosure also breached section 22 GRA 2004.

19. The disclosure of sensitive medical information (for example evidence relating to mental or sexual health) may be just as distressing and damaging for the cis person as for the trans person, and yet only the latter is a criminal offence. That cannot be justified.

***Inconsistencies between different acts towards trans people***

20. ELA are concerned that that there are serious inconsistencies with the way that the law treats acts towards trans people, with actions that may be intended to assist a person designated as criminal, whilst other actions which are targeted at harming the trans person, are not.

21. The following examples illustrate the concern:

    Scenario 1: As above, *B, a trans woman, applies for a job where are required to bring to the job interview evidence of their qualifications, such as a degree certificate. B contacts a junior HR manager at the prospective employer and explains that her degree certificate has her previous (male) name on it but that she now has a GRC. B does not want the interview panel to know her transgender history. The junior HR manager is keen to help and has a possible solution (namely the HR manager checks all degree certificates herself and produces a table of results for the interview panel*

*but not the certificates themselves for the panel). The HR manager then speaks to her supervisor to check that her supervisor is happy with this approach. In doing so she reveals to her supervisor that B has a GRC. She did not obtain B's consent before doing so. She has therefore committed a criminal offence, despite the fact that she is simply seeking to help the applicant.*

*Scenario 2: A trans person applies for a job. They are open about being transgender. They do not obtain the job because the prospective employer does not want to employ a trans person. That is discrimination but is merely a statutory tort (a civil wrong) as opposed to a criminal offence. The discriminator may face proceedings before an employment tribunal, but they cannot face a criminal conviction because they have not committed a criminal offence.*

22. ELA are of the view that such inconsistences are not acceptable. It leads to a lack of respect for the law if such inconsistencies are allowed to remain.

23. Concerns about accidentally breaching section 22 GRA 2004 may also mean that employers are less willing to be flexible in their recruitment processes, for example in respect of what documentation they ask for. Where there is a risk of staff inadvertently incurring individual criminal liability, experience suggests that employers will seek to protect staff by insisting upon adherence to strict internal guidelines which deter management from using their initiative to better assist individual applicants. (For example, employers now commonly only provide 'minimalist' references due to concerns about potential claims from disgruntled ex-employees or future employers, which approach has devalued the purpose behind seeking references and, ironically, disadvantaged many who might otherwise have expected and been given more meaningful and helpful support in seeking new employment).

***Restriction on the rights of others***

24. Section 22 GRA 2004 may also indirectly impact upon the rights and freedoms of others, including in the employment context

25. For example, if a person has a child and, after that child is born, transitions and obtains a GRC, the child's birth certificate will still register the trans person's pre-transition gender. This was made clear in *R (JK) v The Registrar General for England and Wales* [2015]

EWHC 990 (Admin) where a transgender woman fathered two children prior to transitioning and obtaining a GRC. JK challenged the continued reference to her as "father" on the birth certificate on the basis that it breached her human rights. Her challenge failed: the interference was justified because to permit a scheme by which such an amendment could be made would result in substantial interference with the rights and interests of others, including the rights of other parents and of the children.

26. This is consistent with established case law that the issuing of a GRC does not "rewrite history" – see *J v C* [2006] EWCA Civ 551, [2006] 3 WLR 876 per Walls LJ. In that case the Court of Appeal held that the obtaining of a GRC did not have retrospective effect so as to validate J's marriage to a woman before she obtained her GRC. In doing so the Court of Appeal was giving effect to Section 9(2) GRA 2004 which provides that the issuing of the GRC "does not affect things done, or events occurring, before the certificate is issued".

27. The practical impact of this will be that it will sometimes be necessary, and certainly legitimate, for others to refer to matters that pre-date the issuing of a GRC which could have the impact of disclosing the GRC holder's gender before they acquired a GRC. In our view they should not have to risk criminal sanctions by doing so. For example, the child who is fathered by a transwoman may have to provide her birth certificate to apply for a passport or job or visa (for example to travel to another country for work purposes). The official receiving a copy of that birth certificate may need to pass that information on within their organisation. In doing so they will have received protected information about the GRC holder. If they pass that information on they have committed a criminal offence. That, in our view, is not acceptable and further demonstrates the inappropriateness of Section 22 GRA 2004.

28. Indeed in *R (JK) v The Registrar General for England and Wales* [2015] EWHC 990 (Admin) the Court noted the protection afforded by Section 22 GRA 2004 as a protection that JK would have as regards receipt by someone of protected information in an official capacity, but does not address the situation outlined above.

