

Submission to GANHRI re: Equality and Human Rights Commission accreditation

Stonewall Equality Limited

1 June 2022

Introduction

We are writing, as the largest LGBTQ+ rights organisation in Europe, along with 25 UK LGBTQ+ and human rights organisations, to provide evidence in support of the accreditation review of the United Kingdom national human rights institution, the Great Britain Equality and Human Rights Commission (EHRC), scheduled for October 2022.

We believe the EHRC should not be considered a Paris Principles compliant 'A' status institution. Their lack of political independence is demonstrated by the UK Government's extensive involvement in the selection and appointment process of the Board, the complete absence of financial autonomy, and the absence of any direct relationship with Parliament. We set these arguments out in Part I of this submission and urge that they should guide the Sub-Committee on Accreditation (SCA) in its review of the accreditation status of the EHRC.

Furthermore, we believe this lack of political independence has led directly to the EHRC's failure to effectively promote and protect human rights in the UK across a range of protected groups. In particular, we believe it has led over the last two years to a profound failure to protect and promote the rights of transgender (trans) people in the UK, where the EHRC has played, and continues to play, a key role in driving regressive rather than progressive policy development. We set out evidence of this in Part II.

Our request for a special review

We note that we previously provided evidence to the committee on 11 February 2022 requesting a Special Review under Article 16.2 of the GANHRI Statute. We did this as a coalition 25 of LGBTQ+ rights organisations and associated human rights organisations working across the UK.

On 4 April 2022 we received an email from the GANHRI Secretariat stating that '*GANHRI Sub-committee on Accreditation (SCA), after reviewing the third-party submissions and the EHRC response to those submissions, did not deem necessary to initiate a Special review of EHRC.*' The email went on to state that there is a periodic review of the EHRC in October 2022.

Despite having followed up with a request to better understand, we remain unclear as to what evidence of independence and effectiveness was taken into account by the Committee, and on what basis the decision to not initiate a special review was made. Since making the original submission in February, the EHRC has again taken significant action that negatively impacts the rights and lived experiences of trans people in the UK. We fear this pattern is likely to continue.

For these reasons we are making a further submission; we urge the SCA to also consider the evidence set out in our request for a special review.

Part 1: Paris Principles compliance

The Paris Principles require an NHRI to be independent from government in its structure, composition, decision-making and method of operation. It must be constituted and empowered to consider and determine the strategic priorities and activities of the NHRI based solely on its determination of the human rights priorities in the country, free from political interference. We believe the EHRC remains deficient on a number of fronts.

1.1 Selection and Appointment Process

The EHRC was established in 2007 as a statutory Non-Departmental Public Body by the Equality Act 2006 as a merger of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. It has enforcement powers related to the Equality Act 2010 (henceforth referred to as “the Equality Act”) and the Human Rights Act 1998.

In the SCA’s 2015 re-accreditation report it is noted as an area of concern that the appointment process for Commissioners of the EHRC “*currently enshrined in the Law is not sufficiently broad and transparent.*”¹ While in practice there are additional safeguards to ensure pluralist representation among senior leadership, the SCA highlighted their concerns that “*provision is not sufficiently defined in the law and may be open to abuse.*”

Appointments are made by Ministers, and the selection and appointment process is run by the Government’s Cabinet Office.

¹ ICC Sub-Committee on Accreditation, ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)’, November 2015
<https://ganhri.org/wp-content/uploads/2019/11/SCA-FINAL-REPORT-NOVEMBER-2015-English.pdf>

The application pack for Commissioners clearly shows that Ministers and ministerial directions are key to making appointments.² A 3-person assessment panel comprises the Chair of the EHRC, an NGO member and a member of the Cabinet Office. The process for appointments has the direct involvement of Ministers, with the application package for a recent post stating that:

“The responsible Minister may wish to meet the candidates who are deemed appointable by the selection panel.”

It is our view that the lack of transparent, participatory, formalised appointment processes enshrined in law, and the clear placement of selection in the hands of a government minister has directly contributed to the selection of Commissioners who were appointed not solely for merit but for ideological compatibility with the current UK Government.

As a non-department public body, the EHRC are ‘sponsored’ by a governmental department who are responsible for overseeing operational, spending, and budgetary issues, and supporting the appointment process. This relationship is formalised in a Framework Document between the Commission and its sponsor department which details this relationship in terms of accountability and governance.

The current Framework Document³ provides for the appointment process for Commissioners to be circumvented by ministerial discretion:

“Under the Code [on Public Appointments] there is scope for Ministers to appoint without competition in exceptional circumstances subject to the approval of the Commissioner for Public Appointments. Such exceptional circumstances may be when a Commissioner resigns and it is important that the post is filled immediately to continue crucial work, for example. In the event of the above, the EHRC Chair will not be required to take part in the process, however, the Department will endeavour to consult with the Chair where possible and, where it is not, it shall provide an explanation to the EHRC Chair.”

Recent changes have exacerbated long-standing concerns about the independence of the Commission. We believe these now require substantive review by the SCA. Of particular concern

² Cabinet Office, ‘Commissioners; Equality And Human Rights Commission; Candidate Information Pack 2020’ <https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2020/08/EHRC-Commissioners-2020-Candidate-Information-Pack.pdf>

³ Equalities and Human Rights Commission, ‘Framework Document’, November 2019, <https://www.equalityhumanrights.com/en/who-we-are/how-we-work-government>

is the appointment of a Chair of the EHRC Board and four Commissioners, all of whom have been selected in a manner that is not compliant with the Paris Principles.

We note that similar concerns about independence and transparency in recruitment and selection (along with others about financial independence and adequacy of funds) are echoed in the recent decision to defer re-accreditation of the Australian Human Rights Commission.⁴

1.2 Evidence of politicisation in the activities of EHRC

In the wake of recent appointments, we have seen marked shifts in the policy positions held by the EHRC regarding the rights of trans people in the UK (protected under Section 7 of the UK Equality Act 2010). This illustrates that the non-independent manner of appointments to the Board is not simply a procedural matter, but is having real and direct consequences on the promotion and protection of human rights.

In August 2020, David Issacs, then Chair of the EHRC stood down at the end of a single term of office, a decision he attributed in interviews to his perception that the government wanted a Chair that was *'more like their agenda'*.⁵ In later interviews the former Chair expanded on his concerns about politicisation and issues with independent decision-making at the EHRC:

*"My view is that an independent regulator shouldn't be in a position where the governments of the day can actually influence the appointments of that body to support a particular ideology...[The Commissioners] need to understand the role and function of the Commission and that is to be independent."*⁶

In December of 2020, the current Minister for Women and Equalities gave a speech laying out her vision for tackling inequality, which referred to her recent appointment of a new EHRC chair and Commissioners:⁷

⁴ ICC Sub-Committee on Accreditation, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)', March 2022, https://ganhri.org/wp-content/uploads/2022/04/SCA-Report-March-2022_EN.pdf

⁵ Doward, Jamie, *The Guardian*, 'David Isaac: Equalities chief bids farewell after four 'momentous' years', 8th August 2020, <https://www.theguardian.com/society/2020/aug/08/david-isaac-equalities-chief-bids-farewell-after-four-momentous-years>

⁶ Siddique, Haroon, *The Guardian*, 'EHRC undermined by pressure to support No 10 agenda, says ex-chair', 18th January 2021, <https://www.theguardian.com/society/2021/jan/18/ehrc-undermined-pressure-support-no-10-agenda-david-isaac>

⁷ Cabinet Office, 'Speech: Fight For Fairness', 17th December 2020, <https://www.gov.uk/government/speeches/fight-for-fairness>

“That is why I am appointing a new chair and a wide variety of Commissioners to the Equality and Human Rights Commission to drive this agenda forward.

