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## **(TRANS)FORMING SINGLE-GENDER SERVICES AND COMMUNAL ACCOMMODATIONS**

### **Introduction**

In July 2015, Maria Miller MP, Chairperson of the UK House of Commons Select Committee on Women and Equalities ('WEC' or 'the Committee'), announced the establishment of a Transgender Equality Inquiry ('the Inquiry') (WEC, 2015), to consider 'how far, and in what ways [transgender] people still have yet to achieve full equality; and how outstanding issues can most effectively be addressed' (WEC, 2015). The scope of the Inquiry's investigations and recommendations was broad, touching upon healthcare, law, education and the media (2015). Its most controversial proposal addressed single-gender services and communal accommodations. Noting the particular hardships that transgender individuals experience in public bathrooms, locker rooms and other segregated facilities, the Committee recommended that people who have obtained a Gender Recognition Certificate should be allowed to use their preferred gendered facilities. Responding to the Committee's Report, the feminist scholar, Julia Long, warned that transgender individuals in segregated space are 'antithetical to women's rights' and pose a 'threat to women only spaces and women only services' (2016). One Daily Mail columnist remarked that there was now 'an official [parliamentary] approach which turns nature, reason and common-sense upside down' (Littlejohn, 2016).

Every jurisdiction that acknowledges the existence and status of transgender persons must, at some point in time, determine what legal rights individuals have to use their preferred gendered-spaces. In the United Kingdom, where a comparatively liberal gender recognition law has been in place for over a decade (Gilmore, 2015: 183), the question of segregated services has a growing sense of immediacy. This is particularly so in a context where, owing to mainstream and social media coverage, transgender identities are ever more visible (Monroe, 2016; Jacobs, 2006). Yet, transgender persons in single-gender spaces are neither a new controversy nor a conversation which is unique to the UK. In her landmark 1974 memoir, *Conundrum*, the author, Jan Morris, described her (and others') uncertainty as to what facilities, and services, she should use after transitioning to live in her preferred female gender (2002: 107). In North America, where Time Magazine famously declared a transgender 'tipping point' in 2014, access to single-gender bathrooms has long been a source of legal, political and

academic concern (Chambers, 2007; Archibald, 2016). In 2016, the United States Department of Justice, as well as the Department of Education, issued guidelines interpreting trans exclusionary laws as impermissible sex discrimination under the federal Civil Rights Act 1964 (DOJ and JOE, 2016). Even in countries, such as Ireland, Malta and Sweden, which only reformed their gender recognition laws in 2015, there is an increasing need to determine what legal rules should apply for single-gender services.

Yet a striking feature of transgender legal scholarship in the UK is the absence of meaningful engagement with the segregation question. While debates over transgender access abound on television, radio and in newspaper opinion columns, British academics have largely failed to reflect on the rules which should apply. Instead, most scholarship remains focused on legal gender recognition and the rights of transgender persons within the criminal justice system<sup>i</sup>. In light of the Committee's recent recommendations, it is now an appropriate time to begin filling this lacuna, both so as to consider necessary reforms in the UK and to offer future guidance for those who will confront this topic in years to come. This article explores the proper legal response to transgender use of gender segregated spaces. It approaches the question through the lens of the UK Equality Act 2010.

The article proceeds in four parts. Part 1 sets out the broad relationship between transgender identities and single-gender spaces. It introduces key terms and concepts which affect transgender communities, and identifies the main transgender legal protections under UK law. Part 1 also explains the operation of single-gender services and communal accommodations under the Equality Act 2010 and considers how transgender individuals may be excluded from their preferred facilities without breaching equality guarantees.

Having defined the contours of the segregation debate, Parts 2 and 3 then address the two overarching motivations for excluding transgender persons from single-gender spaces. In Part 2, the article explores the phenomenon of non-transgender 'discomfort'. Part 2 is divided into three sub-sections, each discussing the related (yet conceptually distinct) questions of privacy, abnormal bodies and spaces of vulnerability. While the article suggests that privacy and body normality are normatively weak justifications for a transgender exception in the Equality Act 2010, it acknowledges that concerns for the proper care of vulnerable populations – such as occupants in women's refuges and intimate partner violence shelters – should influence the way Parliament accommodates transgender individuals.

In Part 3, the article shifts to address the second, perhaps more politically charged, objection to transgender inclusion; the fear of ‘misconduct’ in segregated facilities. Opponents of amending the Equality Act 2010 frequently cite risks of sexual assault and abuse. Extending greater rights to transgender communities has been equated with reducing the safety of women and young girls. Part 3 explores the policies and psychology which inform and produce fears over the ‘transgender menace’. It investigates the extent to which trans-inclusionary laws outside the UK have diminished the security of occupants in single-gender space. Ultimately, Part 3 concludes that extending access rights under the Equality Act 2010 would not negatively impact non-transgender users.

Finally, in Part 4, the article considers three possible routes for reforming UK law. Focusing on body type, legal status and the obligation to increase private space, the article embraces the Committee’s recent recommendations and also suggests an alternative policy which would create a safe, workable model for respecting both transgender and non-transgender rights.

Before commencing, however, it is important to flag one final consideration relating to the scope and focus of the article. Throughout the substantive analysis, there is an obvious emphasis on transgender women and the public anxieties to which their identities give rise. This is an unavoidable consequence of a media and political discourse which has overwhelmingly concentrated on transgender females. Typical narratives arising from the intersection of gender identity and segregated facilities – privacy, vulnerability and sexual misconduct – reveal both the cultural unease which transgender women elicit, and the strong societal prejudice that they continue to suffer. Yet, in focusing on transgender females, this article does not seek to undermine or erase those persons who identify as male or who experience their gender on the masculine spectrum. Indeed, male-identified transgender persons often live at a unique intersection of oppression, confronting both transphobia and misogyny. The lived-realities of transgender men, and the cultural biases they encounter, are important and must be acknowledged. To the extent that this article emphasises transgender women, this merely reflects the historical contours of single-gender debates in the UK.

## **Transgender Identities and Single-Gender Spaces**

Transgender (hereinafter ‘trans’) is an umbrella term which refers to all individuals whose gender identity (one’s internal sense of gender and self) and/or gender expression differs from the legal gender that was assigned at birth. While there are no definitive statistics for the UK’s trans population, it is estimated that approximately 650,000 people are gender variant (WEC, 2016: 6). Like the ‘cisgender’ population – a term derived from the Latin word ‘cis’ (‘on this side of’) and referring to persons who identify with their birth-assigned gender – trans individuals form diverse and varied communities. There is no singular trans narrative or experience (Green, 2004: 121). While many individuals seek to live in their ‘preferred gender’ (‘transition’) through medical intervention, others prioritise legal and social recognition (Tomchin, 2013: 843). Some trans people cannot or will not alter their sex characteristics but place great importance on private and public affirmation of their preferred identity. Legal gender recognition has particular significance for trans populations. Without a passport or birth certificate which confirms their lived gender, trans persons may be unable to access basic rights and services, including public transportation, postal services and even marriage (UNDP, 2013: 21-23).

