

**CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**

**CENSUS (AMENDMENT) (SCOTLAND) BILL**

**SUBMISSION FROM TIM HOPKINS, EQUALITY NETWORK**

Thank you again to the Committee for inviting the Equality Network to give oral evidence last week, and for the Committee's consideration of the issues discussed. I am submitting this brief supplementary evidence in order to provide references to material I mentioned in my oral evidence about the meaning of "sex" in discrimination law.

The case of *Corbett v. Corbett* was decided in the English divorce court in 1971. It is no longer a reliable source for the legal meaning of "sex" in legislation including the Equality Act 2010, because the law in this area changed with the introduction of the Gender Recognition Act 2004, which came into effect in 2005.

The enactment of the Gender Recognition Act followed a 2002 ruling against the UK in the European Court of Human Rights, in the case of *Goodwin v. UK*. The judgement may be found here:

<https://www.unionedirittiumani.it/wp-content/uploads/2012/07/CASE-OF-CHRISTINE-GOODWIN-v.-THE-UNITED-KINGDOM.pdf>

In this case, the Court ruled that trans woman Christine Goodwin's rights under article 8 of the ECHR (right to privacy) were breached by the fact that she could not (at that time) change her legal sex to female.

In regard to *Corbett v Corbett*, at paragraph 100 the Court commented, "The Court is not persuaded that at the date of this case it can still be assumed that these terms [man and woman] must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*)."

The Gender Recognition Act (GRA) allows a trans person to apply to change their legal sex, and to receive an amended birth certificate showing that changed sex. The amended birth certificate is in all other respects identical to the original, so that it is not possible to tell from it that the applicant has changed sex, protecting their privacy.

Section 9 of the GRA specifies the legal effect of gender recognition. It says, "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)." The remainder of section 9 makes it clear that this applies for the interpretation of legislation, except where legislation specifically provides otherwise. Section 9 may be found here: <http://www.legislation.gov.uk/ukpga/2004/7/section/9>

This means that the sex protected characteristic in the Equality Act 2010 must be interpreted as provided by section 9 of the GRA. As a result, a trans women who has a gender recognition certificate (GRC) is treated as a woman for the purposes of sex

discrimination law, and a trans man with a GRC, as a man. They are not treated as their biological sex at birth.

In oral evidence, I mentioned that the Equality and Human Rights Commission has published information on this. That can be found here, in the form of a statement issued on 30<sup>th</sup> July this year:

<https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

In the fifth paragraph, this states, “a trans person is protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female.”

In a nutshell, “sex” in the Equality Act refers to legal sex, not biological sex at birth, and in the case of trans people these two may be different.

I also stated in oral evidence that if a trans woman who does not have a GRC (and so is legally male) was subjected to discrimination because she was perceived to be a woman, that would also be unlawful sex discrimination, because “discrimination by perception” is covered by the Equality Act. The Equality and Human Rights Commission guidance on this is here: <https://www.equalityhumanrights.com/en/advice-and-guidance/sex-discrimination>, and states:

“The Equality Act 2010 says you must not be discriminated against because:

- you are (or are not) a particular sex
- someone thinks you are the opposite sex (this is known as discrimination by perception)”

It is important to note that the sex discrimination provisions and the gender reassignment provisions of the Equality Act stand separately. Under the latter, it is permitted to treat trans people less favourably than non-trans people in certain restricted circumstances. But if that exemption is applied to a trans woman with a GRC for example, perhaps by excluding her from a service, that does not mean that she is being treated in law as if she were not a woman – she remains legally a woman.

We would suggest that further clarification of the law on this, if needed, could be obtained from the Equality and Human Rights Commission Scotland.