I am proud we have Baroness Kishwer Falkner, David Goodhart, Jessica Butcher, Su-Mei Thompson and Lord Ribeiro, all of whom are committed to equality and ready to challenge dangerous groupthink. Under this new leadership, the EHRC will focus on enforcing fair treatment for all, rather than freelance campaigning.”

Our view is that the Minister’s comments indicate that these Commissioners have been appointed in order to deliver on the UK Government’s agenda, as opposed to acting in the manner required of an independent human rights institution. This raises clear concerns about the perceived independence of the institution and public confidence in its ability to promote and protect human rights.

Over the last two years, the EHRC has made a series of statements which make it clear that they understand themselves to be part of a governmental policy agenda. For example, responding to the Minister’s December 2020 speech the EHRC stated:

“The Commission stands ready to support a renewed drive to identify and address the root causes of the barriers that hold people back from fulfilling their potential.”⁸

The language used here is identical to the language used by the Minister and suggests a politicisation of the EHRC, with the notionally independent institution changing its focus to match the priorities of the current Government.

Commissioners appointed by this Government have clearly demonstrated their opposition to the expansion of human rights, and their appointments have been widely criticised by NGOs and elected representatives. For example, Liberty, the leading UK human rights NGO, criticized the appointment of David Goodhart as an EHRC Commissioner for his record supporting the ‘hostile environment’, a collection of policies intended to cut off undocumented migrants from access to any public services.⁹ Concerns about Goodhart are also raised by Equally Ours, the UK-wide pan-

⁸ Equality and Human Rights Commission, ‘Evidence to the Women and Equalities Committee inquiry: The role of the Government Equalities Office – embedding equalities across Government’, March 2021, <https://committees.parliament.uk/writtenevidence/23393/pdf/>

⁹ Liberty, ‘Liberty criticises the appointment of David Goodhart as EHRC Commissioner’, 17th November 2020 <https://www.libertyhumanrights.org.uk/issue/liberty-criticises-appointment-of-david-goodhart-as-ehrc-chair/>

equality and human rights organisation.¹⁰ Members of the Scottish Green Party submitted a motion requesting the Scottish Parliament express their concern over the appointment of Jessica Butcher and David Goodhart.¹¹ The Fawcett Society, a leading feminist NGO expressed concern about the appointment of Jessica Butcher in the following terms:

“With these appointments one can only conclude the government is more interested in undermining the credibility of the EHRC rather than ensuring we have an independent and effective statutory body with a strong understanding of structural inequalities.”¹²

Most notably in relation to the claim we make about a marked shift in the EHRC’s position on the rights of trans people, EHRC Commissioner Alasdair Henderson was the lawyer who acted on behalf of Keira Bell in the Tavistock v Bell case regarding the prescription of puberty blockers to under-16s. This case sought to end access to NHS-provided gender affirming healthcare, arguing that under-16s should not be considered competent to consent to this treatment, undermining the core principle of Gillick competency (which supports children to engage in autonomous decision making where they are competent to do so). Despite this, it is clear from responses to Freedom of Information Act requests that Commissioner Henderson did not recuse himself from EHRC Board conversations regarding the case and associated matters.¹³ In fact, Commissioner Henderson appears to excuse himself from activities relating to trans people due to this conflict of interest on two occasions, as noted in the EHRC Board Minutes on 11 March 2020 and 10 September 2020. Yet Document ‘FOIReq1 - Henderson’ (Appendix B, B.4), a partial email obtained through a Freedom of Information request, shows Commissioner Henderson pushing for intervention in the Forstater vs Centre for Global Development appeal on the 11 September 2020 - one day after declaring a conflict of interest in trans issues.

Finally, not only has the Chair repeatedly indicated that she considers her role to be to delivering an agenda set by government, but she has also consistently used language that indicates a lack of

¹⁰ Equally Ours, 'Letters on the appointment of David Goodhart', December 7th 2020, <https://www.equallyours.org.uk/equally-ours-letters-on-the-appointment-of-david-goodhart-as-an-ehrc-commissioner/>

¹¹ Scottish Parliament, Motion: New Appointments to the Board of the Equality and Human Rights Commission, 15th December 2020, <https://www.parliament.scot/chamber-and-committees/votes-and-motions/votes-and-motions-search/S5M-23696>

¹² Jayanetti, Chaminda, *The Guardian*, 'New equalities Commissioner attacked 'modern feminism' and #MeToo', 22nd November 2020, <https://www.theguardian.com/society/2020/nov/22/new-equalities-commissioner-attacked-modern-feminism-and-metoo>

¹³ Hunte, Ben, *Vice*, 'Britain's Equalities Watchdog Met Privately With Anti-Trans Groups', 2nd February 2022, <https://www.vice.com/en/article/wxdzwn/ehrc-trans-rights-leaked-emails>

commitment to protecting and progressing the rights of trans people, and has engaged closely with ‘gender critical’ groups, including through private channels of communication.

Public statements include the Chair saying in a national newspaper that it is “*entirely reasonable*” to challenge the status of trans women.¹⁴ Further, in oral evidence on reform of the Gender Recognition Act provided to the Women and Equalities Select Committee, the Chair described the EHRC’s longstanding official position on reform of gender recognition laws as a “*narrow legalistic view*” and pointed to what she described as an “*obvious*” conflict of rights between women and trans people.¹⁶ In this evidence she referred to trans people as “*trans-identifying people*”, a term that is not considered respectful within the trans community, and in fact is associated with trans hostile groups. For an ordinary member of the public to use outdated, or unintentionally disrespectful language is of course entirely understandable. For the Chair of our National Human Rights Institution to use it to describe a marginalised group they are charged with protecting is neither understandable nor acceptable.

We believe that the Commissioners appointed by Ministers consider themselves to be, at least in part, political appointees whose responsibility is to ensure that the actions of the EHRC are in line with the priorities of their sponsoring Minister, and/or the wider Government.

1.3 Stable Mandate & Security of Tenure

Appointments made to the EHRC are for a period of “between 2 and 5 years”. This is clearly out of line with the Paris Principles’ requirement for the specific duration of the mandate to be set in law, as well as the SCA’s recommendations (General Observation 2.1). Duration of tenure, and, critically, reappointment are subject to ministerial discretion. As clearly provided in recent governmental application materials for Commissioners:

“...Commissioners’ terms are likely to be a minimum of 3 years, with the possibility of re-appointment for a further term, at the discretion of Ministers.”¹⁵

Further, there is a concerning level of oversight of the EHRC Chair provided for in the Framework Document:

¹⁴ Wright, Oliver, *The Times*, ‘Women must be heard on trans identity, says new equalities chief’, 15th May 2021, <https://www.thetimes.co.uk/article/women-must-be-heard-on-transgender-identity-says-new-equalities-chief-kqttljxmd>

¹⁵ Cabinet Office, ‘Commissioners; Equality And Human Rights Commission; Candidate Information Pack 2020’ <https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2020/08/EHRC-Commissioners-2020-Candidate-Information-Pack.pdf>

“[The Departmental Senior Sponsor will] ...on behalf of the Minister for Women and Equalities, conduct an annual appraisal of the Chair of the EHRC against agreed objectives.”

This raises serious questions as to the independence of the EHRC Chair, where they are subject to a “yearly review” by a government department. Commissioners are then subject to a similar review by the Chair, and this requirement raises questions about the independence from government of all members of the Commission, particularly when reporting requirements to the Department are considered.

