

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

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

**SUPPLEMENTARY SUBMISSION FROM: PROF. ROSA FREEDMAN,  
UNIVERSITY OF READING**

Thank you for inviting me to give evidence on Thursday 6<sup>th</sup> December.

I am writing to clarify the law on sex, and to address the misrepresentation of the law by Mr Watkins who spoke on the second panel which meant that I did not have an opportunity to raise these issues with him in-person. I am happy for you to forward my email to him if you feel that it is appropriate to do so and/or want to give him the opportunity to reply to my comments. I would also be happy to send more detailed explanations and/or links to further reading if it would be helpful in any way.

The legal definition of sex is contained in the case of *Corbett v Corbett* (the April Ashley case) which can be found here: <http://www.pfc.org.uk/caselaw/Corbett%20v%20Corbett.pdf> That definition remains good law and has not been challenged let alone overturned in any subsequent cases. The law clearly sets out in that case that sex is biological, and that transsexualism (what we would now term transgender) is psychological. As a result, when we use the word 'sex' in law, we are referring to biological sex.

The case of *Goodwin v the UK* did not challenge the definition of sex as being biological. That case came after the UK brought in the Human Rights Act (1998). That Act brings into domestic law the European Convention on Human Rights. Article 8 of the ECHR sets out the right to a private and family life. *Goodwin* was a transsexual and argued that by not allowing her to change her sex on her birth certificate, her right to a private and family life was violated because her employer would know that she was a transsexual. The European Court ruled that this was a violation in her specific circumstances. The Court did not rule that her biological sex had changed, nor did it challenge the UK definition of sex being about biology. As a direct result of that case, the UK passed the Gender Recognition Act. That Act sets a high bar for people to change the sex on their birth certificate – medical diagnosis of gender dysphoria and living for two years as though a person is of the opposite sex to their biology. If someone meets those criteria they can apply for a Gender Recognition Certificate that allows them to change the sex on their birth certificate. This creates what is known as a 'legal fiction' in that a person will be treated in law as something that they are not in reality (i.e. they will be treated as a member of the sex that is not their biological sex). Legal fictions are not unusual, for example we have a legal fiction that an institution has personhood if we need to take them to court.

It is important to note that fewer than 5,000 people have a Gender Recognition Certificate. It is important also to note that the GRA was absolutely needed to prevent violations of Article 8 in 2004 when same-sex marriage was not permitted, when there were pensions inequalities, and so on. A GRC allowed a trans-woman to marry a man or to access her state pension at the lower age.

The Equality Act 2010 was brought in to bring together various pieces of legislation about non-discrimination including the Sex Discrimination Act. In the Equality Act the protected characteristics include both sex (biology) and gender reassignment (the legal fiction). There are exemptions in the Equality Act that allow sex-segregated spaces where they are proportionate and legitimate. That also includes in some circumstances excluding trans individuals who hold a GRC. Mr Watkins stated yesterday that the Equalities and Human Rights Commission guidance states that GRC holders are always to be treated as a member of the sex that they have chosen, but this is not true –the EHRC guidance was changed recently to state that GRC holders may be excluded where it is proportionate and legitimate to do so, and this is to be decided on a case-by-case basis.

(Julian Norman -- a human rights barrister -- has written about the relationship between the Equality Act and the Gender Recognition Act:

<https://filia.org.uk/news/2018/8/23/has-everyone-really-got-it-wrong>)

In short, the law is clear that it defines sex as biology. It also creates a legal fiction for individuals who meet very specific requirements for a Gender Recognition Certificate, and even then they are viewed in law as having changed sex not as having done so in fact.