Trans individuals in the UK enjoy considerable rights and entitlements. The Gender Recognition Act 2004 (hereinafter ‘the 2004 Act’) formally acknowledges the preferred gender of trans persons. Individuals, who have been diagnosed with gender dysphoria and who have lived in their preferred gender for two years, can apply for a Gender Recognition Certificate, and subsequently an amended birth certificate, without any requirement for sterilisation or body modification (e.g. gender confirming surgery, etc.).<sup>ii</sup> Trans communities are also protected under the Equality Act 2010 (hereinafter ‘the 2010 Act’), which prohibits discrimination on the basis of ‘gender reassignment’.<sup>iii</sup> Section 7(1) provides that a person falls within the scope of the 2010 Act if he or she ‘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.’ Individuals or organisations, such as employers, cannot comparatively disfavour trans persons merely because they have a gender reassignment characteristic.<sup>iv</sup>

The 2010 Act does not require that trans persons have unfettered access to their preferred single-gender services or communal accommodations. The UK, like most other

European and Commonwealth jurisdictions, operates a highly gendered model of publicly available facilities. Bathrooms, locker rooms and government-supported shelters are typically divided along binary-gender lines. Individuals are expected to use facilities according to their gender status, which, in the great majority of cases, is presumed to be both unambiguous and fixed. Although some scholars have argued that gender segregation reflects an historical attempt to remove women from public space (Williams, 1991; Griffin, 2008), the gender segregation of basic services and accommodations appears to enjoy implicit support among the UK population. While, in recent decades, there has been increasing promotion of women's access in symbolic institutions (Gentlemen, 2016; Riach, 2014), such as colleges and private-member clubs, there has been no equivalent call for women's entrance into male toilets or male locker rooms. This perhaps reflects the fact that, unlike men-only clubs, segregated bathrooms are not perceived as undermining women's status in society. Indeed, many female identified persons may – for reasons of sanitation, modesty or safety – actually prefer to use a public toilet or changing room where only women may enter.

Schedule 3, Part 7(28) of the 2010 Act (hereinafter 'the Schedule 3 Exception') provides that there is no discrimination if an individual disfavours persons with a gender reassignment characteristic in 'the provision of separate services for persons of each sex'<sup>v</sup>, 'the provision of separate services differently for persons of each sex'<sup>vi</sup> and the 'the provision of a service only to persons of one sex.'<sup>vii</sup> As a result of the Schedule 3 Exception, providers can remove trans individuals from gender segregated-services where exclusion furthers a legitimate aim.<sup>viii</sup> A similar result is achieved under Schedule 23(3) (hereinafter 'the Schedule 23 Exception') of the 2010 Act. There is no discrimination if a person disfavours trans individuals in accessing communal accommodation or 'benefit[s], facilit[ies] or service[s] linked to the accommodation.'<sup>ix</sup> Schedule 23 defines 'communal accommodation' as 'residential accommodation[s] which [include] dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex.'<sup>x</sup> Accommodation providers must consider reasonable alterations to the facility<sup>xi</sup>, the provision of additional space<sup>xii</sup> and the extent to which the service is used by only one gender.<sup>xiii</sup>

During the Inquiry, contributors raised considerable opposition to the Schedule 3 and 23 exceptions, both as a matter of principle and practice (WEC, 2016: 27-30). Excluding trans persons from single-gender space has often been rationalised on the basis of contentious and somewhat questionable claims about cisgender discomfort, sexual misconduct and the

propriety of trans bodies. While the safety of all persons who use gender-segregated services must be the primary focus, there is a sense that Parliament has been too willing to enact trans exceptions without adequately evaluating the legitimacy of those concerns which are raised (WEC, 2016). To the extent that exclusionary laws, such as the Schedules 3 and 23 Exceptions, have tangible impacts on trans lives, and may possibly expose trans individuals to violence and abuse, one must properly critique the need for trans-exclusionary rules. There is also concern that, as a matter of practice, the seemingly open-ended wording of the 2010 Act would, depending on the circumstances, allow providers to exclude *any* trans individual from their service or communal accommodation (WEC, 2016: 29). In their current form, the Schedules 3 and 23 Exceptions are only limited by the requirement for a legitimate aim (a term which, even itself, is not clearly defined). Therefore, it is possible that providers could refuse services to trans persons who have undergone a full medical transition or who have even obtained a Gender Recognition Certificate.

In the subsequent three sections, this article considers the arguments which have motivated the Schedules 3 and 23 Exceptions, and offers a road map for reforming the 2010 Act.

## **Discomfort**

Cavanagh writes that a trans ‘presence in gendered...space is confusing and upsetting to cissexuals’ (2010: 63). Laws which permit trans access into single-gender facilities are said to reduce cisgender comfort in three important ways. First, the appearance of any person, who was assigned male at birth, in women-only spaces violates the ‘privacy’ of other users (Tobin and Levi, 2013: 316). Second, focusing on trans individuals who have not chosen a full medical transition, cisgender persons should not be exposed to supposedly ‘unnatural’ or ‘abnormal’ trans bodies (i.e. men with breasts and a vagina, women with a penis) (Currah, 2008: 333). Finally, and perhaps most importantly, many segregated facilities serve particularly vulnerable populations, such as survivors of intimate partner violence, and the perceived presence of opposite-gender users may inhibit the effective provision of services (WEC, 2016: 27-28).

## *Privacy*

Laws which exclude trans persons from single-gender services and accommodations have, first, been justified on the basis of the claimed ‘privacy’ rights of other users (Tobin and Levi, 2013: 316). Cisgender men and women have a right to use services, such as public bathrooms and changing rooms, without being ‘ogled’ (Harvard Law Review, 2015: 1736). Where they share single-gender services with trans individuals, so this argument goes, cisgender persons suffer an invasion of their privacy (Weinberg, 2009: 147).

One must assume that those, who oppose trans-inclusion on the basis of privacy, are not defending an absolute right. It would undermine all public services and accommodations if every person could expect to use those facilities without being observed by another. Elkind notes that multi-user bathrooms are not places where individuals ‘typically have a high expectation of privacy’ (2007: 925). A person who chooses to enter gender-segregated communal spaces – even ones where that person may expose their body parts – implicitly accepts that he or she will be observed (but, perhaps not ‘ogled’) by the other occupants. Trans individuals in single-gender spaces do not ‘invade...privacy any more than anyone else who shares the public’ facility (Etta-Keller, 199: 370).

