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Women and Equalities Committee Call for evidence on the Gender Recognition Act

Response from the Employment Lawyers Association

27 November 2020

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, chaired by Paul McFarlane was set up by the Legislative and Policy Committee of ELA to respond to this call for evidence. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters

dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. Transgender rights and how they intercede with other rights is an area of considerable controversy. The diverse and contrasting views of members of the Working Party represent the diverse and contrasting views of ELA. The Working Party has sought to answer the questions posed counterposing the different views of the Membership but to consider the technical legal questions.

5. The current legislation is unclear, leads to uncertain outcomes and is subject to piecemeal judicial development. Primary legislation is required to bring clarity to the central questions as to which characteristics are protected? Or, to put it another way, who is the appropriate comparator for a trans person who is discriminated against? The answer to that question is a policy one. It is not for ELA. Our evidence highlights that this is an issue that a consultative legislative process should tackle.

6. Further, ELA notes the difficulties in dealing with the following issues under the current law and highlights these matters as a focus for legislative review and or action:
   6.1. There is legislative inconsistency between the civil tort regime under the Equality Act 2010 and the criminal regime under the Gender Recognition Act 2004. That inconsistency should be reviewed;
   6.2. In exactly what circumstances trans people are protected by the law against sex discrimination and in exactly what circumstances trans people are protected by the law against discrimination because of gender reassignment;

6.3. If there is justification for special treatment of sex segregated sport and whether there should be consistent treatment of both the professional and amateur codes;

6.4. There are issues to resolve in respect of separate and single sex services and single sex spaces; and

6.5. The law should address Complex Gender Identities as we set out below.

QUESTION 1

Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?

7. ELA does not answer this question.

QUESTION 2

Are there challenges in the way the Gender Recognition Act 2004 (GRA 2004) and the Equality Act 2010 (EqA 2010) interact? For example, in terms of the different language and terminology used across both pieces of legislation?

8. The greatest difference in terminology between the GRA 2004 and the EqA 2010 relates to the definition of those who are protected. That is not in and of itself wrong, given the different functions of the two pieces of legislation: the EqA 2010 being there to protect those with protected characteristics from discrimination and the GRA 2004 to give specific legal rights to those who have successfully undergone the process for obtaining a Gender Recognition Certificate ("GRC"). The original two most significant purposes of the GRA: (1) to allow a transgender person to marry in their acquired gender and (2) to receive a state or private pension when their acquired gender allowed have both been overtaken by equal marriage and equalisation of pension rights.

9. However, the differences between the definitions contribute to some of the potential difficulties / anomalies under the EqA 2010 discussed further below.

10. There is considerable uncertainty, and controversy, as to whether possession of a GRC makes a difference to the 'sex' of a person when their rights or position under the Equality Act 2010 are considered.

10.1. OPTION 1: One view is that the EqA 2010 does not deal with the sex of a transgender person. They will, for all EqA 2010 purposes, always be their cis/natal sex[1], male or female. This position is inconsistent with protection of transgender persons and their accommodation in society but it is a possible reading of the Equality Act as far as provisions based on 'sex' is concerned.

10.2. OPTION 2: Another view is that a transgender person should be considered to be of their affirmed sex for the purposes of the EqA 2010 ONLY if they have a GRC, as a result solely of 9(3) GRA 2004. This, however, leads to significant anomalies and logical problems as will be shown below. If this interpretation is correct, two transgender people could have otherwise identical circumstances, (i.e. have transitioned for the same period of time and undergone the same degree of transition), and yet be regarded differently for the purposes of the EqA 2010 solely because one has a GRC and one does not.