1.4 Operational independence

As a non-departmental public body, the EHRC should operate independently of Government, but in fact it is also in a formal arms-length relationship – referred to as “sponsorship” – with the UK Government Equalities Office (GEO) and Ministers, who hold the remit for governmental policy related to women, sexual orientation, and trans equality, as part of an Equality Hub responsible for the overall framework for equality legislation in the UK.¹⁶

The Framework Document laying out the relationship between the sponsoring department and the EHRC notes its intended operational independence:

“The EHRC does not carry out Government business or perform its functions on behalf of Government, and it is to operate independently of the Government. The Minister for Women and Equalities intends that this Framework Document is consistent with her obligation to have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining its activities, timetables, and priorities (as set out in paragraph 42(3) of Schedule 1 to the 2006 Act).”¹⁷

When the GEO is reassigned to a different government department, this means that the EHRC’s “sponsoring” department also changes. However, the GEO is an “unusually itinerant” government department, according to the Women and Equalities Select Committee (WESC), the parliamentary committee tasked with scrutiny of its work, having been hosted by at least ten different departments since its establishment in 1997³¹. It is now permanently located within the Cabinet

¹⁶ Equalities and Human Rights Commission, ‘Framework Document’, November 2019, <https://www.equalityhumanrights.com/en/who-we-are/how-we-work-government>

¹⁷ Equality and Human Rights Commission, ‘Framework Document’, November 2019, section 2.2 <https://www.equalityhumanrights.com/en/who-we-are/how-we-work-government>

Office, while the Minister is currently operationally based within the Foreign, Commonwealth, and Development Office (FCDO) due to her dual brief as Foreign Secretary.

The EHRC themselves identify the impact of this disruption and division on their operational effectiveness and independence, noting in their submission to the WESC inquiry into the role of the GEO that,

“This division of responsibility and accountability [between the GEO and the Minister] also impacts negatively on the Commission, in particular in relation to the arrangements for settling our budget where the Minister for Women and Equalities has statutory responsibility for providing the Commission with a budget sufficient to enable us to perform our statutory functions, but our budget is allocated by the Department in which the GEO sits.”¹⁸

One example of the impact of the changing government department ‘sponsorship’ on the human rights activities the EHRC was recorded in the 2018 Government *Tailored Review of the Equality and Human Rights Commission*, which reported that stakeholders had not understood why the EHRC had commented on access to Premier League football stadiums, with the report noting *“this was initiated when the EHRC was under the sponsorship of the Department for Digital, Culture, Media and Sport.”¹⁹* This is just one example illustrating the problematic nature of the relationship between government departments and the EHRC.

The Framework Document is a point of serious concern, as it details a range of ways in which the EHRC’s independence may be curtailed by a government department. Some examples are provided and in this and the following sections. It is of particular concern that available framework documents created after moves in the responsible department show a significant increase over time of direct ministerial oversight and interference in the EHRC’s operations.

By way of example, in 2015, the Framework Document agreed between the EHRC and its then-sponsoring government department, the Department for Culture, Media and Sport (DCMS) stated in its introduction:

¹⁸ Equality and Human Rights Commission, ‘Evidence to the Women and Equalities Committee inquiry: The role of the Government Equalities Office – embedding equalities across Government’, March 2021, <https://committees.parliament.uk/writtenevidence/23393/pdf/>

¹⁹ EHRC and DCMS Framework document, 1st March 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/416426/EHRC-GEO_Framework_March_2015.pdf

“If, in practice, any of the controls constrained in this Framework Document or related documents should be found to constrain the EHRC in the discharge of its functions, the EHRC agrees to alert DCMS, and the DCMS agrees to review the relevant controls as soon as is reasonably practicable.”³⁴ (1.5)

No equivalent introductory statement exists in the current Framework Document; however, it is mentioned multiple times in the responsibilities of members of the EHRC that:

*“If, in practice, any of the guidance requirements should be found to constrain the EHRC in the discharge of its functions, the EHRC agrees to alert the Sponsorship Team who will liaise with the issuing department **to consider the request to lift the requirement** based on the evidence provided by EHRC. The Sponsorship Team to notify the EHRC of the outcome promptly”²⁰*

This is a significant increase in oversight by the sponsoring department, who retain the right to decline a request to review controls that limit the EHRC’s ability to discharge its statutory functions.

Important EHRC documents are laid before parliament not directly by the EHRC, as would be appropriate for an NHRI, but by the Minister: *“The Minister for Women and Equalities shall lay the EHRC’s Strategic Plan before Parliament in accordance with the 2006 Act and will endeavour to do so as soon as practicable after receipt.”²¹* The Framework Document also provides that *“The Minister for Women and Equalities will account for the EHRC’s business in Parliament.”* (Framework Document para 5.1)

In fact, the EHRC is limited from engaging directly with parliament other than with Ministerial consent:

*‘Where appropriate and agreed with the Department, the EHRC will provide substantive answers to Parliamentary Questions directly by letter from the Chief Executive to the Member of Parliament. This will generally be appropriate where the Questions relate wholly to the EHRC’s own activities. In these cases, **the Minister will table a written Answer***

²⁰ Equality and Human Rights Commission, ‘Framework Document’, November 2019, section 9.3 <https://www.equalityhumanrights.com/en/who-we-are/how-we-work-government>

²¹ 2019 Framework Document, para 2.3

indicating that the EHRC will write to the Member directly and undertaking to place a copy of the EHRC's reply in the Libraries of both Houses (as appropriate).'

There is a concerning level of oversight of the EHRC granted in the Framework Document to the Department:

"The [Departmental Officer – Principal Accounting Officer] PAO is also responsible for ensuring arrangements are in place to:

- 1. provide oversight of the EHRC's activities;*
- 2. address significant problems in the EHRC, making such interventions as are judged necessary, whilst also respecting the EHRC's independence;*
- 3. periodically carry out an assessment of the risks both to the department and the EHRC's objectives and activities;*
- 4. inform the EHRC of relevant government policy in a timely manner; and*
- 1. bring concerns about the activities of the EHRC to the full EHRC Board and, as appropriate, to the departmental board, requiring explanations and assurances that appropriate action has been taken.' (Framework Document para 5.5)"*

1.5 Policy independence

The Minister is, according to the EHRC's establishing documents, responsible for laying the Commission's Strategic Plan before Parliament, giving the Minister oversight for their policy priorities.

This SCA highlighted the issues regarding Ministerial oversight in the 2015 accreditation report:

*"The SCA acknowledges that the EHRC has indicated that the Minister's role is limited to laying the document before Parliament, and that he or she is not permitted to modify the report or require that modifications be made. However, the SCA considers it important that the enabling laws of a NHRI establish a process whereby the Institution's reports are required to be widely circulated, discussed and considered by the legislature. **It is preferable for a NHRI to have the explicit power to table reports directly in the legislature, rather than through the Executive, and in doing so to promote action on them.**"²²*

²² ICC Sub-Committee on Accreditation, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)', November 2015, p20

Government departments are required to carry out tailored reviews into the functioning of public bodies to ensure they remain fit for purpose, well governed and properly accountable for what they do. These reviews must occur once in the lifetime of a Parliament. In 2018, an independent review team conducted a Tailored Review of the EHRC. In this review, the team notes that:

*“The EHRC can brief parliamentarians or anyone else directly, but its statutory documents are laid in Parliament by the Secretary of State. **While in practice these issues do not directly impinge on what the Commission can prioritise or issues it can champion, a different kind of independence could bolster the EHRC’s credentials as an NHRI and have potential practical benefits, including in relation to budget setting and Commissioner appointments.**”²³*

Insufficient scrutiny in the legislature of the Commission’s reports was pointed out in the SCA’s recommendations during the 2015 re-accreditation process. These were not addressed between 2015 and 2018, and do not seem to have been resolved as of 2022. As noted above, recent policy statements by the EHRC demonstrate that it has not been pursuing its policy objectives in an independent manner.