Instead of protecting a general right to privacy, gender-segregation ensures, more narrowly, that women and men can access services without being observed by the opposite gender (Daley, 2016). The notion of privacy thus invoked arises in a uniquely gendered context. A male, who specifically chooses a men-only changing room, should be able to shower and cloth himself without encountering a female occupant. A woman, who wishes to relieve herself in a women-only bathroom should not have to confront a male user as she washes her hands. Mottet suggests that laws which extend trans access to gendered-space have historically incited fear because they are framed as forcing individuals to undress or share a bathroom, locker room, or shower with members of the opposite gender (2002: 739). A trans woman, who accesses her preferred gendered-space, is considered a male interloper whose presence inappropriately subjects occupants to the ‘male gaze’ (Bosman and Rich, 2015).

Contrary to what certain commentators have argued, however, trans individuals in single-gender spaces do not violate ‘gendered’ privacy. Reducing trans persons to their birth-assigned gender – as is necessary if trans women are to be considered as male interlopers – is

inconsistent with both the trans lived experience and the conceptualisation of trans identities in human rights law (Chambers, 2007: 326). Wodda and Panfil write, unequivocally, that trans women 'are women' (2014: 952). They self-identify with and, where not restricted by violence or discrimination, live in their preferred female gender. Trans women communicate and engage with other persons as women. They often undertake difficult, even painful, transitions so as to be fully recognised as women. In the UK, as in many other jurisdictions, trans women have the right to have their gender legally recognised by the State. Where trans women access women-only spaces, they are giving expression to a female, rather than a male, identity. If men and woman have a privacy right to enjoy segregated space free from the opposite gender, laws which permit trans persons to enter their preferred gendered space do not diminish that right.

Paradoxically, a more credible threat to gendered privacy arises where, under the Schedules 3 and 23 Exceptions, individuals – who identify with, publically express and are perceived as having their preferred gender – must use segregated facilities which correspond to their birth-assigned identity. Following the enactment of a trans-exclusionary bathroom law in North Carolina, a number of trans men published photos of themselves using women-only facilities throughout the state (Wong, 2016). The image of muscular, bearded men showering and relieving themselves next to cisgender mothers and their young daughters illustrates how trans exclusionary laws fail to protect gendered privacy. As Wolf observes, forcing 'the transgender person to use facilities based upon the gender...assigned at birth...[places] transgender men in women's bathrooms and transgender women in men's, in visible defiance of the gender-segregation norm' (2012: 214). If courts and law makers desire to offer women and men privacy, that goal is not furthered by mis-gendering the trans community.

### *Abnormal bodies*

Many cisgender people express discomfort that a trans presence in gender-segregated space would expose supposedly 'unnatural' bodies (Harvard Law Review, 2015: 1736). Brown, for example, writes of feeling 'unsafe, vulnerable, and threatened by the sight of, and proximity to, male genitals, even if those genitals belong to a person who...identifies as female' (Brown, 2014: 304). Laws which exclude trans persons from gendered accommodations and services reinforce the idea that, as a matter of nature, all human beings are born with one of two rigid body configurations. It is the fact that an individual has breasts, a vagina and a uterus that allows the State to recognise that person as female (Greenburg, 1999: 275). A woman who fails

to satisfy this strict physical ideal is deemed to be biologically unnatural and should not be imposed upon other women in communal facilities. In essence, a trans woman who retains her penis is not really considered a woman.

Debates over trans bodily diversity are often more hypothetical than real. Trans bodies are rarely, if ever, visible. Mottet observes a general reluctance among trans populations to expose their sex characteristics, even in designated space (2013: 418). Trans individuals are coerced into concealing their physical characteristics through an 'inherent shame in having a body that is somehow different from the cisgender norm' (Levassuer, 2014: 946). It is doubtful that, even if trans persons did have free access to single-gender services and communal accommodations, cisgender persons would frequently (if ever) encounter unfamiliar bodies.

Even if that were not the case, however, there is at least an arguable case that concerns over bodily diversity do not justify exceptions, such as the Schedule 3 and 23 Exceptions. The idea that there are only two rigid, naturally occurring body configurations is 'medically, scientifically, and factually inaccurate' (Levesseur, 2014: 1003). Greenberg observes that a binary sex paradigm does not reflect reality, as 'sex and gender range across a spectrum' (1999, 275). Intersex persons offer a particularly compelling challenge to rigid natural body standards. Intersex individuals are born with a reproductive or sexual anatomy that do not fit typical definitions of male or female. According to Blackless *et al*, 'approximately 1.7% of all live births do not conform to a presumed Platonic ideal of absolute sex chromosome, gonadal, genital, and hormonal dimorphism' (2000: 161). While intersex remains a minority experience, and most persons who identify as 'male' or 'female' do exhibit common sexed-attributes, intersex challenges essentialist arguments about the 'naturalness' of binary sex. Where a woman, who is assigned a female legal gender at birth, can be born with atypical sex characteristics, it is not unnatural for a trans women to exhibit non-normative body traits.

Even conceding that bodily diversity is not *per se* unnatural, can one still argue that trans bodies are sufficiently uncommon that the 2010 Act should permit their possible exclusion in appropriate circumstances? Garfinkel claimed that 'typical' male and female bodies have such public acceptance that they enjoy a degree of moral authority (2006: 62). According to Garcia, the history of the separation of public restrooms by sex is due to the belief that 'human bodies come in only two types: male and female' (2013: 258) so that sex-segregation of bathrooms and locker rooms constitutes a 'social norm' (p.258). In cases, such

as *Vancouver Rape Relief Society v Nixon* (2005)<sup>xiv</sup>, deviation from binary sex has been considered taboo and thus harmful for both wider society and those who immediately occupy single-gender facilities.

The problem with this ‘social norm’ reasoning is that, like Lord Devlin’s infamous defence of sodomy laws in the 1950s (1965), it offers little substantive or normative justification for legal rules which exclude trans individuals. One cannot properly defend the Schedules 3 and 23 Exceptions simply by pointing to the historic exclusion of trans people or by observing that a majority of contemporary UK society supports the current law (Hart, 1959: 53-54). In the landmark United States Supreme Court decision, *Brown v Board of Education of Topeka* (1954), proponents of racially divided schools attempted to bolster their position, notoriously, by pointing to the history of American segregation since the Reconstruction. Laws should only exclude trans persons from their preferred accommodations and services if exclusion pursues a tangible social good or avoids a potential harm (Hart, 1959: 53-54).

