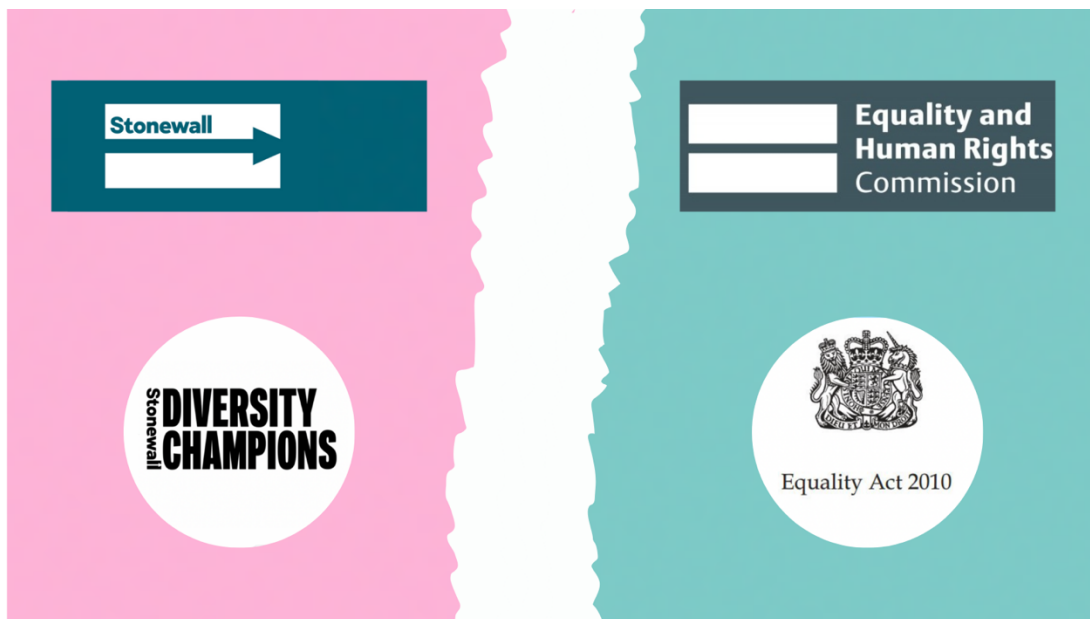


Understanding the Risk of Following Stonewall Advice



A BRIEFING FOR EMPLOYERS
AND POLICY MAKERS
JULY 2021

ABOUT THIS REPORT

This report compares Stonewall guidance on “trans inclusion” with the law, as set out in the Equality Act 2010, associated case law and the Employment Statutory Code of Practice.



It is written to support organisations in the public, private and voluntary sectors undertaking due diligence as to whether they should stay in or leave the Stonewall Diversity Champions scheme and the UK Workplace Equality Index.

ABOUT SEX MATTERS

Sex Matters is a UK based not-for-profit organisation. We have a single mission: to re-establish that sex matters in rules, laws, policies, language and culture in order to protect everybody’s human rights. We campaign, advocate and produce resources to promote clarity about sex in law, policy and institutions. Our priorities are:

- Establish clarity about the law – Sex is a protected characteristic, and the Equality Act 2010 protects single-sex services. Clear guidance for organisations is needed.
- Support people to speak up – It should not take courage to say that sex is real, binary, immutable and important – but right now it does.
- Empower organisations – We work to empower organisations to adopt sound, fair and transparent policies that reflect material reality and protect everybody’s human rights.

Comments are welcome and should be sent to info@sex-matters.org

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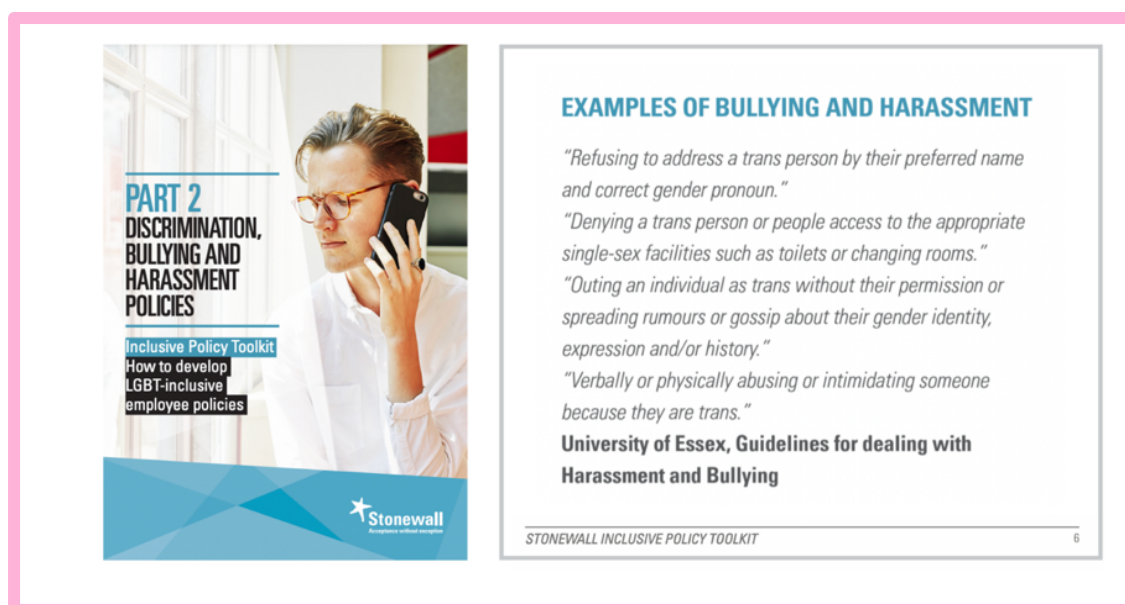
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THE NEED FOR DUE DILIGENCE

Many public, private and voluntary sector organisations are reconsidering their membership of Stonewall Diversity Champions and the UK Workplace Equality Index, after criticism that the organisation’s advice undermines compliance with the Equality Act 2010.

Freedom of information responses reveal a scheme which goes well beyond “HR good practice” to involving public bodies in promoting a lobbying agenda for law reform.¹ For example, documents disclosed in the ongoing case of **Allison Bailey v Stonewall Equality Ltd** and others show the organisation targeting an individual for her opinions directly through their employer.² A report by barrister Akua Reindorf for the University of Essex found that its policy on “Supporting Trans and Non Binary Staff”, reflecting Stonewall guidance, was not in line with the Equality Act and contributed to an environment of fear for staff holding dissenting views about sex and gender.³



The judgment in the recent **Forstater** case has strengthened recognition that the Equality Act 2010 protects people who disagree with Stonewall on the nature of sex and gender from discrimination and harassment.⁴

1 <https://archive.is/bcTQg>

2 <https://archive.is/9tNT9> and <https://allisonbailey.co.uk/updates/update-5-breaking-exclusive/>

3 <https://www.cloisters.com/reindorf-review-on-no-platforming/>

4 https://www.bailii.org/uk/cases/UKEAT/2021/0105_20_1006.pdf

A lobbying group campaigning to change the law

Stonewall has a declared lobbying agenda to change the law. In 2017 it published “A Vision for Change” for “acceptance without exception” for trans-identifying people. Its goal was a radical change to the law to allow people to change their legal sex through “a simple administrative process”.

It has also called for changes to the Equality Act 2010 to remove the protected characteristic of “gender reassignment”; to replace it with “gender identity” and to remove all instances of permitted discrimination (the “exceptions”) against trans-identified people.

At the heart of this is an ideological theory about the primacy of a spectrum of fluid, variable “gender identity” over binary, immutable sex.

Gender identity

A person’s innate sense of their own gender, whether male, female or something else (see non-binary below), which may or may not correspond to the sex assigned at birth.