The EHRC is also obliged to provide its public statements to the sponsoring government department 48 hours prior to issue:

“[Responsibilities to the Department include] ...ensuring that where reasonably possible GEO receives near final versions of external EHRC announcements or public commentary, where this has implications for Government, 48 hours before issue for information only.” (Framework Document, para 6.4)

While listed as ‘for information only’ this requirement raises questions about the ability of the NHRI to freely comment on any issues of human rights concern, as required by the Paris Principles.

The Paris Principles recognise that effective human rights work comes through cooperation that requires NHRIs to collaborate with other State institutions, NGOs and civil society groups. Given the lack of independence of the EHRC leadership from political influence, a growing number of NGOs see no merit in cooperation with the EHRC and openly complain about its lack of

²³ Government Equalities Office, ‘EHRC Tailored Review, 19th November 2018, p34 <https://www.gov.uk/government/publications/ehrc-tailored-review>

independence, bias and failure to promote the most progressive interpretations of international human rights law.

1.6 Adequate funding and financial autonomy

As the Committee will be aware, the Paris Principles require that an NHRI has adequate resources - including the funding, staffing, infrastructure and institutional capacity to perform their functions and discharge their responsibilities - which ensures their ability to function independently.

Over the 15 years since the EHRC was established, its budget has reduced from £70.3 million in 2007-08 to £17.1 million in 2020-21, with an according drop in staffing and resources.²⁴ In 2012, a comprehensive budget review identified £17.1 million per year as the minimum required for the EHRC to discharge its functions effectively. In 2018, the Tailored Review of the EHRC states that the Commission believed that number should increase by about 30 per cent,²⁵ suggesting that £22.2 million would be a more appropriate funding level to ensure financial independence.

The EHRC does not appear to have full and independent access to, or management and control over the dispersal of, its budget. The SCA previously expressed its concern about the level of ministerial discretion over the EHRC's budget in 2015, however, we wish to highlight the extent of that discretion and the level of governmental oversight that has been agreed to by the EHRC. As noted by the EHRC itself, the budget of the NHRI is provided via a government department, on an annual basis by the Minister, and in contravention of the SCA's clear position on this:

*"The Minister for Women and Equalities has statutory responsibility for providing the Commission with a budget sufficient to enable us to perform our statutory functions, but our budget is allocated by the Department in which the GEO sits."*²⁶

There is a highly concerning level of ministerial oversight of the autonomous use of the NHRI's budget, as set out in the Framework Document, which provides for:

"Annual meeting between the Minister for Women and Equalities and the EHRC Chair and Chief Executive around the time of publication of the EHRC's Annual Report and Accounts,

²⁴ Equality and Human Rights Commission, 'Annual Report and Account 2020-21', <https://www.equalityhumanrights.com/sites/default/files/annual-report-and-accounts-2020-21.pdf>

²⁵ Government Equalities Office, 'EHRC Tailored Review', 19th November 2018, p27 <https://www.gov.uk/government/publications/ehrc-tailored-review>

²⁶ Equality and Human Rights Commission, 'Evidence to the Women and Equalities Committee inquiry: The role of the Government Equalities Office – embedding equalities across Government', March 2021, <https://committees.parliament.uk/writtenevidence/23393/pdf/>

to review the previous year’s performance; ... Regular catch-up meetings between the Sponsorship Team in GEO, the Department’s Finance Team and EHRC to discuss current operational, spending and budgetary issues.”

Further, as noted, the budget is set annually by the Minister, but is provided by way of monthly grant-in-aid: *“The grant-in-aid will normally be paid in monthly instalments on the basis of written applications showing evidence of expenditure required.”* (Framework Document, para 14.8 & 14.9). The SCA has found such practices to be against the Paris Principles.²⁷

A government departmental officer – the Principal Accounting Officer (PAO) of the Department – reports to Parliament and the Minister on the use of the EHRC’s budget, and for reporting on the usage of the EHRC’s money, in violation of the principle of financial autonomy. Of additional concern is the reference to the NHRI’s performance in the context of departmental priorities:

“The PAO is accountable to Parliament for the issue of any grant-in-aid to EHRC. The PAO is also responsible for advising the Minister responsible:

1. *on the EHRC’s performance against its objectives and targets in the light of the Department’s wider strategic aims and priorities;*
2. *on an appropriate budget for the EHRC, taking into consideration the Minister for Women and Equalities statutory duty under paragraph 38 of Schedule 1 to the 2006 Act and the department’s overall public expenditure priorities; and*
3. *how well the EHRC is achieving its strategic objectives and whether it is delivering value for money.”* (Framework Document, para 5.4)

The duty of the NHRI’s CEO in relation to the EHRC’s budget and reporting to parliament is listed as *“giving evidence, normally with the PAO.”* It raises concerns about the actual and perceived independence of the EHRC when its CEO is expected to report to parliament about its budget with a representative from a government department.

Further, the Framework Document suggests that requests for resources are subject to Ministerial review and subject to Ministerial discretion:

“[The Departmental Senior Sponsor will] ... ensure requests for approval of expenditure are dealt with promptly and proportionately, and that approval is not unreasonably delayed

²⁷ SCA, ‘Accreditation Report— Togo (CNDH)’ (May 2013) 18; SCA, ‘Accreditation Report— Togo (CNDH)’ (October 2019) 18– 19.

and is not withheld for any reason except where the Minister for Women and Equalities reasonably considers that the proposed expenditure does not represent value for money.”
(Framework Document para 7.1)

This emphasises the lack of autonomy of the EHRC over the use of its own funding.

Part 2: Impact of Absence of Independence on the rights of trans people in Great Britain

Recent history demonstrates that the policies and priorities of the EHRC are directly influenced by political leaders and shows the EHRC is not functioning as an independent body.

Here we provide three examples where the EHRC’s position on trans people’s rights has moved away from international human rights standards and towards government policy since Ministers’ appointment of new Commissioners. These are taken from a wider pool of available evidence on the Commission’s approach to trans people’s rights and freedoms, some of which we understand referenced in submissions from third parties. We have selected these examples because in each case the Commission is acting in a way that is inconsistent with Paris Principles, relevant international human rights law and previously established policy positions, appearing to seek to curtail, rather than promote, the rights and freedoms of trans people.

2.1 Reform of the Gender Recognition Act

We note that the Paris Principles require NHRIs to have a broad human rights mandate, and the General Observations require that this mandate be:

“interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights”

The relevant human rights standards for recognition of gender are set out in the 2006 Yogyakarta Principles²⁸ which, together with Yogyakarta +10, set out an authoritative interpretation of international human rights law as it relates to protections on the basis of sexual orientation and gender identity.

Principle 3, on the right to recognition before the law, directly addresses legal recognition of gender. It states that:

²⁸ The Yogyakarta Principles, ‘Principles on the application of international human rights law in relation to sexual orientation and gender identity’, March 2007, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf

“[States shall]

B) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity;

C) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity;

D) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

E) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy”

Further, Resolution 2048 of the Assembly of the Council of Europe,²⁹ adopted in April 2015 calls upon Member States to:

“6.2.1 Develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

6.2.2 “abolish sterilisations and other compulsory medical treatment, as well as a mental health diagnosis” as a prerequisite for individuals to obtain legal recognition of their acquired gender.”