Outside spaces of vulnerability (discussed below), it is doubtful that the Schedules 3 and 23 Exceptions advance sufficiently compelling social goals. Where a person uses a private stall in a women’s toilet, it is irrelevant to her fellow occupants how she urinates within those private confines (Jost, 2006: 391). Similarly, for persons at the urinals in a men’s bathroom, it is of no consequence whether those on either side are urinating through a natural penis, a constructed penis or a Stand-to-Pee device. Arguments asserting the need to exclude non-normative bodies for single-gender spaces are undermined by evidence that cisgender and intersex individuals are not held to that same ‘normal’ body standard. Tomchin notes, perceptively, that ‘only transgender people are held to a definition of gender that hinges entirely on possessing certain body parts’ (2013: 842). Discomfort with visible breast tissue has not resulted in cisgender men with gynecomastia being excluded from male dormitories. Under the 2010 Act, cisgender women cannot demand that an intersex woman, who identifies with her assigned female gender, be excluded from women-only changing rooms. It would be unthinkable that general discomfort could prevent a cisgender woman from using segregated showering facilities after she had a double mastectomy. In reality, UK law tolerates a considerable amount of bodily diversity when cisgender and intersex persons use single-gender spaces. Why are trans persons treated differently? Levasseur suggests that trans bodies are ‘placed in a separate category for display and legal assessment, using sex stereotyping as a compass’ (2014: 1001). If cisgender and intersex persons can use women-only and men-only

services, even when they have non-normative bodies, concerns about bodily diversity do not justify the current legal position under the 2010 Act.

### *Spaces of vulnerability*

Some of the most common single-gender facilities in the UK are services which have been established to assist vulnerable populations. This includes counselling groups for gender-related abuse and refuges for victims of intimate partner violence. In many cases, these spaces accommodate the needs of female-identified persons who have suffered emotional or physical violence at the hands of men. Jeffreys argues that ‘women’s domestic violence refuges/shelters and rape crisis centres...offer space in which women can feel safe, free of any threat from male abusers or the triggering effects of seeing and being dealt with by men’ (2014: 27-28). The concerns which militate against trans-inclusion in segregated refuge spaces may be qualitatively different from those which arise in the typical restroom or locker room scenario.

A primary concern – expressed both during the drafting of the 2010 Act and during the Inquiry – is how including trans individuals in segregated services and communal accommodations might reduce the capacity to serve at-risk populations (WEC, 2016: 27-28). There is a fear that, if survivor facilities are open to persons who – while living and identifying as women – are perceived by a majority of service users as men, this would obstruct meaningful engagement with abuse victims (WEC, 2016: 27-28). It is not that service users are inherently prejudiced against trans persons, or even that they necessarily deny trans identities in a more general sense. Rather, the experience of male-perpetrated violence may create a heightened sense of discomfort in the presence of persons who are perceived – particularly because of physical characteristics – as sharing the male gender. In their evidence to the Inquiry, service providers warned that ‘[s]ome...women may feel unable to access services provided by or offered jointly to all women including transwomen’ (WEC, 2016: 27-28).

The discomfort of vulnerable individuals plays a significant role in maintaining the Schedule 3 and 23 Exceptions. The Explanatory Notes to the 2010 Act specifically envisage a ‘counselling session...provided for female victims of sexual assault’ where the ‘[t]he organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there.’<sup>xv</sup> While (as discussed further below) trans women pose no physical threat to cisgender women

in refuges or survivor spaces, it is perhaps understandable that abuse victims will nevertheless be sensitive to those who – whether voluntarily or involuntarily – have been masculinized by society. This sensitivity which survivors experience is real, and it is important that policy makers create appropriate structures to address the complex, individualised needs of these persons. It may be that, while the law can generally open gender segregated-spaces (toilets, locker rooms, fitting rooms, etc.) to all trans individuals, there needs to be a small, sub-section of services where stricter policies, perhaps based on legal gender, continue to apply. In its recommendations to Parliament, the Women and Equalities Committee concedes that there ‘does need to be some limited ability to exercise discretion, if this is a proportionate means of achieving a legitimate aim’ (2016: 32).

It is important to note, however, that there are equally compelling reasons why trans individuals should have access to their preferred shelters and refuges. Trans individuals suffer disproportionately high rates of physical and sexual violence (EU AFR, 2015). In July 2016, the British newspaper, *The Independent*, reported a ‘170 per cent rise in crime’ against the trans community, including ‘[s]exual assaults, other kinds of violence, threatening behaviour and other kinds of harassment’ (Yeung, 2016). According to the LGBT rights organisation, Stonewall, almost 40% of trans individuals in the UK have experienced physical intimidation and threats (Stonewall, 2016). Like their cisgender counterparts (perhaps even more so), trans communities have a need for safe, secure and affirming survival services. Removing trans-women from the relative shelter of women-only counselling or women-only shelters denies much-needed resources to a recognised high-risk group. If policy makers are concerned to safeguard vulnerable women, trans women should be also be a priority.

It may be possible to protect cisgender women’s sense of security without excluding trans persons. Wenstrom suggests that concerns about vulnerability can be adequately addressed by adopting appropriate admissions and information procedures (2008: 149). Many UK service providers, which already cater for vulnerable trans woman, engage all users in a process of frank and open dialogue that both affirms trans identities and encourages a sense of security. Upon arrival, trans and cisgender women are offered information about the entry requirements and policies, as well as the rules on physical and sexual conduct that will not be tolerated by staff. According to Griffin, the adoption of ‘clear written policies and language’ communicates to all individuals that a provider ‘respects transgender persons (and the law)’ and can advise individuals of how to behave appropriately (2008: 436). Where cisgender

women are informed about the presence of trans women, as well the existing codes of behaviour, ‘experience shows that non-transgender women respect transgender residents and understand that they pose no additional safety risks’ (Wenstrom, 2008: 149). Accordingly, even within the more contentious sub-category of gendered spaces aimed towards vulnerable users, justifications that centre on discomfort tend to be overstated, and can indeed be accommodated within a more nuanced, non-discriminatory approach.

## **Misconduct**

In addition to concerns about discomfort, a second, and perhaps more politically relevant, objection to trans persons in single-gender services and communal accommodations is the perceived threat of physical misconduct. First, advocates of trans exclusion argue that allowing access to single-sex facilities promotes consensual sexual intercourse. Focusing on trans women, who they mis-gender as heterosexual men, advocates suggest that placing opposite-gendered persons in intimate spaces inevitably leads to improper sexual behaviour (Spade, 2009: 214). Second, trans inclusion is opposed in order to avoid sexual assaults (Wenstrom, 2008: 148). Relying upon depictions of trans persons as unstable, deviant and predatory, there are claims that trans women pose a direct threat to cisgender women in shared space (Long, 2016). There is also a fear that, if trans men enter male-only facilities, they may also be exposed to sexual harassment and abuse (Heroux, 2015). Finally, many individuals – policy makers and lay-observers alike – argue that allowing trans access to single-sex accommodation would become an instrument of abuse for cisgender males who seek access to women-only spaces (Steinmetz, 2015).