EQUALITY ACT

Stonewall will lobby Government for reform of the Equality Act, to include 'gender identity' as a protected characteristic and to remove the use of the terms 'gender reassignment' and 'transsexual' from the Act. Removing current ambiguities in the Act will ensure that all trans people, including those who identify as non-binary, are unequivocally protected and included. It will also signal to trans employees and service users, as well as public bodies and employers, that discrimination of trans people is not acceptable.

In addition, Stonewall will advocate for the removal of all instances of permitted discrimination of trans people from the Act, as well as for updates to the explanatory notes and statutory codes of practice accordingly. Stonewall will lobby political parties in England, Scotland and Wales to include full equality for trans people, and the reform of the Equality Act, as part of their political commitments.

Stonewall has not achieved these lobbying goals, largely because of resistance from women’s rights campaigners who argued against their proposal. The Gender Recognition Act 2004 and the Equality Act 2010 remain as they were when they were enacted by Parliament.

However, Stonewall has encouraged employers to disregard parts of the Equality Act 2010, viewing it as out of date and insufficient and telling them to act as if the law had already been changed.

As employment lawyer Audrey Ludwig writes, going beyond the law sounds positive but it is a “trap for the unwary” since it ignores the potential for conflicts of rights with those who have other protected characteristics.⁵



- An overview of **legal protections** for trans people in the workplace, including issues of confidentiality. The most inclusive employers acknowledge the limitations of the Equality Act (2010) in relation to the term ‘gender reassignment’, committing themselves to protect against all discrimination on the basis of gender identity. For more information, see Stonewall’s **‘First Steps to Trans Inclusion’** guide.

Your Trans Inclusion Policy should include

- An overview of **legislation and further resources**. This should include information about confidentiality, the Gender Recognition Act (2004) and the Equality Act (2010), while also acknowledging that the current law is **insufficient in its terminology and framework**.

5 Ludwig, L (2021) To Boldly Go – Why “going beyond the law” risks unlawful discrimination
<https://legalfeminist.org.uk/2021/05/22/to-boldly-go-why-going-beyond-the-law-risks-unlawful-discrimination>

A trusted advisor on the current law?

Employers join the Stonewall programme as a means to ensure compliance with equality law and promote an inclusive culture, but it cannot fulfil this role as it does not recognise conflicts of rights.

Sex Matters, along with many individuals, has been writing to organisations asking them to reconsider their participation in the Stonewall schemes. Some have written back saying that they have already left (see Annex 1).

Many organisations have said they are reviewing their involvement. Some have stated they are taking the lead from their **LGBT Allies group** or **LGBT diversity lead**. This approach is inadequate since these groups may have been set up with the purpose of promoting Stonewall's policies, and are very unlikely to represent all LGB or T employees. They may be tempted to dismiss criticism of the scheme too readily as "transphobia".

Some Stonewall programme members indicate they are undertaking **value for money assessment**. This approach is also likely to be inadequate unless risks are factored in. While membership of the programme may seem relatively low cost in the short term, the legal and reputational risk of lawsuits is not.

Organisations should undertake **due diligence assessment** of whether the scheme is consistent with the law. They should consider the risk of staying in on that basis. This decision should be made at the highest level, with leadership taking responsibility for accepting that risk.

The key benchmark for organisations undertaking due diligence on their policies and the schemes they sign up to is the relevant **statutory Code of Practice** on the **Equality Act 2010**.

What are the statutory Codes of Practice?

To support organisations to understand and comply with the Equality Act 2010, the Equality and Human Rights Commission (EHRC) published three statutory Codes of Practice in 2011; one for employment and one for services and one on Equal Pay. They have all been approved by the Secretary of State and laid before Parliament. The Codes do not impose legal obligations, nor are they an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, they can be used in evidence in legal proceedings.

<https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

<https://www.equalityhumanrights.com/sites/default/files/equalpaycode.pdf>

NB: Apart from where otherwise indicated exhibits in green boxes are from the Employment Statutory Code of Practice

Stonewall has defended its guidance and Equality Index scheme, saying it is based on the statutory Code of Practice “which was recently reaffirmed in the High Court”.⁶ However, the case that it is referring to (**AEA v EHRC**) was about the Code of Practice for service providers.

The Stonewall Diversity Champions programme concerns organisations as **employers, not as service providers**. This briefing therefore considers whether Stonewall guidance is in line with the **Employment statutory Code of Practice** (and the underlying law and case law), as the primary source of relevant guidance.

It finds that it is not.

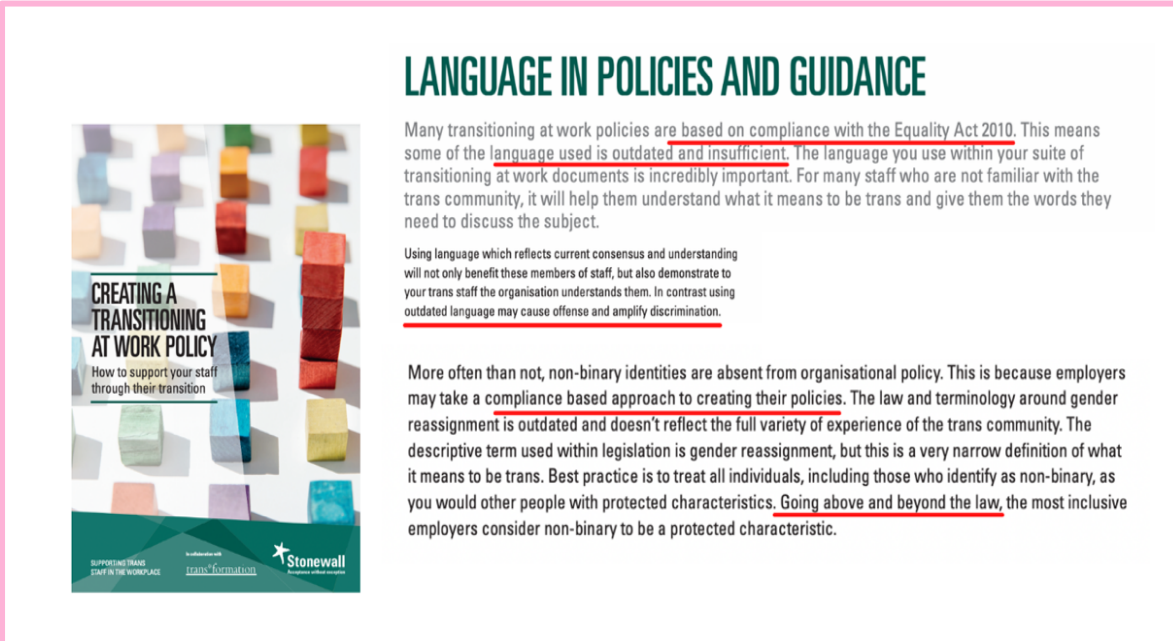
6 <https://www.stonewall.org.uk/about-us/stonewall-statement-diversity-champions-programme>

CHANGING THE PROTECTED CHARACTERISTICS

The Equality Act 2010 covers discrimination based on nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. A basic starting point for any employer to ensure compliance is being clear what each of these characteristics means.

Stonewall is committed to the political project of “gender self-identification”. Across all of its guidance and training it advises employers to ignore the legally protected characteristic of sex and to treat self-identified gender as if this was the legally protected characteristic.

The charity explicitly argues against taking a compliance approach and opposes using language in line with the Equality Act 2010. It says that the language of the law might be offensive. It calls for organisations to go “above and beyond the law”, and in the process induces them to misinterpret their legal freedom and capacity to act.



LANGUAGE IN POLICIES AND GUIDANCE

Many transitioning at work policies are based on compliance with the Equality Act 2010. This means some of the language used is outdated and insufficient. The language you use within your suite of transitioning at work documents is incredibly important. For many staff who are not familiar with the trans community, it will help them understand what it means to be trans and give them the words they need to discuss the subject.

Using language which reflects current consensus and understanding will not only benefit these members of staff, but also demonstrate to your trans staff the organisation understands them. In contrast using outdated language may cause offense and amplify discrimination.