The important issue of legal recognition of gender has been the subject of considerable political debate in the UK over recent years. While once at the forefront of international standards on gender recognition, the UK now lags behind, with a system that is medicalised, bureaucratic and demeaning. The need for reform was described by the former Prime Minister (Theresa May) in 2017 in the following terms: *“[we will] reform the Gender Recognition Act and streamline and de-medicalise the process for changing gender, because being trans is not an illness and it shouldn't be treated as such”*. This commitment formed part of the UK Government LGBT Action plan.

²⁹ Parliamentary Assembly of the Council of Europe, Resolution 2048 (2015), *Discrimination against transgender people in Europe*, Assembly debate and text adopted by the Assembly on 22 April 2015 (15th Sitting), <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736>

However, in September 2020, following significant public consultation that came out in favour of reform, Liz Truss, the Minister for Women and Equalities, announced that the UK Government would not be making significant changes to the Gender Recognition Act 2004 and would instead focus on digitising the process and lowering the application fee.¹³ Since then, the UK Government has made it clear that GRA reform is not a policy priority, and that they do not support an approach to legal recognition of gender that is compliant with Yogyakarta Principles and COE Resolution 2048.

2.1.1 EHRC position on reform of gender recognition processes 2018 -2021

Between 2018 and 2021 the EHRC had taken a formal position that recommended significant reform of the Gender Recognition Act, and the creation of a simplified process of gender recognition.

Throughout this period the Commission repeatedly stated that their “*firm legal view*” was that reform would not erode Equality Act protections.

Examples of this include, but are not limited to the following documents produced by the EHRC:

1. *Response to the Scottish Government Consultation on the Gender Recognition Act, March 2018*³⁰

This response supported significant reform, and was grounded in Yogyakarta Principles, COE 2048 and community consultation. It supported de-medicalisation, removing the requirement of “*living in the acquired gender*” for two years, the adoption of a process of legal declaration, and the extension of gender recognition to 16-17 year olds (with additional support and advice).

2. *Response to the UK Government Consultation on the Gender Recognition Act, October 2018*³¹

This response supported significant reform. It used Yogyakarta Principles and COE 2048 as a guide, and was informed by consultation with trans people. In particular it supported de-medicalising the process for gender recognition, removing the requirement of living for

³⁰ Equality and Human Rights Commission, ‘Equality and Human Rights Commission Response to the Review of the Gender Recognition Act 2004 Consultation’, 1st March 2018, https://www.equalityhumanrights.com/sites/default/files/gender_recognition_act.pdf

³¹ Equality and Human Rights Commission, ‘Response of the Equality and Human Rights Commission to the consultation: Reform of the Gender Recognition Act’, 18th October 2018, <https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>

two years “*in the acquired gender*”, and the adoption of a process of legal declaration for gender recognition.

3. *Response to the Scottish Government Consultation on the Gender Recognition Act, March 2020*³²

This response reaffirmed the position set out in March 2018, with the exception of stating that there should not be a limit on the number of times a person can apply for a GRC (the March 2018 response suggested a statutory maximum of two applications).

4. *EHRC briefing note, published prior to the Scottish Parliament election, May 2021*³³

This briefing note highlighted the need for reform as one of the Commission’s seven policy priorities for Scotland, stating “*the process for gender recognition must be simplified. A de-medicalised system to change legal sex will better support trans people to live their lives free from discrimination*”.

2.1.2 EHRC position on gender recognition processes 2021 – present

Following the change in policy from the UK government in September 2020, and changes in composition of the EHRC Board at around the same time, the Commission’s position on the need to reform the UK’s Gender Recognition Act also changed radically.

In December 2021 the Women and Equalities Select Committee published a report on reform of the Gender Recognition Act, having conducted an inquiry to which the EHRC gave evidence, albeit reluctantly. In evidence the EHRC chair stated the following:

“The Government have indicated that they are not moving to change legislation, therefore nothing has changed and there is very little that we find we would wish to say on this. However, Madam Chair, you have insisted and therefore we sit before you. I put those comments into context because I do not wish to appear at all uncooperative. One of the reasons that we did not wish to appear in front of you in this inquiry is because we feel that

³² Equality and Human Rights Commission, ‘Consultation response: Gender Recognition Reform (Scotland) Bill’ March 2020, <https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-reform-scotland-bill-march-2020.docx>

³³ Equality and Human Rights Commission, ‘Briefing for the 2021 Scottish Parliament election’, 5 November 2020. <https://www.equalityhumanrights.com/en/briefing-2021-scottish-parliament-election/briefing-2021-scottish-parliament-election>

*a lot of the ground that you may wish to cover is ground better covered by Government than by a regulator, whose duty it is simply to enforce the law as we find it*³⁴

Under the Paris Principles, NHRIs are required to have “a broad mandate to protect and promote human rights” (Principle A2), submit “opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights” (Principle A3a), and “promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments” (Principle A3b). Yet here the EHRC Chair appears to be limiting the institution’s scope to “enforcing the law as we find it”, even to the extent of not being prepared to represent the Commission’s longstanding policy positions on reform of the Gender Recognition Act. Unsurprisingly, this was the subject of comment in the Committee report:

“We appreciate that the Equality and Human Rights Commission has a core function as an enforcer. It also, however, has a responsibility to provide information, influence policy and be a catalyst for change. In our view, the Commission has neglected to adequately fulfil these functions in relation to Gender Recognition Act reform. It is a matter of deep regret that the Government and its public bodies have chosen to evade Parliamentary scrutiny on this contentious subject.”

2.1.3 EHRC intervention in reform of the Gender Recognition Act in Scotland

It should be noted here that the EHRC’s remit in Scotland is limited to upholding the Equality Act, with other human rights matters reserved to Scotland’s NHRI, the Scottish Human Rights Commission. Therefore, the following intervention by the EHRC represents not only a failure to protect and promote the rights of trans people, but also to respect the mandate of a sister NHRI. This is perhaps particularly surprising given the EHRC Chair’s statements to the Women and Equalities Select Committee set out above, where she declined to give opinions or recommendations on reform of the Gender Recognition Act reform despite the fact that gender recognition within Great Britain does lie **within** the EHRC’s mandate.

On 26th January, 2022, the EHRC published a letter from the EHRC Chairperson to the Scottish Government,³⁵ which (unlike the UK Government) was planning to press on with reform of gender recognition processes. It should be noted that a letter of this kind is considered the official view of

³⁴ Women and Equalities Committee, ‘Reform of the Gender Recognition Act: Third Report of Session 2021–22’, 15 December 2021, <https://committees.parliament.uk/publications/8329/documents/84728/default/>

³⁵ Equality and Human Rights Commission, ‘Letter to Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government’ 26 January 2022, <https://www.equalityhumanrights.com/sites/default/files/letter-to-cabinet-office-our-position-gender-recognition-act-2004-reform-january-2022.docx>

the EHRC, comparable to a formal policy position. This letter from the Chair fundamentally changed the position of the EHRC on reform of gender recognition processes in the UK.

The letter makes no reference to the relevant human rights standards and explicitly goes against previous EHRC statements on the necessity of reform to gender recognition processes.³⁶ The primary reason given for the change in position appear to be the public expression of ‘concerns’, which closely align to the key talking points of trans hostile groups, and at least in some cases have no relationship with legal recognition of gender:

“These concerns centre on the potential consequences for individuals and society of extending the ability to change legal sex from a small defined group, who have demonstrated their commitment and ability to live in their acquired gender, to a wider group who identify as the opposite gender at a given point. The potential consequences include those relating to the collection and use of data, participation and drug testing in competitive sport, measures to address barriers facing women, and practices within the criminal justice system, inter alia.”