### *The myth of the trans predator*

The myth of the trans predator operates on the idea that trans persons, particularly trans women, pose a threat of sexual violence to cisgender persons. Both feminist and conservative scholars, in the UK and beyond, have long argued that trans persons should be excluded from their preferred single-gender spaces as a means of protecting bodily integrity rights (Long, 2016). According to Brydum, there is a “‘provably false’ fear that trans people inherently threaten the safety of cisgender women and children’ (2015).

Supporting trans-exclusionary laws, such as the Schedules 3 and 23 Exceptions, by reference to sexual misconduct is problematic. It suggests that trans persons are sexual deviants, who target the cisgender population and who are incapable of complying with rules on proper sexual conduct. Characterising trans individuals as predators reflects a deeply engrained social prejudice. It is supported by neither legal nor medical evidence (Maza and Brinkler, 2014). In response to the Women and Equalities Committee's recommendations, Long complained that the Trans Equality Inquiry had ignored research undertaken in Sweden which, she claimed, found that trans women commit violent crime, including sex offending, at the same rates as cisgender men (2016). However, the research that Long references – a 2011 article by Dhejne *et al* – makes no suggestion that trans women are a rape risk. Indeed, as the first author notes, 'claims about trans criminality, specifically rape likelihood, is misrepresenting the study findings' (Williams, 2015). In reality, there is no peer-reviewed scholarship which proves, or even suggests, that trans individuals, as a class, pose a threat of sexual violence to cisgender populations (Yoshino, 2006).

As noted above, the existing research actually illustrates that, rather than instigating sexual violence, trans persons are disproportionately the victims of rape and sexual assault in segregated spaces (Gehi and Arkles, 2007: 17). Where the law prohibits trans access to single-gender facilities, trans individuals must reveal their birth-assigned gender and expose themselves to the risk of transphobic abuse. Recent evidence suggests that up to 70% of trans individuals have experienced 'denied access, verbal harassment, and/or physical assault when trying to access or while using gendered public restrooms' (Herman, 2013: 77). Transphobia in segregated-spaces can significantly decrease life quality, precipitating 'absences from work and school', 'choosing to not participate in public life' and 'avoiding particular places or events' (Herman, 2013: 77). While removing the Schedules 3 and 23 Exceptions would not compromise cisgender safety, it would considerably enhance the welfare and protection of trans communities.

### *Sexually deviant men*

Concerns relating to misconduct also assume that trans women, irrespective of self-identification and gender expression, are men. Observers argue that allowing trans women to enter women-only facilities is equivalent to welcoming cisgender males (Ditum, 2016). If there

are policy reasons for excluding men from gender-segregated spaces, so too trans women, particularly those who do not medically transition, should be barred. Opposing any change to the 2010 Act, Ditum warned that ‘94% of violence against women is committed by men’ (2016). The implications of Ditum’s arguments are clear: trans women are men, they commit male-pattern violence and they should be excluded from female-only space.

From a human rights perspective, denying the true identity of trans women disregards their lived identities and personal experience of gender. As noted, trans women are women. They live their lives in their preferred female gender. As a group, trans women are as diverse in their make-up and characteristics as any other female population. Different trans women respond differently to similar situations, including their proximity to female-only services and communal accommodations. However, if UK law operates upon a general presumption that cisgender women can share segregated spaces without inappropriate sexual activity, the courtesy of that presumption should also be extended to trans persons. As in the general female population, many trans women have no interest whatsoever in a voluntary sexual relationship with a person of the same gender. A large number of trans persons, just like those in the cisgender community, experience only opposite-gender attraction. On the other hand, some trans women are indeed lesbian-identified (de Sutter et al, 200). Yet, unless service providers are excluding all women with same-gender attractions – cisgender and transgender – there is no justification for excluding only trans women. Considering that the 2010 Act does not permit gay persons to be excluded from women-only and men-only services and accommodations, there is no logical reason for a specific trans exception.

Excluding trans women promotes the ‘sexist and heterosexist assumption that a [person] with a penis will inevitably attack and rape a female’ (Wenstrom, 2008: 151). Irrespective of whether trans women are actually deviant or really men, it is argued that segregated-spaces should bar trans females on the sole basis that individuals with ‘male’ genitalia are dangerous (Wenstrom, 2008: 148). Cavanagh observes an ‘antiquated and heterosexist construction of masculinity...[whereby] “if a man sees a woman, just a glimpse, he cannot be controlled”’ (2010: 78). Like concerns relating to sexual deviancy, ‘penis as predator’ reasoning is both offensive and troublingly overbroad. It implicates each trans woman, who retains her penis, and all cisgender men. It not only encourages a damaging vision of male identities, but also reduces women to passive, unwilling prey: women are constructed, inherently, as ‘potential victims’ (Cavanagh, 2010: 78). The notion of the ‘unequivocally

violent penis' is unsubstantiated in wider criminology research, and has little impact on how gendered-spaces actually operate in the UK. If the presence of any male genitalia automatically compromises the sexual safety of cisgender women, why are male staff permitted to work in prisons or women-only education institutions? Claims that all persons with a penis are dangerous does not support a legal rule which allows trans persons to be removed from single-gender spaces.

### *Cisgender abuse*

In recent years, the politics of trans inclusion has been increasingly focused on fraud and abuse. Even if critics concede that trans persons do not pose a heightened threat in single-gender facilities, they nevertheless oppose extending trans rights on the basis that they will be abused by cisgender males (Tobin and Levi, 2013: 326). In seeking the repeal, or rejection, of laws that would permit trans persons to use their preferred facilities, opponents have consistently relied upon graphic, child-focused threats. Within the US, for instance, a recurring tool has been short media advertisements, which suggest that greater trans protections will serve as cover for paedophile males who follow young girls into restrooms (Campaign for Houston, 2015). In November 2015, opponents of an Equal Rights Ordinance in Houston, Texas, used the threat of cisgender abuse to defeat proposed anti-discrimination protections (Dart and Redden, 2015).