More often than not, non-binary identities are absent from organisational policy. This is because employers may take a compliance based approach to creating their policies. The law and terminology around gender reassignment is outdated and doesn't reflect the full variety of experience of the trans community. The descriptive term used within legislation is gender reassignment, but this is a very narrow definition of what it means to be trans. Best practice is to treat all individuals, including those who identify as non-binary, as you would other people with protected characteristics. Going above and beyond the law, the most inclusive employers consider non-binary to be a protected characteristic.

Sex

As the Equality Act 2010 states, **sex** refers to being a male or female of any age. It relates to the words man and woman, girls and boys. Sex discrimination covers men and women in the same way.

Sex

What the Act says

2.62

Sex is a protected characteristic and refers to a male or female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls.

2.63

A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraph 2.21) or sexual orientation (see paragraph 2.64).

Stonewall's [glossary](#) describes sex as "assigned based on genitalia" and then immediately seeks to promote the idea that "sex" and "gender" (which it defines as "masculinity" and "femininity") are interchangeable.

What Stonewall says:

Sex

Assigned to a person on the basis of primary sex characteristics (genitalia) and reproductive functions. Sometimes the terms 'sex' and 'gender' are interchanged to mean 'male' or 'female'.

Gender

Often expressed in terms of masculinity and femininity, gender is largely culturally determined and is assumed from the sex assigned at birth.

[Stonewall Glossary]

Adopting these definitions is inaccurate, intrusive and sexist. It directs attention either to a person's genitals, or their performance of gender stereotypes, rather than simply recognising that the person is male or female and telling employers to avoid unlawful discrimination on this basis.

Sexual orientation

Stonewall uses its own idiosyncratic definition of sexual orientation rather than the one in the Equality Act 2010.

This is what the Act and the Code of Practice says:

Sexual orientation

What the Act says

2.64

Sexual orientation is a protected characteristic. It means a person's sexual orientation towards:

- persons of the same sex (that is, the person is a gay man or a lesbian);
- persons of the opposite sex (that is, the person is heterosexual); or
- persons of either sex (that is, the person is bisexual).

This is what Stonewall says:

Sexual orientation

A person's sexual attraction to other people, or lack thereof. Along with romantic orientation, this forms a person's orientation identity.

Stonewall uses the term 'orientation' as an umbrella term covering sexual and romantic orientations.

[Stonewall Glossary]

Gender reassignment

Finally, Stonewall does not accept the Equality Act 2010 definition of gender reassignment (or being a transsexual in the terms of the Act) which relates to a person going through a process or part of a process to “reassign their sex”.

Gender reassignment

What the Act says

2.21

The Act defines gender reassignment as a protected characteristic. People who are proposing to undergo, are undergoing, or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

“Reassignment of sex” is a legal rather than a physical process. The Gender Recognition Act 2004 has allowed people with gender dysphoria who commit to living as if they were the opposite sex to change their legally deemed sex. The protected characteristic of gender reassignment thus covers anyone at any point on a journey whose end point might be the legal reassignment of their sex (including, for example, thinking about it, receiving counselling, considering options, beginning a process of transition that may or may not involve hormones or surgery, stopping and starting or detransitioning).

However, it does not cover people who cross-dress for other reasons.

2.26

Protection is provided where, as part of the process of reassigning their sex, someone is driven by their gender identity to cross-dress, but not where someone chooses to cross-dress for some other reason.

The government’s [policy document at the time of the Gender Recognition Act 2004](#) spelled out some of the other reasons which did not come under the protected characteristic.

What transsexualism is not

Transsexualism is *not* transvestism or cross-dressing for sexual thrill, psychological comfort or compulsion.

[Government Policy concerning Transsexual People, 2003]

Stonewall tells organisations participating in its schemes that the Equality Act 2010 protected characteristic of gender reassignment is out of date, and instead to use a wider umbrella term, “trans”, which includes people without gender dysphoria and with no intention of trying to live as the opposite sex.

Trans

An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.

Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois.

[Stonewall Glossary]

This does not reflect the Equality Act 2010.

The recent employment tribunal case of [Taylor v Jaguar Land Rover](#) is claimed by Stonewall and others to mean that the Equality Act 2010 characteristic of gender reassignment covers people who identify as “non-binary” or “gender fluid” (including those who would previously have been described as cross-dressing for other reasons). This is a misinterpretation of the tribunal decision. The case concerned a man who has now transitioned to identifying as a woman, and who during that transition described himself (at the time) as “gender fluid”. The tribunal found that on the facts of this case Taylor met the criteria for the protected characteristic of gender reassignment. This doesn't mean that everyone else who describes themselves as “gender fluid” or “non binary” with different facts would necessarily meet the criteria.

“Gender Identity”: self-identification by the back door

The Act and the Code of Practice are very clear that the individual protected characteristics are separate. Sex and sexual orientation clearly relate, as do sex and pregnancy/maternity. But sex does not include gender reassignment and nor does sexual orientation.

Sex

What the Act says

2.62

Sex is a protected characteristic and refers to a male or female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls.

2.63

A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraph 2.21) or sexual orientation (see paragraph 2.64).

2.68

Gender reassignment is a separate protected characteristic and unrelated to sexual orientation – despite a common misunderstanding that the two characteristics are related (see paragraph 2.21).

Under UK law there are only two sexes and the only way a person’s sex can be changed is via a Gender Recognition Certificate (GRC), following a clinical diagnosis of gender dysphoria.

That sex is not changed through self-identification was confirmed by the case of [Green v Secretary of State for Justice \[2013\]](#) which went to the High Court after the Code of Practice was published. The Green case involved a transwoman prisoner (held in a male prison) who argued that she was being discriminated against by being denied tights, a wig, prosthetic breasts and vagina (the prison governor argued that these items are a security risk), as well as difficulty in obtaining other items such as make-up, sanitary towels, hair removal products and women’s shoes and clothing. The Judge ruled that since Green remained legally male (without a Gender Recognition Certificate), “a woman prisoner cannot conceivably be the

comparator”. He further ruled that “male to female transsexuals are not automatically entitled to the same treatment as women - until they become women.”

Thus, as the EHRC has clarified [in a statement in 2018](#), a person who has not changed their sex through the legal process of a GRC remains legally the sex that they were born. Both those with a GRC and without are protected against harassment and discrimination by the separate protected characteristic of gender reassignment.

In UK law, ‘sex’ is understood as binary, with a person’s legal sex being determined by what is recorded on their birth certificate. A trans person can change their legal sex by obtaining a GRC. A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes.

[EHRC, 2018]]

This was also reconfirmed in the case of **Fair Play for Women v The Office for National Statistics** [2021] which found that it was not lawful for the Office for National Statistics to advise people to answer the question on sex with their self-identified gender when it collected personal information under its statutory powers set by the Census Act 1920.⁷

The case of [Forstater v CGD Europe and Others](#) [2021] also reconfirmed that common law regards sex as binary and fixed at birth (see *Corbett v Corbett* [1971] P 83, *A v Chief Constable of West Yorkshire* [2005]). It reconfirmed that the coming into force of the Gender Recognition Act does not require individuals to disregard either the belief that biological sex is immutable and important, or their first hand perception or knowledge of what sex an individual is. Avoiding harassing people who identify as transgender does not equate to ignoring their sex in all circumstances, nor does obliging people to pretend in all circumstances to perceive them as the opposite sex.

Stonewall throughout its materials conflates both sex and gender reassignment with “gender identity”. For example, in the Workplace Equality Index 2011, to achieve a “bronze award” employers are required to have an explicit ban on discrimination, bullying and harassment based on “gender identity” and “gender expression” (i.e. cross-dressing).