10.3. OPTION 3: A third view, consistent with s9(3) GRA 2004 is that possession of a GRC is IRRELEVANT to consideration of an individual's rights or position under the Equality Act 2010 and PERCEIVED gender or sex in the particular circumstance under question is all that matters. This, however, leaves a person's gender or sex to be defined by the perception of an alleged discriminator. ELA notes that the EqA recognises the concept of

[1] A cis man is a man who is not transgender. A cis woman is a woman who is not transgender.

discrimination on the basis of perception (e.g. where a straight person is bullied because they are perceived as gay, or a white person is rejected for a job because they have an African name), albeit perceptive discrimination requires a Tribunal to establish what sex the alleged discriminator perceived the complainant to be.

10.4. OPTION 4: A fourth view is that an individual is the sex and/or gender in which they identify for the purposes of the EqA 2010, regardless of whether they have taken steps to transition and regardless of whether or not they hold a GRC. This also has potential difficulties given that they may present differently from how they identify, also discussed below.

Difficulties arising over the question of who is the correct comparator for the purposes of the EqA 2010 and potential inconsistency with the GRA 2004

11. As set out at Question 9 of ELA's "Response to GEO consultation on reform of the Gender Recognition Act 2004" (Appendix 1), there are differing views within ELA as to the approach to the correct comparator under the EqA 2010 when considering sex discrimination / gender reassignment discrimination.

12. When considering sex discrimination (leaving aside for a moment consideration of the GRA 2004) is a transgender woman who does not hold a GRC but who does fall within the s7 EqA 2010 definition of transsexual, male or female for the purposes of the EqA 2010? Some would say that, as she identifies as female, she is a woman for the purposes of the EqA 2010 (OPTION 4). Others would say that the transwoman is biologically male and therefore is male for the purposes of the EqA 2010 (OPTION 1). The EqA 2010 does not provide a clear answer as it does not define male or female or man or woman[2].

[2] Equality Act 2010 only contains a definition of sex at section 11, namely:
in relation to the protected characteristic of sex:

13. To take an example, if a transwoman applies for a job and is rejected for it despite being better qualified than all the other candidates, who are all male and not transgender, can she claim less favourable treatment on grounds of sex, the comparator being a man? Or is she treated as a man, and would therefore have to compare herself with a non-transgender person? Is that person a natal/cis man or a natal/cis woman or does it not matter?

14. Some in the working party take the view that looking at the above option, if the employer failed to appoint her because she is transgender, she can claim gender reassignment discrimination, comparing herself to a natal/cis man. In relation to sex discrimination, some in the working party consider the position is less clear. If OPTION 1 is right, she is male for the purposes of EqA 2010 and so her comparator for the purposes of a claim of less favourable treatment on grounds of sex would normally be a woman, and in principle her claim would fail. However, others in the working party point out that if the reason for her rejection is that the employer perceived her as a woman, then she can claim sex discrimination on the basis of perception, her comparator being a man

15. There is a further potential lacuna: if the potential employer does not realise that the transwoman is transgender and simply rejects her because they do not want to employ a woman, is it acceptable that she has to rely upon perceived discrimination, i.e. that she is perceived as being female (OPTION 3)? Again,

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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**.

It is the view of some of the working party that the terms 'male' and 'female' should be regarded as having their natural biological meanings at common law as this would be consistent with the decision in ***R (McConnell and YY) v Registrar General* [2020] EWCA Civ 559** which addressed this issue in a different context but which proceeded on that basis as did ***R v Chief Constable of Humberside ex parte Miller [2020] EWHC 225***.

who is the comparator in such a situation? Some in the working group say, yes this is acceptable because the EqA provides a remedy through the concept of perceived discrimination. Whereas others in the working group consider this does not appropriately reflect a trans person's gender identity.

16. Now consider the position of a transgender person under OPTION 2 and compare the position of the above transgender woman (who falls within s7 EqA 2010 but who does not hold a GRC) with a transgender woman who does hold a GRC. The effect of holding a GRC is that, as a result of s9 GRA 2004, the transwoman is a woman 'for all purposes'. IF this affects rights under the EqA 2010 (OPTION 2), for the purposes of the EqA 2010 she is a woman and the correct comparator is a man and the question of who is the correct comparator for sex discrimination purposes does not arise. However, this potentially means that a transgender woman who "passes" as a woman, who has lived potentially all of her adult life as a woman (potentially not even going through male puberty if she received puberty blockers as a child) may not be regarded as a woman for the purposes the EqA 2010 WHEREAS a person who transitioned later and possibly less successfully but who has obtained a GRC, is regarded as a woman for the purposes of the EqA 2010[3].