***Proposed solution***

29. ELA's proposed solution is simple: repeal Section 22 GRA 2004. Concerns about malicious disclosure can be amply dealt with by the harassment provisions contained in the Equality Act 2010, which also have the advantage of meaning that the injured person can receive compensation.

30. Alternatively, section 22 2004 be amended to ensure that only disclosures that are malicious, or intend to do harm, and are not reasonable, are covered. In addition, the existing exemptions need to be expanded to address the situation set out below.

## B. Section 22 GRA 2004 is not workable in practice and is likely to have unintended consequences

### Provision of Healthcare

***Position of healthcare professionals***

31. First there are some significant omissions from the definition of "healthcare professional". For example, only paramedics and operating department practitioners are included under those registered under the Health and Social Work professions Order 2001 (see Article 5(3)(e)). As such the following healthcare professionals (who are also registered) are excluded: arts therapists; biomedical scientists; chiropodists and podiatrists; clinical scientists; dietitians; hearing aid dispensers; occupational therapists; orthoptists; physiotherapists; practitioner psychologists; prosthetists and orthoptists; radiographers and speech and language therapists. It is submitted that there is no apparent reason for such an exclusion. For example, why should physiotherapists not be included when they may be important in assisting with a transgender patient recover from surgery? Why should a psychologist be excluded when they may be working closely with a psychiatrist in treatment a transgender patient? Similarly, there is no reference to osteopaths, despite their being healthcare professionals regulated by the General Osteopathic Council.

***Omission of those working with healthcare professionals***

32. The second omission relates to those working with / assisting healthcare professionals. Take the example of a patient agreeing to a disclosure as part a referral by their GP to a hospital specialist (a consultant). Permission is likely to be given for the sharing of the

information with said consultant, but what if the consultant's secretary opens the letter before passing it on to the consultant (presumably as part of his or her routine duties for that consultant in terms of managing their post)? Does the patient's consent impliedly cover the opening of the letter by the secretary or has a criminal offence been committed via a breach of Section 22 GRA 2004? Similarly, if an administrative assistant files that referral letter / scans it onto the system (rather than the consultant doing it themselves), does the consent impliedly cover that or does healthcare professional or again has a criminal offence been committed via a breach of Section 22 GRA 2004? Alternatively, should "healthcare profession" be read as including those whose work is incidental to / assists in the providing of healthcare by said healthcare professional? It cannot be the case that a criminal offence is committed because the consultant's secretary opens the referral letter (before passing it on to the consultant in the normal way). Again, this makes a mockery of the current legislation and is unworkable in practice.

33. In practice, it may well be that the Courts will take a practical approach to this legislation by pursuing a "purposive" approach to its interpretation. This was the case in *A v The Shrewsbury and Telford Hospital NHS Trust* (Stoke on Trent County Court, 19 December 2016 – unreported) per HHJ Rawlings at para 206, in which he held that on the facts of that case there was no breach of Section 22 where receptionists (who printed off A's care plan containing protected information) and archivists (who scanned information onto the system, including A's care plan) had sight of the protected information. This was on the basis that Parliament could not have intended there to have been a breach of Section 22 GRA 2004 where copies are printed off and why they are scanned is solely to promote and ensure effective and efficient medical treatment of the patient by the relevant healthcare professionals.

34. However, those working with medical professionals should not need to rely upon the Courts applying such a purposive interpretation in order to avoid being convicted of a criminal offence.

***Difficulties where consent is not given***

35. In addition, healthcare professionals may find themselves in difficulty where consent to disclose information is refused. No protection has been provided for healthcare professionals in such situations. For example, a transman is about to have abdominal

surgery. He tells the nurse about his trans history. The nurse is concerned that the surgeon needs to be informed that the transman has a womb. The risk of not doing so may be extremely serious for the patient. The patient however refuses consent for that information to be passed to the surgeon. What is the nurse to do in that position? Cancel the operation without informing anyone why and potentially putting the patient at a different risk (because they require surgery) or put the patient (and surgeon) at risk by not providing the necessary information to the surgeon? Where is the protection for the nurse (or surgeon) in such a situation?

**Disclosure in Court**

36. Section 22(4)(d) provides for an exception where disclosure is in accordance with an order of a court or tribunal and Section 22(4)(e) provides for an exception where "the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal".