⁷ <https://sex-matters.org/wp-content/uploads/2021/07/R-Fair-Play-for-Women-Ltd-v-UK-Statistics-Authority-09.03.21JUD.pdf>

- *The policy (or policies) should clearly state that the organisation will not tolerate discrimination, bullying or harassment against employees on the grounds of sexual orientation or gender identity and/or trans identity.*
 - *These may be listed along with other protected characteristics.*
- A. Explicit ban on discrimination, bullying and harassment based on sexual orientation (bronze award requirement)
 - B. Explicit ban on discrimination, bullying and harassment based on gender identity and gender expression (bronze award requirement)
 - C. An example of biphobic bullying or harassment
 - D. An example of homophobic bullying or harassment
 - E. An example of transphobic bullying or harassment
 - F. Clear information about how to report an incident and how complaints are handled
 - G. None of the above

These are not protected characteristics.

Achieving a shift from the separate characteristics of sex and gender reassignment to “gender identity” was a major lobbying goal in Stonewall’s Vision for Change, since it would put into law the belief that “trans women are women” (i.e. male people who self-identify as women share the protected characteristic of being a woman with female people).

When challenged on this use of words the charity now says it does not change anything and is simply in the service of everyday communication:

“In most contexts, gender identity is an appropriate, inclusive, and well-understood term, so – in line with the UK Government and with international standards – we talk about gender identity in our everyday communications. Similarly, when we describe the Equality Act’s protected characteristic of ‘gender reassignment’, we refer to ‘gender identity’ to explain who is covered by the law and how they are protected, as the EHRC does in their Code of Practice.”

This is an attempt at sleight-of-hand. Discrimination law is based on comparators. The comparator in sex discrimination is a person of the opposite sex. The comparator in gender reassignment is a person who is not transsexual or transitioning. Using “gender”/“gender identity” for both fundamentally disrupts the understanding of this, and the protection of rights.

It should be noted that the term “gender identity” is not, as Stonewall claims, in general use in the Employers Code of Practice (it is used just four times over 326 pages in such phrases as “gender identity clinic” and “gender identity disorder” and to try to explain the difference between a recreational cross-dresser and someone transitioning).

INEFFECTIVE AND UNLAWFUL EQUALITY MONITORING

Stonewall's approach of using non-standard characteristics that don't align with the Equality Act 2010 can be seen in its advice on equality monitoring. It tells employers not to collect data on the protected characteristic of sex, but instead to ask staff if they are male or female or some other term under the category of "gender identity".

UNDERSTANDING LGBT EXPERIENCES: A GUIDE FOR EQUALITIES MONITORING IN THE UK

BEST PRACTICE MONITORING QUESTIONS

Use the following questions when asking employees and job applicants about their gender identity and sexual orientation.

Asking about gender identity:

1. WHAT BEST DESCRIBES YOUR GENDER?

a. Female

b. Male

c. I use another term (for example, non-binary): _____

d. Prefer not to say

2. DO YOU CONSIDER YOURSELF TO BE TRANS?

a. Yes

b. No

c. Prefer not to say

Here you should consider including a short definition of trans: *'Trans is an umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.'*

Giving employees the space to define their own identity for all questions is important – including an open text box will allow you to collect the most accurate information. This option will capture the experiences of employees who don't identify as female or male. These employees may use a range of terms including, but not limited to, non-binary. To ensure you're considering the experiences of all employees who identify outside of binary genders, you should report on the experiences of all employees who select this option. This analysis can be reported as 'responses of employees using another term' or it can be explained that, for example, 'respondents used a variety of terms, we will refer in our reporting to 'non-binary respondents' as an umbrella term for these respondents'.

This is not good practice and could be challenged by those whose data is being collected.

The Code of Practice is clear that data on sex should be collected, alongside other protected characteristics. Data on sexual orientation and transsexualism should be collected sensitively.

The GDPR and Data Protection Act 2018 allows collection of personal data for specified, explicit and legitimate purposes and requires that the data collected be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

Sex

11.

As well as the male and female categories, employers should consider whether to monitor for part-time working and for staff with caring responsibilities, including child-care, elder-care or care for a spouse or another family member. Both groups are predominantly women at a national level and are likely to be so for many employers as well.

If data is collected incorrectly, knowingly or unknowingly, companies may not long satisfy the legal basis needed to collect the data. In particular where the legal basis is consent, this could be invalidated if the data subject is consenting to the wrong thing.

If an employer states the purpose is supporting compliance with the Equality Act 2010, it should monitor the protected characteristics. It can also choose to ask for information on additional characteristics in line with its own policies, but it should be clear what these are. Special categories of data which need to be handled with more care include information about political opinions, religious or philosophical beliefs and physical or mental health.

Data on belief or lack of belief in gender identity is sensitive information. Replacing a straightforward question about sex in equality monitoring with one about gender identity (or in effect confusing people into answering about sex and then processing the data as if it indicated a belief in gender identity) is a misuse of personal data and is likely to be challenged.

Forcing or tricking a female employee into ticking a box which declares her to have the same "gender identity" characteristic (innate femininity) as a man who identifies as a woman is compelling her to state a belief that she doesn't have. Constructing the form in such a way that she had to "out" herself as gender critical in order to avoid this is demanding sensitive information.

This approach to monitoring is contrary to the advice of the EHRC which developed a set of recommended questions which allow people to answer separately about their sex (as recorded at birth), the sex they consider themselves to be, whether they are going through or have gone through any part of a process of transition (i.e. being covered by the protected characteristic) and how they would describe themselves.⁸

8 https://www.equalityhumanrights.com/sites/default/files/rr75_final.pdf

UNDERMINING UNDERSTANDING OF HARASSMENT AND DISCRIMINATION

Stonewall tells employers that they have obligations to avoid discrimination and harassment based on “gender identity”. The lobby group erases the obligations employers have to avoid discrimination based on sex and gender reassignment and confuses their understanding of comparators.

Stonewall also introduces the term “LGBT” - merging sexual orientation and gender reassignment into a single characteristic. This does not reflect the Equality Act 2010, under which sexual orientation and gender reassignment are two distinct protected characteristics and are not related.

DEFINITIONS OF KEY TERMS

Direct discrimination – an employee is treated less favourably than someone else because of their sexual orientation or gender identity, their perceived sexual orientation or gender identity, or the sexual orientation or gender identity of someone they’re close to.

Indirect discrimination – a policy or practice disadvantages employees of a particular sexual orientation or gender identity.

Victimisation – unfair treatment triggered by an employee making a complaint of discrimination in the workplace.

Harassment – unwanted conduct which violates an LGBT employee’s sense of dignity or serves to create a hostile, degrading or humiliating environment for LGBT employees.

Bullying – offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure an LGBT employee.

[Stonewall Inclusive Policy Toolkit, 2018]

This mis-definition of key terms creates unfounded expectations of rights (such as the idea that a part-time cross-dresser has the right to use the ladies toilet on days when appearing “femme”).




In Stonewall’s Workplace Equality Index, organisations lose points if they hold events or group meetings solely for people with a same-sex orientation, “LGB”, without always including trans-identified people, “LGBT”. Policing individuals’ expression of their sexual orientation in this way is the opposite of inclusive.

The impact of merging all of these different protected characteristics (and unprotected characteristics) into a single term is to prevent organisations accurately analysing whether their policies cause detriment in relation to the actual protected characteristics in the Equality Act 2010 (i.e. to think clearly about comparators).

The ongoing case of **Allison Bailey v Stonewall Equality Ltd and others** highlights one of these risks; that redefining “lesbian” to include straight men who identify as women (which is not consistent with the Equality Act 2010) and bringing disciplinary action against lesbians who do not accept this, is harassment and victimisation on the grounds of sexual orientation.

Section.109(4) EA 2010 provides a statutory defence for an employer when discrimination has been found if they took “all reasonable steps” to prevent that or similar discrimination. Employers rely on their equality policies to show that they have taken all reasonable steps. However if an equality policy fails to identify the protected characteristics in the Equality Act it risks being at best ineffective, and at worse a liability in itself.