17. It might be suggested that one solution to the above would be to say that the transwoman should obtain a GRC. However, she may not wish to do so or she may not be able to do so, for example, if she does not (yet) meet the requirements for a GRC, albeit still falling within the protection of s7 EqA 2010.

18. In another example, what about a teenager who is a transwoman/trans-girl applying for a "Saturday job"? If under 18, she will not be able to obtain a GRC,

[3] Note that some in the working party take the view that in the scenario above, this person can still claim discrimination by perception if she doesn't get a job because she is perceived to be female.

however successfully she has transitioned. Is she male or female for the purposes of the EqA? Why should she be potentially regarded as different under the EqA 2010 from an 18-year-old whose circumstances are the same but who is simply a few years older?

19. There is a further complication in the above scenario. If the trans-teen with a GRC is not offered the job because she is transgender, who is the correct comparator? Is the comparator a male or female teenager or does it not matter?

20. There has been some, but very limited, guidance in this regard by the courts. It can be argued that, following the decision of the House of Lords in *Chief Constable of West Yorkshire Police v A (No2)* [2004] UKHL 21, [2005] 1 AC 51 (in which it was held that European Union law requires that those who have undergone hormonal treatment and surgery and lived successfully in the opposite gender be recognised in their reassigned gender for the purposes covered by the Equal Treatment Directive)[4], it is difficult to see how a post-operative trans person who lives permanently in their acquired gender could be regarded as not being of their acquired gender for the purposes of the EqA 2010 and therefore for comparator purposes (OPTION 3 and OPTION 4 if they have gone sufficiently down the transition pathway). However, it is possible to argue that, short of receipt of a GRC, a transwoman remains a man as a matter of law, including for EqA 2010 purposes (OPTION 2).

[4] On that basis, some members consider that the individual in these circumstances is to be treated as being of that acquired gender. Others however note that the case pre dated the GRA which established the principles for determining whether gender had changed in law. Baroness Hale expressly stated that the forthcoming Gender Recognition Bill which subsequently became the GRA would provide *"a definition and a mechanism for resolving these demarcation questions. But until then it would be for the Employment Tribunals to make that judgment in a borderline case"*. Some therefore consider that the case has been superseded by the GRA.

21. As a non-political organisation, ELA recognises the strong divergence of views on the above questions and does not advocate for one view over the other. It recognises both legal views as legitimate. However, what is recognised by the working group is that this is an area that requires sensitive legislative consideration and not "piecemeal judicial development". It is also plain that legal uncertainty is unhelpful in employees and employers seeking to understand their rights and responsibilities under the EqA 2010 and unhelpful to professionals advising in the field.

22. ELA further notes the following issues are also unclear, namely:
    22.1. whether a woman can claim sex discrimination or equal pay citing a transwoman as a comparator (with or without a GRC). This is particularly important in respect of equal pay where no hypothetical comparator is available;
    22.2. categorisation of transwomen (in particular those with GRCs) when undertaking an equality impact assessment for the purposes of considering whether a sex neutral policy puts natal/cis women at a particular disadvantage. Should GRC recognition be suspended for this purpose?

The above problem of the comparator / the inconsistency between the EqA 2010 and the GRA 2004 in the operation of single-sex and separate-sex exceptions under EqA 2010

23. The above problem of the appropriate comparator is particularly acute when considering the operation of single-sex and separate-sex exceptions under the EqA 2010 and the potential difference in treatment between a trans person who has a GRC and one who does not and whether the treatment that needs to be justified is based on gender reassignment discrimination or sex discrimination.