37. These exceptions are important. They are necessary for others to be able to pursue and defend their own rights in court. They are similar to many other situations where exemptions are provided.

38. There are already adequate protections in place to mitigate any distress or difficulties caused by the exemptions. For example, the use of anonymity orders in court, anonymization of court documents and, where appropriate, the holding of hearings in private. Each case falls, rightly, within the discretion of the judge to use his or her judicial discretion to make the appropriate order in the circumstances.

39. That position should remain as it is.

**C. Impact of the proposed reforms on all of the above**

40. In ELA's view the proposed reforms will exacerbate the above problems. In particular there may be situations in which a person's gender history is more obvious because they obtain their GRC at a time when they have not progressed as far through the transition process. This may mean that their gender history may need to be referred to, for example

by medical professionals or other officials, and the imposition of a criminal offence in such situations may lead to greater anomalies and practical difficulties.

***Question 12:***

***Do you think that the participation of trans people in sport, as governed by the Equality Act 2010, will be affected by changing the Gender Recognition Act? Please give reasons for your answer.***

41. The answer to this question is very similar to the answer to question 13: there are two views in ELA, both of them tenable. On one of those views (set out in detail below in answer to question 13), the participation of trans people in sport will not be affected by the proposed changes; on the other view, the class of persons whom it will be lawful to exclude from single-sex sports only if exclusion is justified in their particular case will expand substantially.

42. This is only marginally relevant to employment, except in cases of those employed to participate in competitive sport.

***Question 13:***

***Do you think that the operation of the single-sex and separate-sex service exceptions in relation to gender reassignment in the Equality Act will be affected by changing the Gender Recognition Act?***

43. The government has stated that it has no intention of amending or removing these exceptions, but changes to conditions for the grant of a GRC may affect how these exceptions operate in practice. The extent of that effect is a matter of some debate within ELA.

44. The answer to this question is a matter of some debate within ELA. Essentially, there are two positions. This answer aims to set out both.

45. This answer is framed in terms of male-to-female transition, because ELA recognises that contentious issues arise chiefly in relation to access by

trans women to single-sex services or facilities for women; and because it is easier to make the issues clear in the context of concrete examples.

46. A single-sex service is permitted by part 7 of schedule 1 to the EqA to discriminate on grounds of sex provided it falls within the scope of the relevant exemption. That is a question which can be determined generally, at the point when the service is set up, by reference to considerations such as the nature of the service, the needs of those for whom it is provided, the effectiveness of joint provision, and the proportions of men and women in the general population of have need of such services.

47. A single-sex service is permitted by paragraph 28 of schedule 3 to the EqA to discriminate on grounds of gender reassignment if doing so is a proportionate means of achieving a legitimate in the particular case.

48. Some within ELA take the view that a trans woman without a GRC can at present lawfully be refused access to female-only services provided only it is lawful under the EqA to run such a service, because until she has a GRC, in law her sex is male. Others disagree, arguing that a trans woman with or without a GRC is a woman, and therefore to deny her access to a women-only service cannot be discrimination on grounds of sex: it must be discrimination on grounds of gender reassignment, in which case it falls to be justified in her particular case.

49. This disagreement goes to the heart of the wider ideological debate about the nature of sex and gender identity. That can be seen by considering the legal analysis by way of an example.

50. Suppose Chris, a trans woman, seeks access to a rape crisis centre that operates as a single sex service. The centre refuses to let her access its

services, saying that she is not in the requisite sense a woman. The question is: is this discrimination on grounds of sex, or gender reassignment?

51. The answer depends on the choice of comparator. How would the centre treat someone who is the same as Chris in all material respects, apart from the relevant protected characteristic? We can try this in turn with the protected characteristics of gender reassignment and sex.

52. Take gender reassignment first. If you hold everything else about Chris the same, but remove her 'transness' from Chris, are you left with a man or a woman? One group within ELA say you are left with a man, because Chris's body remains the same, but her identity and gender presentation now align with her (now his) biological sex. The other group say that Chris as a trans woman is a woman, and so if you remove her 'transness' - that is, the fact that her body does not conform to her gender identity and presentation - you are left with a woman.

53. If the first argument is correct, the centre would refuse Chris access just the same if she were not trans, because then she would be a man. So this is not gender reassignment discrimination. If the second argument is correct, the centre would admit Chris, because if she were not trans she would be a (biological) woman.