Equality Act 2010 definitions and Stonewall definitions

PROTECTED CHARACTERISTIC	 Equality Act 2010 definition	 Stonewall definition	Includes Some 	Risk of adopting detrimental policies
SEX	<p>“Woman” Female of any age</p>	Someone who identifies as a woman (gender identity)	Men + Gender reassignment	To women (and men) (sex discrimination)
	<p>“Man” Male of any age</p>	Someone who identifies as a man (gender identity)	Women + Gender reassignment	To transsexuals
SEXUAL ORIENTATION	<p>“Lesbian” Same-sex orientation Female</p>	A (self-identified) woman who is attracted to women	Men + Gender reassignment + opposite sex orientation (i.e. a straight man)	To lesbians and gays (sexual orientation discrimination)
	<p>“Gay” Same sex orientation Male</p>	A (self-identified) man who is attracted to men	Women + Gender reassignment + opposite sex orientation (i.e. a straight woman)	
TRANSSEXUAL	A person who is proposing to undergo, is undergoing, or has undergone a process (or part of a process) to reassign their sex	A person whose gender identity does not correspond with their sex	Transsexuals Non-transsexuals	To transsexuals (gender reassignment discrimination)
Not found in the Equality Act 2010		LGBT(QI+) All of the above (plus “queer, questioning and ace”)	Transsexuals Non-transsexuals Homosexuals Heterosexuals Bisexuals	Unable to consider the individual needs of any group May create detriments for all

DIVERGENCE FROM THE CODE OF PRACTICE

Discrimination

The Code of Practice is clear that people covered by the protected characteristic of gender reassignment should not be discriminated against at work because of it. The comparator in identifying discrimination is with people without that characteristic. In particular they should not be penalised for taking time off for medical treatment.

Gender reassignment discrimination - absence from work

What the Act says

9.31

If a transsexual worker is absent from work because of gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent due to an illness or injury.

Example:

A transsexual worker takes time off to attend a Gender Identity Clinic as part of the gender reassignment process. His employer cannot treat him less favourably than she would treat him for absence due to illness or injury, for example by paying him less than he would have received if he were off sick.

Nor should they be treated less favourably than other employees in general. It gives several examples of such workplace discrimination.

Example:

A saleswoman informs her employer that she intends to spend the rest of her life living as a man. As a result of this, she is demoted to a role without client contact. The employer increases her salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment because of gender reassignment.

Example:

An employer decides not to confirm a transsexual employee's employment at the end of a six months probationary period because of his poor performance. The employee is consequently dismissed. Yet, at the same time, the employer extends by three months the probationary period of a non-transsexual employee who has also not been performing to standard. This could amount to direct discrimination because of gender reassignment, entitling the dismissed employee to bring a claim to the Employment Tribunal.

Example:

It could be direct discrimination for the government Minister responsible for approving the appointment of members of the BBC Trust to refuse to approve the appointment of a person because they are undergoing gender reassignment.

Harassment

The Code of Practice says that offensive or humiliating comments about a person's sex or their gender reassignment (or any other protected characteristics) could amount to harassment.

11.56

It is also unlawful for an employment service provider to harass, in relation to the provision of an employment service, those who seek to use or who use its services.

Example:

An advisor for a careers guidance service is overheard by a transsexual client making offensive and humiliating comments to a colleague about her looks and how she is dressed. This could amount to harassment related to gender reassignment.

It does not mention pronouns or outlaw any mention of a person's sex or their transition. Nor does it state that the employer must require other employees to pretend not to perceive or know a person's actual sex.

Dress codes

Stonewall states that dress code should not be different for men and women (different “genders” in its terminology, different sexes in the Equality Act 2010). It says that employees should be able to choose whatever uniform they feel most comfortable in.

Information about **dress codes**. Dress codes and uniforms should be gender neutral and flexible where possible. If employees must choose from certain types of clothes, you should not specify which genders they are for. Employees should be able to choose the uniform they feel most comfortable in.

[Stonewall Creating a Transitioning at Work Policy, 2016]

While this approach would not be unlawful it is not **required** by the Equality Act 2010. As the Code of Practice states, the Equality Act 2010 **does** allow differing dress codes for men and women, as long as they meet similar standards of comfort and smartness.⁹

17.41

In some situations, a dress code could amount to direct discrimination because of a protected characteristic. It is not necessarily sex discrimination for a dress code to set out different requirements for men and women (for example, that men have to wear a collar and tie). However, it may be direct discrimination if a dress code requires a different overall standard of dress for men and for women; for example, requiring men to dress in a professional and business-like way but allowing women to wear more casual clothes. It could also be direct discrimination if the dress code is similar for both sexes but applied more strictly to men than women – or the other way round.

Since gender reassignment often involves wearing clothes designed for the opposite sex, separate dress codes for men and women can be a detriment related to gender reassignment.¹⁰

9 Further (non statutory) guidance was produced by the Government Equalities Office on this in 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709535/dress-code-guidance-may2018-2.pdf

10 The EHRC Code of Practice states that it may be **direct** discrimination because of gender reassignment if a transwoman is not allowed to wear skirts. The Code of Practice was written in 2010-11, just a few years after the Gender Recognition Act was passed, and it was perhaps anticipated that all or most people covered by the characteristic would quickly progress to getting a GRC. Thus a “male to female transsexual person” in this example might have been assumed to be someone legally female, and not allowing them to wear a skirt would indeed be direct discrimination based on gender reassignment. However in practice, according to Stonewall, there are many more trans-identified people who do not have GRCs. Thus (as in **Green v Secretary of State for Justice** [2013]) there is no direct discrimination. It could be argued that it is

17.42

Where men are required to wear suits, it may be less favourable treatment to require women to wear skirts, if an equivalent level of smartness can be achieved by women wearing, for example, a trouser suit. If a male to female transsexual person is prevented from wearing a skirt where other women are permitted to do so, this could amount to direct discrimination because of gender reassignment.

The difference between the Code of Practice and Stonewall guidance is that the Code of Practice states that employers do not need to flex workplace dress codes for individuals for reasons other than a protected characteristic such as religion, gender reassignment or disability. Stonewall is now strongly promoting “gender-fluidity” (cross-dressing) as a protected characteristic, which it is not.

While it can be hard for employers (or the individuals themselves) to know whether their cross-dressing is part of considering a transition pathway or is simply a lifestyle choice or hobby, employers are allowed to have this conversation with employees and to ask if they consider if they considered themselves as meeting the Equality Act 2010 definition of gender reassignment.


Credit Suisse (number 27 in the Stonewall Workplace Equality Index) has adopted Stonewall’s expansive definition of “trans”, covering “transgender, transsexual, transvestite, gender-queer, gender-fluid, non-binary, gender-less, a-gender, non-gendered, third-gender, two-spirit, bi-gender, and trans-man and trans-woman”.

In its trans-inclusion policy document it celebrates Philip “Pips” Bunce, a man who says he is straight and happy with his gender identity, but who enjoys dressing up in women’s clothing and coming to work as “Pips”.¹¹

Credit Suisse’s dress code is its choice. However, the Equality Act 2010 allows the company to say that its business image requires men to wear a suit and tie for work and to ask staff who are not transitioning but practicing part-time cross-dressing to practise it in their own time.

indirect discrimination if a rule that is applied based on sex causes a detriment to a male person who wants to wear women’s clothes as part of their transition.

11 https://outleadership.com/wp-content/uploads/2018/05/Transgender_Guide.pdf




Let me introduce myself

Like many Trans* individuals, I have been Trans* all my life. For me, my Trans* side is limited to gender expression as I am happy in my assigned gender but like to express different gender identities. Put simply, I like to dress up as both gender forms and I embrace both parts of myself equally. To me, they are both merely ways of expressing different attributes of myself and therefore I consider myself gender variant.

I am straight, I have been happily married for over 20 years and have two amazing children. My wife and children unconditionally accept and love all expressions of myself and I feel fortunate to have a family that is non-judgmental.