It is both intellectually and practically unsatisfactory to exclude trans persons from single-gender facilities because other, non-trans individuals (over whom trans communities have no control), may engage in illegal conduct. General public sexism cannot undermine the capacity of women to work, and should not legitimise anti-woman practices as applied in the workplace. Similarly, general public homophobia is not evidence that gay and lesbian couples are unsuitable parents, and should not restrict their right to adopt or access assisted reproduction. In the same way, public concern about cisgender predators – whether organic or encouraged by advocates – does not demonstrate a pressing need for laws which remove trans individuals from women-only or men-only facilities. On the contrary, it simply proves that, while trans persons pose no heightened threat, there is a sub-category of cisgender men who are willing to carry out improper acts. These individuals should be targeted for appropriate, properly-directed sanction. The 2010 Act should not deny trans persons full equality because another, unrelated class of persons intends to break the law.

This line of reasoning applies equally to the claims of trans men who are removed from male spaces to prevent their physical and sexual assault. Policy makers have defended such exclusionary rules, similarly, on the basis that they protect trans men's welfare (Heroux, 2015). Yet, focusing on the conduct of trans men suggests, at least tacitly, that the prospective victims of violence are responsible for avoiding future injury, even if this requires that they refrain from morally unobjectionable acts. By excluding trans men from male-only space, the law normalises (even legitimises) male violence in bathrooms and locker rooms. Rather than condemning the violence of cisgender men in gendered space, exclusionary policies condemn trans men who 'unreasonably' expect to use male facilities without harm. This approach mirrors long-running public discussions on sexual offences whereby, under a process termed 'victim blaming' (Carlson, 2014), female victims are considered partially responsible for their assault because they consume alcohol, reveal skin or traverse the streets unaccompanied. No person has the right, irrespective of another's conduct, to sexually assault that other and there are no circumstances which justify violence in male-only spaces. The 2010 Act should not permit the removal of trans men from male-only spaces to protect them. They should ensure safe, accessible conditions in single-gender facilities so that all men, cisgender and trans, can inhabit those facilities without fear of injury.

UK laws do not generally prohibit permissible conduct merely because there is a threat, however remote, that somebody may ultimately engage in the conduct for an unintended purpose. The fact that a person may drive under the influence of alcohol does not cast doubt upon the continuing desirability of driving rights. If authorities foresee a likelihood that certain rights or conduct may be exploited, the solution is not to abolish or suspend the entitlements in question. Instead, the authorities should put in place sufficient sanctions which discourage and censure abuse. In the context of driving, consuming an impermissible level of alcohol may result in a fine, loss of driving privileges or, in extreme cases, a custodial sentence. Establishing a supervisory framework targets (and largely avoids) the general public harm of drunk-driving, without requiring the removal of all motor vehicles. A similar approach should be applied to the threat of cisgender predators. If Parliament believes that trans access to single-gender services facilitates physical and sexual assault, they should put in place laws which censure, and punish, men who attack women in bathrooms and locker rooms. Indeed, as West observes, '[w]e already have laws against sexual predation and harassment in public toilets – they're called laws' (2016).

Excluding trans individuals risks creating a false sense of safety in single-gender services and communal accommodations. Abuse-focused arguments frequently imply that, if trans women are not allowed to enter single-gender facilities, cisgender predators will be definitively prevented from attacking vulnerable women and girls (Spade, 2009: 216). This way of thinking is, at best, overly optimistic, and, at worst, worrying naïve. Archibald cautions that the ‘inconvenience of entering a bathroom marked “women”’ is unlikely to deter a person planning harassment, assault, or rape (2014: 68). Laws which exclude trans individuals do not significantly impede cisgender predators, and they should not be used as a means of absolving law makers from their obligation to create safe, secure services and accommodations. Trans people should not be arbitrarily sacrificed to enact blunt safeguards that will not meaningfully protect women (Wolf, 2012: 207).

Existing research suggests that, despite the near-continuous proliferation of abuse-inspired arguments, there have been few reported instances of cisgender men falsely asserting a trans identity to access women-only spaces and commit crime. There have been well-publicised incidents where cisgender persons – typically male-identified – have, without claiming a trans identity, entered women’s facilities either to highlight the purportedly ‘ridiculous’ character of trans protections or to incorrectly assert that trans inclusion effectively de-genders all public space (Morrow, 2016; Ellis Nutt, 2015). However, in terms of the specific threats envisaged by trans opponents – the man who actually asserts a female gender to stealthily commit a crime – there have been no reported cases (Maza and Brinkler, 2014). As Sterling notes, those who oppose trans inclusion have ‘failed to provide statistics, studies, or facts to verify their assertions’ regarding cisgender predators, meaning that such claims are, essentially, ‘merely conjecture’ (2014: 771). On the contrary, in fact, there is ‘evidence to refute’ such claims (2014: 771). The Schedules 3 and 23 Exceptions are thus a solution in search of a problem.

It is not surprising that cisgender men have, in reality, not adopted a ‘trans strategy’ to enter women-only spaces. Keisling suggests that, in many cases, gender recognition would actually inhibit the ability to hide one’s identity (Mottet, 2013: 414). Where – in order to evade detection – a cisgender man self-identifies as a trans woman, he may in fact find his identity subject to closer scrutiny, particularly if he does not also medically or socially transition. A cisgender man, who falsely expresses a female gender, but who continues to present in his preferred male gender, is in the same position as trans women who, for personal or social

reasons, engage in only a limited process of physical transition so that their appearance may not conform with societal understandings of typical ‘femininity’ or ‘femaleness’. Just as these latter individuals are continuously required to explain and validate their identity, so too a cisgender man who deceitfully expresses a female gender, without actually living that gender, is likely to draw increased attention.

## **Trans Inclusion in Single-Gender Services and Accommodations – Possible Solutions**

As the Women and Equalities Committee notes, questions regarding trans identities in single-gender services and communal accommodations are ‘sensitive areas’ (WEC, 2016: 32). The sheer volume of media and political attention which is increasingly directed towards defining who can (and, perhaps more relevantly, cannot) enter gendered facilities underlines the urgency of finding safe, workable solutions. In formulating a response to the issue, Parliament must keep in mind the policy rationales which justify maintaining gendered spaces, particularly services which cater to vulnerable women. Yet, there must equally be recognition of trans individuals and a proper evaluation of the risks they create in single-gender facilities.

There are at least three possible ways of reforming the 2010 Act to remove the current ambiguity surrounding single-gender services and communal accommodations. A first solution is to amend the Schedule 3 and 23 Exceptions so that trans persons are definitively excluded until they exhibit a typical or ‘normal’ body configuration. If cisgender men are unwilling to shower in the presence of a man who has breasts and a vagina, trans men should be able to enter single-gender facilities where they have undergone chest and phalloplasty surgery. While one might argue that it is legitimate to exclude trans men who retain typically ‘female’ physical characteristics, the 2010 Act should at least accommodate those who have completed a full, medical transition. In many jurisdictions, the law restricts not only access to gendered space, but also legal gender recognition, to those persons who have altered internal and external body attributes. In countries, such as Japan, Ukraine and Turkey, trans persons cannot be acknowledged by the law unless they achieve a conventionally ‘male’ or ‘female’ appearance, including by the presence of ‘gender-appropriate’ genitals. A primary justification for the continued medicalisation of legal gender recognition is the impact which reform would have on single-gender services (Wenstrom, 2008: 144).