54. Similarly, to construct a comparator of the opposite sex to Chris, one must first take a position on whether in the requisite sense Chris is a man or a woman: that is to say, whether "sex" is a matter of biology, or identity; whether or not the centre is discriminating against her on grounds of sex depends on that position.

55. There is no case law as yet to provide a definitive answer to these questions.

56. The reason why this matters for the purposes of question 13 is that if refusing a trans woman access to a single-sex service is gender reassignment discrimination, then it falls to be justified in her particular case whether or not she has a GRC; so the conditions for grant of a GRC will make little or no difference to the operation of this exemption. But if refusing access to a trans woman without a GRC is sex discrimination, then any relaxation of the conditions for grant of a GRC is liable to expand the category of trans women entitled to access women-only services unless refusal is justified in their particular cases; and that is liable to increase proportionately the difficulty (and exposure to discrimination claims) inherent in operating any single-sex service.

57. ELA does not take a position on which analysis is more likely to be correct. Its collective view is that this is already a difficult area of law on which expert discrimination lawyers can reasonably take different views, and the manner in which the single-sex and separate-sex exemptions can lawfully be operated is unclear. But on one of the two tenable views of the law, the operation of those exemptions is likely to become significantly more restricted.

58. ELA, being a non-political organisation, does not take a position on whether it is a good or a bad thing that the operation of those exemptions should be restricted. Clarity is helpful for clients as they are more likely to be advised clearly and accurately, and costs can be managed more easily.

***Question 14:***

***Do you think that the operation of the occupational requirement exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Please give reasons for your answer.***

59. ELA's view is that changes to the GRA will make no significant difference in practice to the operation of the occupational requirement exception.

60. The occupational requirement exception is to be found at paragraph 1 of schedule 9 to the EqA 2010. It is lawful to discriminate in relation to work if (a) having a particular protected characteristic can be shown to an occupational requirement; (b) the requirement to have it is a proportionate means of achieving a legitimate aim; and (c) the person to whom the requirement is applied does not meet it (or the alleged discriminator has reasonable grounds for not being satisfied that they meet it). The part of the final requirement in parentheses is disapplied by subparagraph (4) of paragraph 1 where the protected characteristic is sex.

61. Using the same example as above, suppose Chris is a trans woman with no GRC who applies for a job in a rape crisis centre. The centre rejects her application, claiming to rely on two occupational requirements: to be a woman, and not to be a trans woman.

62. Alternatively, Chris is a trans woman with a GRC. This time the centre accepts (as it must) that in law she is a woman, but rejects her relying on only one occupational requirement: not to be a trans woman.

63. ELA members disagree about the formal legal analysis of the first of these scenarios: those who consider that the sex of a self-identified trans woman is female would argue that the centre in that case is wrongly purporting to rely on sex as an occupational requirement, whereas those who consider Chris to be legally a man until and unless she is granted a GRC take the opposite view. But ELA members agree that little if anything turns on this difference: in both cases, the centre will have to establish and justify the application of an occupational requirement not to be a trans woman.

***Question 15:***

***Do you think that the operation of the communal accommodation exception in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? Please give reasons for your answer.***

64. Again, the answer depends on the position one takes on the debate explained in answer to question 13. The reach of the exception will change - in that the class of trans women entitled to access communal accommodation for women unless refusal is justified in their particular cases will expand - if the proper comparator for a trans woman is a man. If the proper comparator is a woman, it will not change.

***Question 20:***

***Currently, UK law does not recognise any gender other than male and female. Do you think that there need to be changes to the Gender Recognition Act to accommodate individuals who identify as non-binary? If you would like to, please expand upon your answer.***

65. ELA highlights that the law could be reformed so that protection is more easily afforded to those whose gender identity does not fit within the existing definitions contained in either the Gender Recognition Act 2004 and the Equality Act 2010. Protection could be widened so that it includes those with a typical gender identity, such as those who are bi-gender, agender, have no gender identity or whose gender identity is non-binary.

66. This is particularly stark in respect of the Equality Act 2010. Section 7 EqA 2010 limits protection to a narrow cohort, namely a person who 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.". This does not encompass those who are bi-gender, agender, have no gender identity or whose gender identity is non-binary, or other variations on gender identity.

67. ELA does not consider that discrimination because of gender identity (be it bi-gender, agender, no gender or non-binary or variations on the same) is acceptable. Section 7 could be amended to ensure that such discrimination is unlawful.

**19 October 2018**

**APPENDIX**

## LIST OF MEMBERS OF THE WORKING PARTY

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