I spend equal time expressing different personas and my colleagues are used to seeing me as Phil or Pippa.



[Credit Suisse, Transgender Guide, 2018]

Toilets, showers and changing rooms

The Code of Practice says that the employer should endeavour to ensure there are not unresolved questions about toilet use for staff who are transitioning, and that the employer should discuss a date for use of “**different facilities**”. It does not state that the employer must allow the employee to use opposite sex facilities at any particular stage in their transition.

17.55

If a worker is undergoing gender reassignment, it is good practice for the employer to consult with them sensitively about their needs in the workplace and whether there are any reasonable and practical steps the employer can take to help the worker as they undergo their gender reassignment process. For further information on gender reassignment, please refer to paragraphs 2.21 to 2.30 and 9.31 to 9.33.

Example:

A worker will soon be undergoing gender reassignment treatment and the employer has accepted that they want to continue working throughout the transition process. To avoid unresolved questions about which toilet facilities the worker should use, their uniform and communications with other members of staff, the employer should arrange to discuss the situation sympathetically with the worker. The discussion could cover setting a date for using different facilities and uniform; the timescale of the treatment; any impact this may have on the worker’s job and adjustments that could be made; and how the worker would like to address the issue of their transition with colleagues.

This follows the case law in **Croft v Royal Mail Group plc** [2003]. Nicolas Simpson (later Sarah Croft), a Royal Mail van driver, was seeking to transition from male to female and brought a claim after local management refused Croft's request to access the women's toilets at the mail depot. Management had consulted with female staff at the depot and Royal Mail had said "we have to consider two main issues, your own views and preferences, but also the views and preferences of our female employees". They offered Croft use of the unisex accessible toilet.

The Employment Appeal Tribunal considered the workplace regulations which require separate toilets and showers for men and women. They said:

"it seems to us inherently improbable that the terms "men" and "women" [in workplace regulations] should then be referring to the gender a person might choose for himself or herself as that interpretation would require contemplation of the shower rooms... to be separate, nonetheless possibly having amongst their users, in the women's facilities, persons still wholly anatomically male and, in the men's, persons surgically adapted as far as possible to resemble females."


Both the Employment Appeal Tribunal and the Court of Appeal upheld that the Royal Mail had been reasonable in offering a unisex alternative. Lord Justice Pill in the Court of Appeal stated:

"acquiring the status of a transsexual does not carry with it the right to choose which toilets to use".

The panel of Judges anticipated that it might be acceptable for Croft to use the ladies sometime in the future, but they did not specify when or what criteria might be applied.

While this case predates the Equality Act 2010, it is based on the protected characteristic of gender reassignment, which was inserted into the Sex Discrimination Act 1975, via amendment, in 1999. It took place at a time when there were far fewer people identifying as transgender in the workplace, and the expectation was that these would be people seeking surgical transition. It was felt that these cases would be vanishingly rare and dealt with on an individual, one-by-one basis. Now there are many more people seeking to use opposite sex facilities on the basis of "gender identity" (for example, Stonewall says that 1% of Asda's staff identify as "trans"). Therefore employers need well-written, universal policies which protect everybody's rights, provide clear expectations and avoid putting anyone in a hostile situation.

In relation to workplace sanitary facilities, Stonewall holds that people should be allowed to use opposite sex toilets, showers and changing rooms in line with their "gender identity", and should not be required to use unisex accessible toilets or other alternatives.



- Information about **facilities**. All employees should be supported in accessing the facilities, spaces and groups which align with their gender identity. Where possible, gender neutral toilets and changing facilities should be implemented to reflect these commitments.

“The University is committed to supporting the right for trans individuals to use the correct facilities for their gender identity, including changing rooms and toilet facilities. A trans employee should not be required to use disabled toilet facilities, nor facilities of their former assigned gender. Where female-only spaces exist within the University, they should be open to all whom self-define as women, including trans women.”

University of Wolverhampton, Trans and Gender Reassignment Policy

This position contradicts the Code of Practice, workplace HSE regulations and case law from **Croft**. Following correct guidance means employers must provide male and female facilities (apart from where fully-enclosed unisex rooms are available), and should ensure that there is reasonably adequate and suitable provision for people with all protected characteristics. If a fully-enclosed unisex facility is available this solves the problem for all those who feel uncomfortable in facilities for their own sex. Employers must ensure there is adequate provision accessible to those with disabilities in any building, but neither the Equality Act 2010 nor workplace regulations require these to be exclusive.

The Code of Practice does not discuss allowing people to use opposite sex facilities (only "different" facilities) and it certainly does not state they have a right to use opposite sex facilities.

Stonewall wrongly states that there is a “high barrier of proof” for excluding males from women-only spaces. This is not stated anywhere in the Code of Practice.

Stonewall tells employers that if women (or men) complain, on being told they must accept sharing facilities with a member of the opposite sex, they should then be told that there the right of access (to opposite sex facilities) exists. This does not reflect the law or the Code of Practice.

FACILITIES

Trans people are frequently denied access to spaces, facilities, events and groups that are gender specific. This can particularly affect trans women accessing 'women-only' spaces. Reasons given for this exclusion include a belief that trans women 'aren't real women', and a concern that other members of a group would feel uncomfortable with the presence of someone that they perceive to be a man.

There is a legal exemption in the Equality Act 2010, which means that public bodies which provide single-sex services can in some circumstances legally exclude trans people. In order to do this they need to prove that this is a 'proportionate means to achieve a legitimate end'. They also need to prove that there is no other way they could have made sure that everyone could access the service. This is a high barrier of proof, and there is very little case law which shows where an organisation could legitimately use this provision.



3. Physical spaces and facilities – Trans staff may face extra barriers when using gendered facilities or spaces within your office. You should work with your facilities or office manager to ensure you have trans inclusive facilities (for example gender neutral toilets), and when necessary, communicate to staff effectively people's rights to use facilities which match their gender identity.

The Code of Practice specifically references religion or belief in relation to privacy in washing and changing facilities. It recognises that if facilities are only provided in a way that makes them inaccessible to people who share a protected belief, then this can be indirect discrimination, even where others are comfortable with lower levels of privacy.

17.56

Consultation will also help an employer understand the requirements of a worker's religion or belief, such as religious observances. This will help avoid embarrassment or difficulties for those who need to practice their religion or belief at the workplace.

Washing and changing facilities

17.62

An employer may require workers to change their clothing and/or shower for reasons of health and safety. Some religions or beliefs do not allow their adherents to undress or shower in the company of others. Insisting upon communal showers and changing facilities, even if segregated by sex, could constitute indirect discrimination as it may put at a particular disadvantage workers sharing a certain religion or belief whose requirement for modesty prevents them from changing their clothing in the presence of others, even others of the same sex. An employer would have to show that this provision, criterion or practice was objectively justified.

17.63

Some needs relating to religion or belief require no change to workplaces. For example, certain religions require people to wash before prayer, which can be done using normal washing facilities. It is good practice for employers to ensure that all workers understand the religion or belief-related observances of their colleagues, to avoid misunderstandings.

While the Code of Practice did not anticipate the conflict over single sex spaces, this guidance suggests that employers should respect the belief of employees who do not feel comfortable sharing toilets, showers and changing rooms with members of the opposite sex. This is the reason why separate sex facilities are a statutory requirement of workplace building regulations, licensing laws and school building regulations in the first place.

The case of **Forstater v CGD Europe & Others** [2021] also confirmed that not believing that human beings can change sex, or that gender identity should override biology, are protected beliefs. If other employees do not understand this and see it as “bigotry” it would be good HR practice to explain to them. As the Code of Practice says: “It is good practice for employers to ensure that all workers understand the religion or belief related observances of their colleagues to avoid misunderstandings”.

MISSING GUIDANCE

Communal accommodation

The Code of Practice highlights the exception in the Equality Act 2010 which allows people to be excluded from communal accommodation such as dorm rooms on the basis of sex and gender reassignment.