24. This is addressed in more detail in Question 13 of ELA's *Response to GEO consultation on reform of the Gender Recognition Act 2004* (see Appendix 1).

The above problem of the comparator / the inconsistency between the EqA 2010 and the GRA 2004 in the operation of the genuine occupational requirement ("GOR") exception in the EqA 2010

25. The problem of the comparator again arises in the context of the GOR, where a person with a GRC can fulfil a GOR and a person without cannot, with one giving rise potentially to sex discrimination and the other to gender reassignment discrimination, despite the same set of facts.

26. Again, this is discussed in more detail at Question 14 of ELA's "Response to GEO consultation on reform of the Gender Recognition Act 2004" (see Appendix 1).

The problem of s22 GRA 2004, both inherently and as compared with the EqA 2010

27. As outlined in response to Question 9 in ELA's "Response to GEO consultation on reform of the Gender Recognition Act 2004" (see Appendix 1), ELA is concerned about the operation of s22 GRA 2004, breach of which is a criminal offence, however inadvertent the disclosure. As stated in our previous response, ELA believes that breach of s22 GRA 2004 should not be a criminal offence, being disproportionate, and also that, as currently drafted, s22 is unworkable in practice, including in the employment context. ELA set out the reasons for this in more detail in our previous response and refers the reader to that response.

28. One of the reasons why s22 GRA 2004 is disproportionate is because of its inconsistency with the EqA 2010. Breach of the EqA 2010 is a civil tort as opposed to a (much more serious) criminal offence. The consequence is that a significant and intentional breach of the EqA 2010, for example, dismissing a

person because they are transsexual gives rise to a civil tort and possible compensation, whereas an inadvertent disclosure or indeed a disclosure for benign purposes can give rise to a criminal offence under s22 GRA 2004.

29. By way of example:
    29.1. A trans person with a GRC applies for a job. They do not want their qualification certificates disclosed to the application panel because they reveal their previous gender. They inform a junior member of the HR team of this who seeks advice from a senior member of the HR team on how to address this issue, which they resolve together by not requiring any candidate to provide their certificates to the application panel and instead providing a table to the panel showing everyone's qualifications. Under s22 GRA 2004 the junior HR person has committed a criminal offence by revealing the applicant's previous gender to the senior member of the HR team, despite their benign motive in doing so and even if the senior HR person treats the information as confidential and discloses it to no one else.
    29.2. A trans person who applies for a job is rejected by the application panel simply because they do not want to employ a trans person. That is not a criminal offence and instead is a statutory tort.

30. The criminalisation of the junior HR person in the above scenario cannot be right. As previously suggested, the ELA Working Party's solution is that section 22 GRA 2004 is repealed. Concerns about malicious disclosure can amply be dealt with by the harassment provision contained in the EqA 2010, which also has the advantage of meaning that the injured person can receive compensation. Alternatively, section 22 could be amended so that only disclosures that are malicious, or intend to do harm, and are not reasonable, are covered.

QUESTION 3

Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?

31. This question touches on the operation of a number of different provisions of the Equality Act, and calls for different answers in different cases. We summarise those provisions below, and comment on each individually.

Section 195: sport

32. ELA considers the definition of a "gender-affected activity" clear and workable.

33. The intention of the general exemption from the prohibition of sex discrimination of all matters relating to participation as a competitor in any gender-affected activity is also clear enough: it needs to be lawful to operate sports in separate male and female categories. But ELA is troubled by the breadth of the drafting, which taken literally would also appear to exempt sexual harassment or victimisation in relation to participation in a gender-affected activity.

34. The manner in which section 195(2) deals with gender reassignment discrimination in relation to sport is obscure.
    34.1. Some members of the working party were unclear why the qualified exemption from the operation of gender reassignment discrimination provisions is limited to sections 29 (goods and services) and 33, 34 and 35 (disposal and management of premises).
    34.2. In particular, participation in professional sport is not dealt with. The intention may be that participation in professional sport is dealt with by the "occupational requirement" provisions at Schedule 9 to the Act (and ELA's view is that in most circumstances professional sport will amount to work

and the sportsperson will be an employee or applicant within the extended definition of employment in EqA).