The letter also uses the language of ‘balance of rights’, inferring that the rights of trans people and (cis) women are in conflict, something which is of profound concern from a human rights perspective.

The position set out in this letter is not compliant with the Yogyakarta Principles, or with COE Resolution 2048. It is not consistent with the longstanding position of the EHRC, or with the views expressed by a) the trans community, and b) the plurality of Scottish citizens who in successive surveys have been demonstrated to support reform. Further, this intervention, which was not made as part of a public consultation process, appears to be expressly intended to influence the Scottish government to halt its proposed reform to the Gender Recognition Act. All of this is profoundly shocking for an NHRI, and wholly incompatible with its duties under both the Paris Principles and domestic legislation.

Indeed, the Scottish Government has been clear in expressing its shock at this reversal of position. The First Minister expressed her views in First Ministers Questions on 27 January 2022, while affirming her commitment to deliver on reform for the trans community. The depth of the Scottish

³⁶ EHRC Submission to UK Government Consultation on GRA Reform, 18th October 2018, <https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>

Government's feeling on this matter is amply demonstrated in the public correspondence³⁷ between the Cabinet Secretary for Social Justice, Housing and Local Government and the EHRC Chair.

We recommend reading this correspondence in full, but in broad terms it represents a series of (unsuccessful) attempts by the Cabinet Secretary to get the EHRC to justify in evidenced terms, the reasons for its substantial change in position on the matter of Gender Recognition Act Reform. Throughout, the EHRC Chair repeats the content of the original letter, relying on the broad notion of 'concerns' to justify the changed position, without any detailed analysis of domestic and international rights frameworks, or evidence that these concerns are considered material and/or relevant.

Following the publication of the EHRC's letter, the Scottish Human Rights Commission, Scotland's National Human Rights Institution, published a statement³⁸ on the relative mandates of the two institutions, making it clear that the EHRC does not have a mandate to comment on devolved matters in Scotland, and did not make its intervention on the proposed reforms in Scotland with the support or engagement of the Scottish Human Rights Commission. The Scottish Human Rights Commission remains in support of gender recognition act reform in Scotland, in conformance with international human rights standards.

We are not aware of any engagement with LGBTQ+ civil society organisations or communities that explored this proposed change in position, or that indicated the EHRC was intending to change its position. Leading civil society organisations were informed in broad terms of the letter a matter of hours before it became public.

In May of this year, the senior leaders from the EHRC appeared before the Scottish Government's Equality, Human Rights and Justice Committee to discuss reform of the Gender Recognition Act.³⁹

³⁷ Scottish Parliament Equalities Human Rights and Civil Justice Committee, 'EHRC position on reform of the Gender Recognition Act 2004; Letter from the Cabinet Secretary for Social Justice, Housing and Local Government', 21 February 2022 <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/correspondence/2022/ehrc-position-on-reform-of-the-gender-recognition-act-2004>

³⁸ Scottish Human Rights Commission, 'Statement: Clarifying the mandates of the Scottish Human Rights Commission and the Equality and Human Rights Commission in Scotland', 24th February 2022, <https://www.scottishhumanrights.com/news/statement-clarifying-the-mandates-of-the-scottish-human-rights-commission-and-the-equality-and-human-rights-commission-in-scotland>

³⁹ Scottish Parliament Equalities, Human Rights and Civil Justice Committee, 'Gender Recognition Reform (Scotland) Bill: Stage 1', 17 May 2022, <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13752&mode=pdf>

Their evidence was closely aligned with the Commission’s letter, making no reference to international human rights standards, or to evidence of the experience of the trans community, and substantial reference to the need to assuage ‘concerns’ about reform. The evidence given the the Scottish Human Rights Commission, Scotland’s NHRI, stands in sharp contrast:

“It remains our position that we welcome proposals to shorten the process for obtaining legal recognition, remove the requirement for a diagnosis of gender dysphoria and abolish the Gender Recognition Panel. These three steps will move legal gender recognition in Scotland closer to the standards set out in international and regional human rights law and guidance on the realisation of human rights in this area. The Commission therefore welcomes the introduction of the Gender Recognition Reform (Scotland) Bill to the Scottish Parliament....

As Scotland’s National Human Rights Institution (NHRI), the Commission also has responsibilities under the United Nations 1993 Paris Principles relating to the Status of National Institutions (the Paris Principles).⁵ NHRIs act as a bridge between the international human rights law system and the national system. A core function of an NHRI at the national level is advising on compliance with international and regional human rights standards and best practice. The Paris Principles also encourage NHRIs to operate in a way that reflects the need to protect the rights of groups particularly at risk. Trans people are one such group.”⁴⁰

2.2 Conversion Practices

As above we note that the Paris Principles require NHRIs to have a broad human rights mandate, and the General Observations require that this mandate be:

“interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights”

Relevant international law is set out in the Yogyakarta Principle 10:

“Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender

⁴⁰ Scottish Human Rights Commission, ‘Submission to Equalities, Human Rights and Civil Justice Committee: Gender Recognition Reform (Scotland) Bill’, May 2022, <https://www.scottishhumanrights.com/media/2306/written-evidence-to-ehrcjc-on-gra-bill-final-2022-05-13.pdf>

identity. States shall: Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts”

Further, in 2020, at the UN Human Rights Council Forty-fourth session, the UN Independent Expert on SOGIESC, Victor Madrigal, presented his report on conversion practices and called for a global ban, identifying these practices as counter to several principles of international law, including the fundamental principle of non-discrimination, the right to health, the prohibition of torture and ill treatment and the rights of the child.

2.2.1 Conversion Practices in the UK

In 2018, the UK government committed to bringing forward legislation that would ban conversion practices in the UK, as part of its LGBT Action Plan.⁴¹ Despite considerable evidence of the harms of conversion therapy (including in the government’s own research), support from across civil society, the mental health profession and progressive faith leaders, it has proven extremely difficult to get the UK government to make good on this commitment.

After years of campaigning, a commitment to bring forward a ban was made in the Queen’s Speech of May 2021, and following extensive stakeholder engagement and broad public consultation the UK Government arrived a clear position that it would bring forward legislation that made conversion practices on the basis of both sexual orientation and gender identity illegal.

2.2.2 EHRC response to the consultation

In January 2022, the EHRC published its own response to the government consultation on banning conversion practices.⁴² The response recommended the government proceed with a ban on conversion practices that target sexual orientation, but not include practices that target gender identity at this point in time. This stance is particularly surprising given the evidence that trans people in the UK are at substantially higher risk of being harmed by these practices. For example, the government’s National LGBT Survey in 2017 found 8% of trans people had been ‘offered’

⁴¹ Cabinet Office, ‘LGBT Action Plan’, July 2018.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GEO-LGBT-Action-Plan.pdf

⁴² Equality and Human Rights Commission, ‘Consultation response: Banning conversion therapy’, January 2022, <https://www.equalityhumanrights.com/sites/default/files/consultation-response-banning-conversion-therapy-26-january-2022.docx>

conversion practices, and 4% had experienced conversion practices (compared to 5% and 2% of LGBTQ+ people overall).⁴³

The EHRC response did not engage with the significant body of international evidence on the harm caused by conversion practices. Nor did it engage with the wide-ranging support for a ban, including amongst mental health professional bodies and the general public. It was not the subject of engagement with LGBTQ+ civil society organisations, or with the coalition of civil society, mental health and medical organisations that have been working towards a ban on conversion practices for many years.