This recognises that forcing people to share single sex sanitary facilities with members of the opposite sex is inappropriate.

Communal accommodation

13.57

An employer does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting persons to communal accommodation or to providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied.

13.58

Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex. It can also include shared sleeping accommodation for men and for women, ordinary sleeping accommodation and residential accommodation, all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

We have not been able to find any reference to the communal accommodation exception in Stonewall's guidance documents.

Occupational requirements

The Code of Practice also covers the exception for occupational requirements needed to do a particular job, which can include both being a particular sex and not being transsexual.

	What the Act says
Sch. 9, Para 1	<p>13.5</p> <p>An employer may apply, in relation to work, a requirement to have a particular protected characteristic if the employer can show that having regard to the nature or context of the work:</p> <ul style="list-style-type: none">• the requirement is an occupational requirement;• the application of the requirement is a proportionate means of achieving a legitimate aim (see paragraphs 4.25 to 4.32); and• the applicant or worker does not meet the requirement; or,• except in the case of sex, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.
Sch. 9, Para 1(3)	<p>13.6</p> <p>In the case of gender reassignment and marriage and civil partnership, the requirement is not to be a transsexual person, married or a civil partner.</p>

As the Code of Practice notes, this exception can be used in provisions such as gym changing rooms or a women's refuge.

This is a place where obligations in relation to employment and to service provision cross over. For most jobs, a man or a woman can be employed and they should be treated equally. But in some cases the sex of a person is relevant because of the particular needs of service users, such as the need for bodily privacy.

13.8

Examples of how the occupational requirement exception may be used include some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. Similarly, a women's refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women.

As the notes to the legislation make clear, the requirement for someone to be of a particular sex is a low bar (relating to the everyday considerations of privacy and decency in a public changing room or lavatory). There is no mention here of “high standard of proof”.

It also spells out clearly that having a gender recognition certificate does not override a person’s sex when the issue is that their actual sex may cause others distress.

General: paragraph 1

EFFECT

787. This paragraph provides a general exception to what would otherwise be unlawful direct discrimination in relation to work. The exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age – or not being a transsexual person, married or a civil partner – is a requirement for the work, and the person whom it is applied to does not meet it (or, except in the case of sex, does not meet it to the reasonable satisfaction of the person who applied it). The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. In addition, applying the requirement must be proportionate so as to achieve a legitimate aim.

788. The exception can be used by employers, principals (as defined in section 41) in relation to contract work, partners, members of limited liability partnerships and those with the power to appoint or remove office-holders, or to recommend an appointment to a public office.

BACKGROUND

789. This paragraph replicates the effect of exceptions for occupational requirements in current discrimination legislation, and creates new exceptions in relation to disability and to replace the existing exceptions for occupational qualifications in relation to sex, gender reassignment, colour and nationality. It differs from the existing exceptions for occupational requirements in that it makes clear that the requirement must pursue a legitimate aim and that the burden of showing that the exception applies rests on those seeking to rely on it.

EXAMPLES

- The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.
- Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.
- An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL.
- Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.
- A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.

[Equality Act 2010, explanatory notes]

We have not been able to find any reference to the occupational requirements exception in Stonewall’s guidance.

MOVING THE GOALPOSTS

Being compliant with the Equality Act 2010 is something that all employers should seek to do. It is not something that should be difficult to find out how to do, or something that should require an annual rating and Bronze, Silver and Gold Olympic-style awards.

For the charity to ensure the longevity of the Stonewall Champions programme and Workplace Equality Index, it must change the requirements each year. This continues to move Stonewall's guidance further away from the Equality Act 2010.

Definitions and words are continuously shifting, making it harder for employers to understand and comply with Stonewall's demands, and at greater risk of causing detriments in relation to the actual protected characteristics.

Most recently Stonewall has expanded its mandate, removing "LGBT" from its glossary and replacing it with LGBTQ+ which, it says, is the acronym for "lesbian, gay, bi, trans, queer, questioning and ace". "Ace" (asexual) incorporates a bewildering array of variations, none of which correspond to Equality Act 2010 characteristics.

The most recent (2021) Workplace Equality Index asks questions about "menopause and andropause" policies and has a stronger emphasis on checking the training of non-LGBT employees and requiring and incentivising shows of allegiance with programmed values and symbology. There are multiple questions that require respondents to demonstrate their knowledge of gender ideology identities such as "gender fluid". Implementing this programme would very likely result in belief discrimination by forcing those who don't share Stonewall's gender theory beliefs to either play along, or to come out as gender critical.

Abro (sexual and romantic)

A word used to describe people who have a fluid sexual and/or romantic orientation which changes over time, or the course of their life. They may use different terms to describe themselves over time.

Ace

An umbrella term used specifically to describe a lack of, varying, or occasional experiences of sexual attraction. This encompasses asexual people as well as those who identify as demisexual and grey-sexual. Ace people who experience romantic attraction or occasional sexual attraction might also use terms such as gay, bi, lesbian, straight and queer in conjunction with asexual to describe the direction of their romantic or sexual attraction.

Ace and aro/ace and aro spectrum

Umbrella terms used to describe the wide group of people who experience a lack of, varying, or occasional experiences of romantic and/or sexual attraction, including a lack of attraction. People who identify under these umbrella terms may describe themselves using one or more of a wide variety of terms, including, but not limited to, asexual, ace, aromantic, aro, demi, grey, and abro. People may also use terms such as gay, bi, lesbian, straight and queer in conjunction with ace and aro to explain the direction of romantic or sexual attraction if and when they experience it.

Allo (sexual and romantic)

Allo people experience sexual and romantic attraction, and do not identify as on the ace or aro spectrum. Allo is to ace and aro spectrum identities, as straight is to LGB+ spectrum identities. It is important to use words that equalise experience, otherwise the opposite to ace and aro becomes 'normal' which is stigmatising.

Aro

An umbrella term used specifically to describe a lack of, varying, or occasional experiences of romantic attraction. This encompasses aromantic people as well as those who identify as demiromantic and grey-romantic. Aro people who experience sexual attraction or occasional romantic attraction might also use terms such as gay, bi, lesbian, straight and queer in conjunction with asexual to describe the direction of their attraction.

Aromantic




A person who does not experience romantic attraction. Some aromantic people experience sexual attraction, while others do not. Aromantic people who experience sexual attraction or occasional romantic attraction might also use terms such as gay, bi, lesbian, straight and queer in conjunction with asexual to describe the direction of their attraction.

Asexual

A person who does not experience sexual attraction. Some asexual people experience romantic attraction, while others do not. Asexual people who experience romantic attraction might also use terms such as gay, bi, lesbian, straight and queer in conjunction with asexual to describe the direction of their romantic attraction.

[Stonewall glossary]

SUMMARY OF FINDINGS

	 STATUTORY CODE	 STONEWALL	 RISK
PROTECTED CHARACTERISTICS	Use protected characteristics as defined by the Equality Act 2010 Understand comparators	Use idiosyncratic characteristics and definitions which muddle the comparators Consider the language of the Act offensive and outdated	Confusion about rights Victimisation for employees for using Equality Act 2010 language
	Use protected characteristics in the Equality Act 2010 plus additional characteristics	Drop and merge Equality Act 2010 characteristics Adapt to continuously changing language and categories	Lack of data Inaccurate data Data Protection Act problems from non-standard questions
DISCRIMINATION	Treat transitioning/transsexual employees equally - do not discriminate against them as employees	Treat "trans" employees as if they were in reality the opposite sex Expect all employees to do the same	Expectations that cannot be met - conflict with other employees
HARASSMENT	Protect transsexual employees from workplace harassment	Treat all disagreement with gender ideology as harassment	Confusion over the law -> legal liabilities
DRESS CODE	Allow/ facilitate sex-based dress code	Avoid/ eliminate sex-based dress codes	May conflict with business image
	Consider impact of dress code on transsexual employees	Make dress code accommodation for "gender fluid"/ cross-dressers	Expectations that "gender fluidity" gives access to opposite sex facilities
SINGLE SEX FACILITIES - WASHING, CHANGING	Arrange with transitioning employees for use of "different" facilities Consider others with different beliefs	Allow employees to use whichever facilities they feel most comfortable in	Indirect discrimination - religion / belief, sex for women losing single sex facilities Sexual harassment
COMMUNAL ACCOMMODATION	Understand and act on the fact that personal transition does not give a right of access to communal sleeping accommodation	No mention	Expectations that cannot be met - conflict with other employees Confusion over the law -> legal liabilities
OCCUPATIONAL REQUIREMENTS	Understand and act on the fact that personal transition does not give a right of access to jobs where sex matters	No mention	Fear of using legal exceptions Sexual harassment

IMPLICATIONS

The Equality Act 2010 recognises that there are many different reasons why people may be discriminated against or excluded. It doesn't set up a "hierarchy of rights", but recognises the need to balance different considerations, including the practical needs of the business. Aligning HR policies to the Equality Act 2010 supports clear expectations for all.