34.3. Nonetheless, ELA's view is that that is an unnecessarily confusing and inconsistent approach. Where there is justification for special treatment of sex-segregated sport, the factors set out in Section 195(2) (a) and (b) ought in principle to be applicable to both, and a consistent approach across amateur and professional sport would be clearer and more workable.

Schedule 3, part 7: Separate and single-sex services, etc.

35. The EqA provides for conditions in which it is permissible to offer separate services for each sex, separate services differently for each sex, or services only to persons of one sex (subject to a proportionality requirement).

36. Again there are divergent views in the working party about the meaning and clarity of the legislation. Some in the working party take the view that these provisions, taken by themselves are clear. However, others in the working party consider, for the reasons set out above (paragraphs 11-22), and in our response to Question 13 of the previous consultation (see Appendix 1), that there is currently a lack of clarity about who the correct comparator is in these circumstances. As a result it makes these provisions difficult to apply.

37. Some in the working party have also expressed the view that these provisions are not at present well understood by those to whom they apply. As a consequence they consider that there is a need for improved guidance in this area. The legislation itself is inevitably difficult for non-lawyers to understand, and generalisations about what it means are not of much assistance: it would be best explained by way of a large number of practical examples of situations in which it is and is not permissible to offer single-sex or sex-segregated services. However, others in the working group take the view that unless and until there is clarity

about who is the correct comparator (see paragraphs 11-22 above) there is no point producing any guidance in this area.

Schedule 9, part 1: occupational requirements

38. Schedule 9 allows employers to ring-fence certain jobs to individuals with one or more specified protected characteristics, where having regard to the nature or context of the work it is an occupational requirement to have that characteristic, and the application of the requirement is a proportionate means of achieving a legitimate aim.

39. As set out in ELA's response to Question 14 of the previous consultation (Appendix 1) and what we have said above, it is not clear who the correct comparator is when applying this requirement. ELA remains of the view that, in practice and for the reasons previously given, the difficulty with the question of comparator is likely to be of more significance when considering the operation of the occupational requirement provisions than, for example, the provisions relating to single sex services.

QUESTION 4

Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed?

40. ELA notes that this question uses the non-legalistic term "trans people" which is not found or defined in any legislation. In responding to this question, we understand "trans people" to cover a broad range of people with complex gender identities who consider themselves to belong to a subset of what is widely known by the non-legalistic term "the LGBT+ community".

41. ELA does not consider that the law as it stands adequately protects trans people, because it is unclear in exactly what circumstances trans people are protected by

the law against sex discrimination and in exactly what circumstances trans people are protected by the law against discrimination because of gender reassignment – see above where the question of comparators is discussed. It is also unclear whether all trans people would be able to establish that they possessed the protected characteristic of gender reassignment – see below.

42. We do not depart from the position set out in the previous ELA Working Group consultation response (Appendix 1). In particular, ELA still considers that the law in this area remains unclear in regard to whether the law protects "trans people" primarily through the protected characteristic of "sex" or "gender reassignment" at present, and in regard to whether the legal protections against discrimination which the law affords to "trans people" are different for "trans people" with and without gender recognition certificates. In order adequately to protect "trans people" from discrimination and prejudice, we consider that the law in this area should be made clear by legislators.

43. In addition, ELA notes that in employment litigation, disputes often arise over whether acts or omissions should be classified as direct discrimination which may not be justified or as indirect discrimination which can be justified. Such disputes may prove particularly prevalent and significant in the context of protecting the rights of trans people. For example, the issues that surround discrimination may be very different when considering someone who transitioned at a young age and who "passes" in their acquired gender with someone in the early stages of transition whose physical appearance may not be wholly consistent with perceptions of the gender with which they identify. If the latter person is denied access to a particular same sex facility, is that because of their gender (direct discrimination), because of gender reassignment (direct discrimination) or because there is a provision, criterion or practice that someone's physical

appearance is congruent with the gender to which the space in question has been assigned (indirect discrimination).