Using bodily characteristics as *the* metric for trans inclusion in segregated services and accommodations would, however, be both retrograde and highly inappropriate. Since the 2004 Act, UK law has acknowledged that the validity of trans identities does not depend on medical status or physical appearance. Indeed, in line with recent reforms in Ireland, Denmark and Malta, the Committee recommends that individuals should now be able to obtain a gender recognition certificate without any health care intervention – physical or psychological (WEC, 2016: 14). Many trans persons do not want to – or cannot for health, economic or age reasons – undergo a medical transition (Spade, 2009: 160). This does not mean that these individuals are any less committed to their preferred gender (Tobin, 2006: 401). It simply reflects the fact that, for a multiplicity of causes, trans persons in the UK are often not in a position to alter their bodies. As Green has argued, there is no reason that trans individuals ‘should [not] have their gender identity validated’ simply because they lack the capacity – financial or physical – to undergo gender confirming surgeries (2004: 42).

As UK law increasingly appreciates that sex characteristics do not determine legal gender, so too there is a growing understanding that body features should not override a person’s lived identity. It would certainly be incongruent if, under the 2004 Act, a trans man, who does not have a penis, could be formally recognised as male, but, under the 2010 Act, he can be excluded from men-only spaces. Conditioning access to gendered-space on body configuration prioritises only the most privileged trans persons (e.g. those who have the economic or health resources to medically transition). These individuals are often the least reliant on public services and accommodations, such as communal bathrooms and shelters. A ‘body test’ would fall hardest on resource-deprived groups and further isolate those who are already marginalized within trans communities. They encourage greater gender policing in all segregated-space, affecting both trans and cisgender persons alike. If entry into women-only and men-only facilities requires compliance with normative gender, this would also restrict persons who, while identifying with their birth-assigned gender, do not satisfy general assumptions about male and female appearance (Golgowski, 2016).

The second, more palatable, solution is extending access to all trans persons who have obtained a Gender Recognition Certificate. If segregated-space is exclusively available to men or women, there should be entry for all persons who enjoy that legal gender. In its Report, the Committee recommends that ‘the single-sex / separate services provision’ in the 2010 Act

should ‘not apply in relation to discrimination against a person whose acquired gender has been recognised under the Gender Recognition Act 2004’ (WEC, 2016: 32).

As compared with the first, body-centred solution, using legal gender as the metric of access has a number of advantages. First, it avoids awkward conversations about how to ‘assess’ gender. If entry into a restroom or locker room requires evidence of a penis, it is unclear how service providers should comply. Would all prospective users have to reveal their genitals? Such a scenario not only raises concerns about personal privacy but also hinges on an operator’s willingness to carry out the necessary investigations. Second, focusing on legal gender, as opposed to body configurations, is a more objective, measurable standard. The inherent diversity of human bodies means that any test based on one, normative body type will inevitably be unstable and unworkable (Tomchin, 2013: 842). This can be seen in the comparisons between the 2010 Act’s implied inclusion of non-normative cisgender/intersex bodies and the possible exclusion of trans individuals. Legal gender is a more defined, quantifiable marker against which to determine a person’s legal rights. Amending the Schedules 3 and 23 Exceptions, so that they embrace all legal men and women, would create a definitive, unambiguous legal standard. While any such reform might be more easily satisfied by cisgender and intersex communities, access-through-legal-recognition confers benefits which are not subject to individual beliefs about proper or acceptable bodies.

One must acknowledge, however, that even ‘entry based on legal status’ is not without problems. Although the 2004 Act radically improves access to gender recognition, formal legal acknowledgement remains out of reach for many trans persons. During the Inquiry, numerous witnesses explained how a culture of isolation, as well as economic and resource challenges, continue to impede access to gender recognition, even under the UK’s comparatively liberal regime (WEC, 2016: 11-14). The requirement to obtain a diagnosis of gender dysphoria, coupled with high rates of trans discrimination throughout the National Health Service, prevent many UK trans persons from using the 2004 Act (WEC, 2016: 35-42). In the past two years, there have been several cases where trans women, subject to a custodial sentence, have been placed in male prison units because, despite living in their preferred gender, they had not been able to obtain formal gender recognition (Morris, 2015 and Allisson and Pidd, 2015). The Committee has recommended that, having regard to the insurmountable hurdles which individuals currently face, Parliament should introduce a system of gender self-determination (WEC, 2016: 14). There is also the question of what facility, during the mandatory two-year

period where a trans individual lives in their preferred gender but does not have formal recognition, a person should be entitled to use.

Such concerns do not necessarily disqualify gender recognition as the appropriate marker against which to judge access to single-gender services. Considering that many trans persons do obtain gender recognition, one might conclude that, given the various competing interests to be balanced, using gender recognition is a fair, even-handed solution. In the particular context of spaces of vulnerability, it may be easier to allay other users' fears where not only do trans occupants *live* in their preferred gender but also where they are *legally acknowledged* as women. It is, therefore, little surprise that the Committee favoured this common sense approach. At the very least, Parliament should amend the 2010 Act accordingly. What concerns about the gender recognition process do reveal, however, is that, even where there is a relatively flexible test for obtaining preferred legal status, the requirement to be acknowledged in law may mean that some trans individuals (likely the most vulnerable and at-risk groups) will still be excluded from their preferred single-gender facilities.

A final, possibly optimal, solution (one increasingly adopted in the United States) is to create enhanced privacy options for all service-users. According to Tobin and Levi, the solution is not to segregate or exclude the person who offends the majoritarian position, but rather, to increase privacy options for everyone where possible (2013: 326). If concerns about privacy lie at the heart of the Schedules 3 and 23 Exceptions, increasing privacy controls reduces the need to remove trans individuals. Enhanced privacy can be achieved in one of two ways (or through a mixture of both). On the one hand, service and accommodation providers could offer greater numbers of single-user facilities, such as personal shower stalls and toilet cubicles. This solution is already implied under the Schedule 23 Exception.<sup>xvi</sup> Individualising facilities decreases the need for uncomfortable interactions, and offers individuals more control over the extent to which they see or are seen by others (Tobin and Levi, 2013: 326). On the other hand, jurisdictions such as Washington State and Connecticut, have adopted policies which allow persons, who may feel uneasy sharing segregated spaces, to access specialised locations where they can dress or shower in private (Tobin and Levi, 2013: 312). Washington's Superintendent of Public Instruction, for example, has recommended that '[a]ny student - transgender or not - who has a need or desire for increased privacy, regardless of the underlying reason, should be provided access to an alternative restroom' (Tobin and Levi, 2013: 312).