Stonewall's approach of disregarding the law and focusing so intently on its expanded category of transgender people, with no consideration for the rights of people with other protected characteristics, has promoted a "culture war" in the workplace. It is increasingly clear that Stonewall's guidance and recommendations create risk for employers, who remain subject to the law as it is, not as Stonewall would like it to be.

Employers: understand Stonewall risk

This analysis shows that the Stonewall approach, as reflected in its guidance, rating system and training, is not in line with the Equality Act 2010, and does not reflect the Statutory Code of Practice for Employers.

This is not accidental but reflects a fundamental disagreement between Stonewall's belief system ("trans women are women", gender should replace sex, gender is fluid) and the definition of sex in UK law.

Employers have an obligation to protect people who share Stonewall's gender identity beliefs from discrimination, but it is unwise to allow them to take the reins of Equality and Diversity policy. (Similarly, the rights of people with fundamentalist religious beliefs are protected, but they wouldn't be allowed to dictate an organisation's equality policies).

Adopting policies that are in conflict with the Act means staff will be unaware of their responsibilities and will foster a situation of hostility and conflict by creating an expectation of rights that do not exist, while ignoring others that do. The idea that the approach goes "beyond compliance" is attractive, but in reality, this approach is incompatible with compliance.

Organisations risk encouraging harassment and discrimination, including harassment and discrimination based on religion and belief (for example, towards Muslim women who do not want to undress with a male colleague, as well as towards secular, gender critical women who also object). The guidance which states that using the language of the Equality Act 2010 can be offensive puts employers at risk of sanctioning people for talking about their rights under the Act, leaving them open to victimisation claims.

While the Diversity Champions and Workplace Equality Index schemes relate to workplace policies, in practice by confusing the definition of sex they also put organisations at risk of harassment and discrimination in service provision situations, and of undermining their safeguarding practices.

The statutory Code of Practice should be the starting point for employers. Following the guidance in the Code helps avoid an adverse decision by a tribunal or court. Anyone adopting guidance from those third parties, whether Stonewall or others known to diverge from the Code, would be wise to take legal advice.

- **Private sector employers** making a value judgment to support Stonewall's lobbying agenda by following the charity's guidance should recognise that this is the risk they are taking. They should record this in their risk register, and tell their insurer. They should also consider increasing their legal cover.
- **Public authorities** have an additional public sector equality duty (PSED) to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity between different groups and foster good relations between different groups. They should justify how being part of a scheme whose advice differs so markedly from the Equality Act 2010, and the statutory guidance, is in line with their PSED, and how they have assured themselves that this membership does not create detrimental effects across the protected characteristics.
- **Charity trustees** must be able to demonstrate that their charity is complying with the law and should have systems and procedures to ensure compliance. If the charity decides to adopt a policy that differs from the statutory Code of Practice it should assure itself to its own satisfaction (and that of its regulatory body the Charity Commission) that it is complying with the law. Should the trustees face an employment lawsuit for discrimination (such harassment or discrimination against those with "gender critical" beliefs), this will likely need to be reported to the Charity Commission as a "serious event".

Government and EHRC: promote the law

Government bodies should also be clear that they are obliged to comply with the law and to use the Code of Practice as their guide.

The EHRC itself should foster use of, and confidence in, the Code.

The EHRC should respond to Stonewall’s claim that its guidance is in line with the statutory Code of Practice. The EHRC in its submission to the High Court in the case of *AEA v EHRC [2021]* made clear that guidance suggesting trans-identified people “**must**” be allowed to access the single sex services of their acquired gender “**is directly inconsistent with the Code of Practice**”.

“the COP makes clear, in terms, that trans-persons can be excluded from a service where that is justified, and, indeed, the EHRC has taken steps to bring that to the attention of service-providers whose guidance erroneously suggests trans-persons must always be permitted to use the single sex services of their acquired gender irrespective of the needs of, or detriment to, others.”¹²

Stonewall directly claims its advice is in line with the Code.. **The EHRC must make clear that this is not the case.**

Given the widespread adoption by the public sector of a private scheme that undermines understanding of and compliance with the Equality Act 2010 (including for some time by the EHRC itself) **there is need for a process of inquiry** to understand how this happened and to prevent it happening again (including in relation to other protected characteristics).

The EHRC should **create accessible guidance resources based on the Code**, and ensure that its own language and equality monitoring follows the Equality Act 2010.

¹² Defendant’s Skeleton Argument for permission hearing, 6 MAY 2021 *AEA v EHRC*
<https://drive.google.com/drive/u/0/folders/1tRXtCZsfGzMM6xL4gwnW1B1IHbK76hf>

ANNEX1: ORGANISATIONS KNOWN TO HAVE LEFT STONEWALL

- Anglian Water
- Bristol, North Somerset and South Gloucestershire Care Commissioning Group
- Cabinet Office
- Cancer Research UK
- Channel 4
- CIPD (Chartered Institute of Personnel & Development)
- Civil Nuclear Constabulary
- Cwm Taf Morgannwg University Health Board
- Dorset Police
- DVLA
- Equality and Human Rights Commission
- Government Equalities Office
- House of Commons
- London Borough of Bromley
- London Borough of Hounslow
- Millbrook Healthcare
- Ministry for Housing, Communities and Local Government
- Ministry of Justice
- Moon Beaver
- MTR Crossrail
- Nationwide Building Society
- NHS Highland
- North East Ambulance Service
- North Lanarkshire Council
- North Wales Police
- Northumbria Police
- Ofsted
- Primark
- Solent University, Southampton
- St Barnabas Hospices
- Swim England
- The Co-operative Bank
- Thurrock Council
- University College London (UCL)
- University of Winchester
- West London College
- West Sussex County Council
- West Yorkshire Police
- Wrexham County Borough Council

ANNEX II: LIST OF STONEWALL DOCUMENTS REVIEWED

Stonewall's Glossary of Terms

<https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>

Workplace Equality Index Survey 2021

Understanding LGBT experiences: A guide for equalities monitoring in the UK (2019)

Inclusive Policy Toolkit (2018)

- Part 1: Embedding LGBT inclusion in all policies
- Part 2: Discrimination, bullying and harassment policies
- Part 3: Family and leave policies
- Part 4 : Trans inclusion policies

Supporting Trans Staff in the Workplace (2016)

- First steps to trans inclusion an introduction to trans inclusion in the workplace.
- Communicating commitment to trans inclusion – the trans inclusion journey and communicating commitment to all staff.
- Creating a transitioning at work policy – how to support your staff through their transition.
- Trans inclusive policies and benefits – how to ensure your policies and benefits are trans inclusive.
- Engaging all staff in trans inclusion – how to engage all levels of staff in the trans inclusion journey.
- Getting it right with your trans service-users and customers – how to ensure your service delivery or customer service is trans inclusive.