Instead, the EHRC response raised some thematic ‘concerns’ about providing protections for trans people as follows:

“The consultation document contains no clear definition of what will amount to “conversion therapy” caught by its proposals, nor of the meaning of “transgender” – a term which has no clear legal meaning, is potentially wider than the concept of gender reassignment in current UK law, and is understood by different people in different ways”

It is particularly shocking that the EHRC here appears to not recognise the breadth of the protected characteristic of ‘gender reassignment’ under the Equality Act, which is as follows:

“S7 Gender reassignment

(1)A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2)A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.”

The Statutory Codes of Practice to the Act, drafted by the EHRC itself, make this interpretative breadth clear. Indeed, Hansard (the record of proceedings in Parliament) tells us that it was Ministerial intent that this characteristic be interpreted expansively:

The Solicitor-General (Vera Baird)

⁴³ Cabinet Office, ‘The prevalence of conversion therapy in the UK’, 29th October 2021
<https://www.gov.uk/government/publications/the-prevalence-of-conversion-therapy-in-the-uk/the-prevalence-of-conversion-therapy-in-the-uk>

“In the Bill, the protected characteristic of gender reassignment covers transsexual people who take steps to enable them to live permanently in the opposite gender to the one assigned to them at birth. There is no requirement for them to seek medical advice or undergo any surgery or other medical intervention.

... As well as the protection I have already described, there is protection by association or by perception, which applies to gender reassignment as well [as other protected characteristics]”⁴⁴

One might expect an NHRI focused on protecting and promoting the rights of trans people to argue here for language that is modern and respectful (transgender, not transsexual) and more explicitly inclusive of non-binary people: this being the only significant group of trans people whose protections under the Equality Act are currently unclear in law. It is entirely fair to say that to have a clear, inclusive and modern law, new statutory language is needed, but this drafting should not be represented as insurmountable problem that should delay the process of legislation. Indeed, there are an increasing number of international models for banning conversion practices to draw on, including recent examples from France and Canada.

The EHRC response also appears to conflate banning conversion practices with access to gender affirming healthcare for children and young people in a troubling manner:

“Given the documented lack of evidence about conversion therapy in relation to being transgender, recent attention and litigation on the implications of medical and surgical transition, and the ongoing NHS-commissioned independent review of gender identity services for children and young people led by Dr Hilary Cass OBE, we consider that these matters require further careful and detailed consideration before legislative proposals are finalised and the implications of them can be fully understood.”

Here the EHRC appears to be referencing two things. First, the Bell v Tavistock case, in which Commissioner Alasdair Henderson was counsel. The case sought to prevent access to gender affirming healthcare for children and young people in the UK, and in doing so argued that children could not be considered “Gillick competent” in the context of this care (Gillick competency refers to the common law right for children to make medical and other decisions where there is capacity

⁴⁴ House of Commons, ‘Gender Reassignment (Equality Bill) Volume 492’, 14 May 2009, [https://hansard.parliament.uk/Commons/2009-05-14/debates/09051460000027/GenderReassignment\(EqualityBill\)](https://hansard.parliament.uk/Commons/2009-05-14/debates/09051460000027/GenderReassignment(EqualityBill))

to do so, in accordance with Article 12 of the UN Convention of the Child). By the time the EHRC published their consultation response, the initial judgment in the case, which had imposed restrictions on access to gender affirming healthcare had already been overturned by the Court of Appeal⁴⁵ (now affirmed by the UK Supreme Court). In any case it is not made clear why ongoing legal action on access to gender affirming healthcare would prevent a ban on abusive conversion practices.

Second, the EHRC response references the ‘Cass Review’,⁴⁶ a government-commissioned independent review of gender identity services for children and young people. It is similarly unclear why the EHRC feels that this review is a reason to not proceed with a ban on conversion practices that target trans people, including trans children and young people. Dr Cass herself has been clear with both government and civil society stakeholders that while care may be needed in drafting, there is no reason for a ban on conversion practices to be delayed pending the outcome of her work. This is now publicly stated on the Review website, presumably to prevent continued misrepresentation of the Review position.⁴⁷

Overall, the EHRC response, rather than setting out routes towards an effective and inclusive ban that is in keeping with international human rights standards and the recommendations of the UN Special Expert on SOGIESC, recommends delaying legislation that protects trans people and in particular trans children from abusive conversion practices.

This intervention from the EHRC has now directly contributed to the UK Government reversing its commitment to ban conversion practices for trans people. It was relied upon in the Prime Ministerial briefing that led to the PM first deciding not to ban conversion practices at all, and then to proceed with a ban that excludes trans people (the paragraph quoted and relied upon is the one set out above).

2.3 Restricting trans people’s access to single sex spaces

As above we note that the Paris Principles require NHRIs to have a broad human rights mandate, and the General Observations require that this mandate be:

⁴⁵ *Quincy Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363, 17th September 2021, <https://www.judiciary.uk/wp-content/uploads/2021/09/Bell-v-Tavistock-judgment-170921.pdf>

⁴⁶ The Cass Review, website homepage, <https://cass.independent-review.uk/>

⁴⁷ The Cass Review, ‘Frequently Asked Questions’, <https://cass.independent-review.uk/about-the-review/frequently-asked-questions/#:~:text=What%20role%20does%20the%20Review,legislation%20to%20ban%20conversion%20therapy.>

“interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights”

The relevant international law is reflected in the Yogyakarta Principles. Principle 7, on the Right to Privacy sets out that states should:

“7F Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.”

Principle 35, on the Right to Sanitation sets out that:

“Everyone has the right to equitable, adequate, safe and secure sanitation and hygiene, in circumstances that are consistent with human dignity, without discrimination, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics.”

2.3.1 Restricting trans people’s access to single sex spaces under the Equality Act

The Equality Act, and its Statutory Codes of practice, codify trans people’s right to access spaces that align with their gender, as well as setting out the limited circumstances in which single sex services can be provided in a way that excludes trans people. The Statutory Code of Practice to the Act is a form of secondary legislation, drafted by the EHRC, and approved by Parliament.

Schedule 3, paragraph 28 of the Equality Act allows providers of separate or single-sex services to provide a different service to, or to exclude, someone who has the protected characteristic of gender reassignment. This includes those who have a Gender Recognition Certificate (GRC), as well as someone who does not have a GRC but otherwise meets the definition of the relevant protected characteristic under the Equality Act.

Application of this exception must be objectively justified as a proportionate means of achieving a legitimate aim.

Schedule 23, paragraph 3 of the Equality Act also allows a service provider to exclude a person from dormitories or other shared sleeping accommodation, and to refuse services connected to providing this accommodation on grounds of sex or gender reassignment. As with paragraph 28

and other exceptions under the Equality Act, such exclusion must be a proportionate means of achieving a legitimate aim.

The Statutory Code of Practice (2011) elaborates on these exemptions as follows:

“13.60 As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.

A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available.”⁴⁸

2.3.2 The EHRCs non statutory guidance

In April 2022, the EHRC published a non-statutory guidance document called *“Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions”*.⁴⁹

This document is aimed at services providers and *“provides information on: • what the law says • how to decide when to use the exceptions • practical steps you can take.”* Developing the guidance did not, to our knowledge, involve engagement with any LGBTQ+ civil society organisations, or consultation with trans people.

This non-statutory guidance represents a significant departure both in tone and in material effect from the statutory code.