44. The distinction is important because the former cannot generally be justified in law but the latter can. Whilst we consider that the distinction between direct and indirect discrimination is unlikely to change and there are advantages and disadvantages from a public policy perspective of using the existing familiar legislative scheme set out in the Equality Act 2010 as the vehicle for protecting trans people through the protected characteristic of "gender reassignment / gender identity", we do consider that these are important issues that should be considered by legislators and not be left to the courts/tribunals to deal with in a piecemeal fashion.

45. Ultimately the current uncertainly is unhelpful and has the potential to cause difficulties for both employers and employees.

QUESTION 5

What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services?

46. ELA does not answer this question.

QUESTION 6

Are legal reforms needed to better to better support the rights of gender-fluid and non-binary people? If so, how?

A policy question

47. This is, essentially, a policy question, akin to the similar question that could have been asked before, for example, in relation to disabled people, those with (or without) religious or philosophical belief, or of particular ages who were granted

legal protection as a protected characteristic (now contained within the provisions of the Equality Act 2010.

48. It is not clear why this question is limited to consideration of gender-fluid and non-binary individuals. There are other complex gender identities such as gender-queer and a-gender. In answering this question we will use the term 'complex gender identities' ("CGIs") to cover the full range of possibilities other than those whose gender identity matches their natal sex/gender.

49. On the face of it section 7 EqA 2010, which defines the protected characteristic of "gender reassignment" is very limited and only protects (broadly) those who are proposing to or have undergone the process (or part thereof) of changing physiological or other aspects of their sex, i.e. classically someone has been assigned a particular gender at birth but who wishes to transition permanently into the opposite gender, i.e. the gender as which they identify. This would not on the face of it cover all CGIs, although the understanding of the scope of section 7 may have been changed by the case of *Taylor v Jaguar Land Rover 1304471/2018* decided at first instance by the Birmingham Employment Tribunal in September 2020 and this will be dealt with by way of a note at the end of this answer.

50. Similarly, individuals with CGIs are not covered by the Gender Recognition Act 2004 which affords recognition of the legal gender of a person who has transitioned (within the definition provided by the GRA), see for example the decision *in R v Elan-Cane [2020] EWCA Civ 363* where the Court of Appeal upheld the UK Government's refusal to issue gender-neutral passports which may be relevant. That case is being appealed and will be heard by the Supreme Court.

51. ELA does not consider that discrimination because of gender identity (be it bi-gender, a gender, no gender or non-binary or variations on the same) is acceptable. However, the question of whether and how this should be addressed in law is a policy question that ELA as a non-political organisation is not in a position to answer. Instead we have set out the legal issues that may arise and should be considered by legislators if reform does take place.

Anticipated reforms

52. In answer this question we have assumed that it is suggested there should be legal reforms to give people who identify as having a CGI equivalent rights to those already enjoyed by transgender people who meet the relevant definitions / tests under the GRA 2004 and EqA 2010:

53. This would appear to require:
    53.1. Amendment of the Gender Recognition Act 2004 to give a right to recognise a CGI rather than having a "binary" legal sex of "male" or "female"; and
    53.2. The protected characteristic of "gender reassignment" in the Equality Act to be broadened or replaced by something like 'gender identity' to include people who identify with a CGI as well as the present position (ignoring Taylor v Jaguar Land Rover) where only male and female gender identities are recognised.

Advantages for persons with CGIs

54. Plainly a recognition of CGIs for persons having CGIs would be of substantial advantage to those people so identifying. They would, for example, be protected from discrimination on the basis of their CGI.

55. The right to work is fundamental to our society and the right not to suffer discrimination in the selection, training, performance of or benefits realised from

work (or a profession) is a fundamental right which should be protected, but whilst not at the same time giving rise to significant conflict with the rights of others.