The American experience can serve as a blueprint for reforming the 2010 Act. Instead of the Schedules 3 and 23 Exceptions, the 2010 Act could require service providers to offer, where reasonably practicable, additional, individualised facilities so that persons, who do not wish to share the general services or accommodations, can access relevant benefits (shelter, bathrooms, etc.) in private. The additional locations should be available to all persons – irrespective of gender identity – and entrance should depend upon voluntary consent. In particular, individualised services and accommodations should not be used as half-way houses for trans individuals who are comfortable using general facilities. While providing a ‘third option’, exclusive to trans persons, might release trans women from the threat of abuse in men-only spaces, it would also serve to reinforce, and perhaps even strengthen, cultural perceptions of the trans community as ‘others’. While acknowledging both policy and political constraints, there is a compelling argument that trans individuals should (at least as a matter of principle) be fully integrated into general segregated-spaces.

## **Conclusion**

The question of trans access into single-gender services and communal accommodations is neither novel nor unique. Since the first public consciousness of trans identities, there has been debate as to what services and facilities individuals should be entitled to use post-transition. Where a trans woman lives and expresses her preferred female gender, should she be entitled to enter women-only restrooms or should she be consigned to services available only to men?

In the legal context – both academic and practical – the rights of trans persons in the UK to use their preferred facilities remains a largely underexplored concern. Within the existing British scholarship, commentators have tended to focus on legal gender recognition, without fully considering the more practical, quotidian challenges that confront trans individuals after they are recognised. The precise requirements for being acknowledged as a man are undoubtedly important. However, one must also consider what rights, entitlements and obligations a person has once he obtains his preferred male status.

Within the wider trans rights movement, particularly in North America, there are growing calls to ‘de-gender’ public spaces and accommodations. Where men and women can equally share dormitories, locker rooms and toilet facilities, there would be no need to determine when trans individuals can use their preferred facilities (Lee Ball, 2015; Scelfo,

2015; O’Conner, 2016). On university campuses, upscale restaurants and cultural centres, administrators increasingly offer all-gender facilities which are available for use irrespective of gender identity. In the UK, the 2010 Act has attempted to strike a complicated balance, establishing a general right to equality for trans communities but permitting trans exclusion from single-gender spaces where a reasonable justification exists. The 2010 Act seeks to establish a workable compromise, which caters to the needs of all interested parties. Yet, the Schedules 3 and 23 Exceptions have resulted in a patchwork legal regime which, at best, remains unclear, and, at worst, encourages arbitrary and capricious decisions to exclude.

The primary goal of any rule governing single-gender spaces must be the protection of all occupants. Where there is evidence that trans inclusion in gendered-services and accommodations *does* reduce public security, there is ample justification for adopting exclusionary laws. Yet, the legal and policy arguments, which have thus far been offered in defence of the 2010 Act, lack a compelling normative basis. Trans individuals do not threaten the cisgender population in single-gender services. Trans bodies may, depending upon medical treatment, not fit common binary expectations, but they are not unnatural. Their presence should not shock, offend or disgust. There is no evidence – anecdotal or research-based – which supports the proposition that trans individuals are inherently violent. Trans communities are as diverse and varied in their make-up as any cisgender group. While there may be trans individuals who have committed, or will commit, violent crimes, that is also true of the myriad other communities who enjoy automatic access to their preferred gendered-space. There is also little (if any) support for the idea that trans protections facilitate cisgender predators who feign a trans identity to perpetrate assaults in women-only space. In reality, concerns over the supposed threat of trans identities often reveal lingering anti-trans prejudice, reproducing historic tropes about the ‘deviant’, ‘deceptive’ or ‘unstable’ trans individual.

Moving forward, a number of options exist for Parliament to create a clearer, less ambiguous policy on access to gendered spaces. Perhaps the most realistic, politically feasible, solution is to use legal gender recognition as a proxy for entry. All persons who have obtained a Gender Recognition Certificate should, irrespective of body characteristics, be entitled to use their preferred services and accommodations. A test based on legal status is both logical and highly defensible. If a person is recognised in law as a woman, there is no reason why she should be excluded from women-only spaces. A second, more contentious solution, is to encourage greater privacy options for all service users. Service providers would be required to

increase individualised service or accommodation units. Where a person is uncomfortable accessing a service with the general population – which should include trans individuals in their preferred spaces – he or she would have the opportunity to use a private facility. Ultimately, it is Parliament who will decide the appropriate standard to adopt. While prioritising the safety of all users, law makers should also aim for rules which respect and uphold the dignity of trans communities.

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## Notes

<sup>i</sup> Sharpe A (2016) Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed Approach. *Journal of Criminal Law* 80(1): 28; Dunne P (2015) Ten Years of Gender Recognition in the United Kingdom: Still a Model for Reform? *Public Law*: 530; Grabham E (2010) Governing permanence: trans subjects, time, and the Gender Recognition Act. *Social and Legal Studies* 19(1): 107; Cowan S (2009) Looking Back (To)Wards the Body: Medicalisation and the GRA. *Social and Legal Studies* 18(2): 247.

<sup>ii</sup> Gender Recognition Act 2014, s. 2(1)(a) and (b).

<sup>iii</sup> s. 7(1).

<sup>iv</sup> s. 13(1).

<sup>v</sup> Sch. 3, Pt 3(28)(2)(a).

<sup>vi</sup> Sch 3, Pt 3(28)(2)(b).

<sup>vii</sup> Sch 3, Pt 3(28)(2)(c).

<sup>viii</sup> Sch 3, Pt 3(28)(1).

<sup>ix</sup> Sch 23(3)(1)(b).

<sup>x</sup> Sch 23(3)(5).

<sup>xi</sup> Sch 23(3)(3)(a).

<sup>xii</sup> Sch 23(3)(3)(a).

<sup>xiii</sup> Sch 23(3)(3)(b).

<sup>xiv</sup> [2005] BCCA 601; see Boyle C (2011) A Human Right to Group Self-Determination – Reflections on *Nixon v Vancouver Rape Relief Society*. *Canadian Journal of Women and the Law* 23(2): 488; Chambers L (2007) Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence and Kimberly Nixon. *Canadian Journal of Women and the Law* 19(2): 305;

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<sup>xv</sup> Equality Act 2010, Explanatory Notes [740].

<sup>xvi</sup> Equality Act 2010, Schedule 23(3)(3)(a).

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