⁴⁸ Equality and Human Rights Commission, ‘Services, Public functions and Associations: Statutory Code of Practice’, 1st January 2011, <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

⁴⁹ Equality and Human Rights Commission, ‘Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions’, April 2022, <https://www.equalityhumanrights.com/sites/default/files/guidance-separate-and-single-sex-service-providers-equality-act-sex-and-gender-reassignment-exceptions.pdf>

There are several significant issues running through the sections on trans people:

First, the non-statutory guidance appears to support the use of blanket exclusions, which are explicitly not allowed under the statutory code of practice. The non-statutory guidance encourages the creation of policies on access for trans people, but does not make it clear that the law requires the policy must nonetheless be applied on a case-by-case basis. This is made clear in the Statutory Code of Practice (2011), as referenced in the example below:

“A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances” (4.17)

In the 2022 non-statutory guidance, the examples provided are significantly more exclusionary than those cited in the statutory code of practice and are highly prejudicial to trans women in particular. The examples are reproduced below:

“Example: A group counselling session is provided for female victims of sexual assault. The organisers do not allow trans women to attend as they judge that the clients who attend the group session are likely to be traumatised by the presence of a person who is biologically male.

Example: A domestic abuse refuge offers emergency accommodation to female survivors. Feedback from survivors indicates that they would feel uncomfortable sharing accommodation with trans women for reasons of trauma and safety. The provider decides to exclude trans women from the refuge. It compiles a list of alternative sources of support in the local area which can be provided to trans women who approach the centre for help.

Example: A leisure centre introduces some female only fitness classes. It decides to exclude trans women because of the degree of physical contact involved in such classes.

Example: A gym has separate-sex communal changing rooms. There is concern about the safety and dignity of trans men changing in an open plan environment. The gym therefore decides to introduce an additional gender-neutral changing room with self-contained units. Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions 9 Example: A small cafe with limited space and facilities for public use has separate lockable, self-contained male and female toilets with hand basins in single

units. To ensure they are fully inclusive, and to make the most effective use of the available facilities, the cafe decides to make them all gender neutral.

Example: A community centre has separate male and female toilets. It conducts a survey in which some service users say that they would not use the centre if the toilets were open to members of the opposite biological sex, for reasons of privacy and dignity or because of their religious belief. It decides to introduce an additional gender-neutral toilet. It puts up signs telling all users that they may use either the toilet for their biological sex or to use the gender-neutral toilet if they feel more comfortable doing so.”

We do not propose to comment on the legality of these examples, though we note legal commentators have indicated some, if implemented, would be clearly open to challenge under the Equality Act. Rather we will make some general observations about the harmful impact they are likely to have on trans people, particularly trans women.

Of the six examples given, three describe examples of how to exclude trans women from single sex spaces and one describes an example of how to exclude both trans women and trans men from single sex spaces. One relates to the creation of a gender-neutral space to “*protect the safety and dignity of trans men*”, where it is unclear who has identified this need for protection. One relates to using gender neutral toilets as a way of including everyone.

The emphasis is on exclusion rather than inclusion, and on excluding trans women specifically. This is not in keeping with international human rights standards, or with the EHRC mandate to protect and promote the rights of all people. This emphasis on exclusion is particularly worrying given the climate in the UK at present, clearly described in the Council of Europe’s 2021 Report on Combating rising hate against LGBTI people in Europe:

“In the United Kingdom, anti-trans rhetoric, arguing that sex is immutable and gender identities not valid, has also been gaining baseless and concerning credibility, at the expense of both trans people’s civil liberties and women’s and children’s rights. At the IDAHOT Forum 2021, the Minister for Equalities stated, in contradiction with international human rights standards with respect to the rights of trans people, “We do not believe in self-identification”. Such rhetoric – which denies trans identities – is being used to roll back the rights of trans and non-binary people and is contributing to growing human rights problems. UK hate crime statistics show a sharp increase in transphobic crimes since 2015 – though only 1 in 7 victims report them to an authority. Online abuse is also rising, and many trans people fear for their safety.

The ‘gender-critical’ movement, which wrongly portrays trans rights as posing a particular threat to cisgender women and girls, has played a significant role in this process, notably since the 2018 public consultation on updating the Gender Recognition Act 2004 for England and Wales. In parallel, trans rights organisations have faced vitriolic media campaigns, in which trans women especially are vilified and misrepresented. The gender critical campaign – which continues to gain momentum, power and financial support – has been instrumental in creating a situation in which legal gender recognition processes still require a clinical diagnosis of gender dysphoria, and remain inaccessible to non-binary people and anyone under 18. There is also a concerning, growing account of parents who (due to difficulties in accessing timely public health care) pursue private health care on behalf of their child, being investigated by State authorities. Trans healthcare is also being erroneously portrayed as a form of LGB conversion therapy.”⁵⁰ (52)

These examples extend trans exclusionary policies to everyday places and spaces: toilets, changing rooms, gym classes. If they were implemented and replicated on a widespread basis, they would prevent trans people being able to conduct their day-to-day life with any semblance of normality, dignity and safety. They are clearly and wholly unnecessary.

We are already hearing accounts of this non-statutory guidance being used to support and justify the exclusion of trans people in day-to-day life. The most worrying example of this came in the run up to the May 2022 local elections, where Douglas Ross, Leader of the Scottish Conservative Party, made a manifesto pledge to ensure all Conservative council facilities in Scotland (schools, gyms, health services) would be operated on a single sex, trans exclusive basis.⁵¹

This non-statutory guidance, produced by our NHRI, can only have a negative impact on trans people in the UK, one that can neither be justified as proportionate or legitimate, and is clearly not in conformance with relevant international human rights standards.

⁵⁰ Parliamentary Assembly of the Council of Europe, ‘Combating rising hate against LGBTI people in Europe’, 27th September 2021, <https://assembly.coe.int/LifeRay/EGA/Pdf/TextesProvisoires/2021/20210921-RisingHateLGBTI-EN.pdf>

⁵¹ Boi, David, ‘Scottish Conservatives commit to protect same sex spaces in council manifesto’, 6th April 2022, <https://www.heraldscotland.com/politics/20048357.scottish-conservatives-commit-protect-sex-spaces-council-manifesto/>

Conclusion

The General Observations, as interpretative tools of the Paris Principles, offer important guidance on how to evaluate if an NHRI falls substantially short of the standards expected of it.

We have set out in a summary format our concern that the EHRC is not Paris Principles compliant. Many of the concerns set out about the way in which the governance and funding of the EHRC undermines its independence are longstanding. We note that the SCA has made recommendations aimed at remedying these weaknesses, and that the UK Government has failed to implement these recommendations.

What is new, and urgent, is the way in which these longstanding weaknesses have enabled a situation where the EHRC is not only failing in its duty to protect all people, including trans people, but is acting in a way that is directly harming the trans community. We note that since we wrote to you asking for a Special Review, the EHRC has published its non-statutory guidance, as set out above. We understand that the EHRC is currently undertaking a review of the Statutory Code of Practice for the Equality Act. If this is revised in line with the recent non-statutory guidance, the UK will take a major step back in the rights and protections afforded our trans citizens, directly as a result of the actions of our own NHRI.

We suggest that the EHRC is no longer an A-status institution, and we ask you to give careful consideration to our representations.

Signed by:

Equality Network

Feminist Gender Equality Network

Gendered Intelligence

GIRES

Global Butterflies

Hidayah

Intercom Trust

Kite Trust

LGBT Consortium

LGBT Foundation

LGBT Lancashire

LGBT Youth Scotland

Liberty

Live Through This
London Friend
Mermaids
Proud Trust
Sparkle
Spectra
Steph's Place UK
Stonewall
The Outside Project
Tonic Housing
Trans in the City
Trans Learning Partnership
TransActual