Challenges for Society

56. Proposals to recognise a class of people who are legally something other than male nor female would have broad implications for society as a whole, including for employers and for employees, and is inevitably more complex than the present protection for those who move from one gender to the other by reassignment. That movement from one binary sex/gender to the other is not without challenge for society but that protection has been in place since the 1999 Sex Discrimination (Gender Reassignment) Regulations were enacted – over 20 years ago now.

57. Society is at present largely organised around binary gender/sex. (N.B. This submission does not attempt to deal with the confusing overlap of the terms 'sex' and 'gender' in some current legislation.)

58. For example, many HR and payroll systems class people as either "male" and "female" and there would be costs associated with accommodating CGIs. However, the need for this may have decreased following the provision of equal pension and pay rights for men and women and the need for payroll systems to maintain that difference may have diminished significantly and now be a historical anomaly. But it is also worth noting that mandatory gender pay-gap reporting is a reason for maintaining data on gender identities.

59. Most toilet provision is organised in separate "male" and "female" facilities, and indeed employers are legally obliged to provide single sex toilets except in the case of individual toilets that are fully self-contained and lockable (section 20 Workplace (Health, Safety and Welfare) Regulations 1992). Any changes legally

to “recognise” people who do not wish to be identified with either sex may place a burden on employers to organise things differently in future, and may involve a conflict with the employment rights of others.

60. It is clear that much remains to be done in the workplace to accommodate binary transgender people and educate work colleagues to treat them appropriately. This is not without controversy and a proportion of the workforce object to steps such as referring to a binary trans person in their preferred gender.

61. Protection for CGI’s can only increase the complexity for employers in drafting policies and training staff.

62. Matters are complicated even further in the case of someone who describes themself as “gender fluid” and presents as male or female on different days of the week, or gender-queer where their presentation may be ambiguous as to the pronoun they wish to be used. The chance of using an incorrect pronoun (and so giving offence which may form the basis of a discrimination claim) is significantly increased from the position of a binary transgender person presenting in their affirmed gender.

Have CGI’s become protected already?

63. The Committee will be aware of the case of *Taylor v Jaguar Land Rover* in which the Birmingham employment tribunal ruled that the protected characteristic of ‘gender reassignment’ included gender-fluid and non-binary gender identities.

64. Full reasons for the ET’s judgment were given orally on 14.9.20 and are due to be published by the end of November 2020. Accordingly, at the time of writing this response, the absence of written reasons has meant that there has not been an

opportunity for the wider employment law community to provide considered comment on the legal analysis adopted by the Employment Tribunal in *Taylor*.

65. It is understood by this working party that the tribunal in *Taylor* relied on the statements made by the then Solicitor-General, The Rt Hon Vera Baird QC when she was piloting through the Commons the Bill which was to become the Equality Act 20105. Hansard records her as recognising that gender is a 'spectrum' and that 'gender reassignment' should be taken to be any move away from natural sex.

66. This case is only first instance and so has no formal precedent value. It is not being appealed. It is, therefore, open to any future employer faced with a claim from a person alleging discrimination related to a CGI to re-argue the point. Therefore, the question whether people who identify as "non binary" "gender fluid" or other CGIs are included in the protected characteristic of gender reassignment will remain a matter of legal debate until the matter is decided either on appeal in another case or by legislation.

67. Further, the lack of legal certainty leaves employers with the added problem of having to decide the content of workplace policies, tackling the complexities set out above and consideration of which employees meet the definition of 'gender reassignment' under the Equality Act.

68. Until the point is considered by a higher court or dealt with by way of legislation, there will remain some doubt in the position, and uncertainty is, of course, unhelpful in advising employers as to their responsibilities or employees as to their rights.

[5] One of the members of this working party, Robin White, was Counsel for the Claimant in the *Taylor v Jaguar Land Rover case*

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