



**‘A CRITICAL ANALYSIS OF UK EQUALITY AND
ANTI-DISCRIMINATION LAW IN LIGHT OF
SOCIAL CHANGE, FOCUSING ON THE LGBTQ+
COMMUNITY’.**

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Abstract

This article aims to analyse UK equality and anti-discrimination law, mainly the Human Rights Act 1998 and the Equality Act 2010, and government policies surrounding them, in order to assess whether these frameworks have kept up with social change, particularly focusing on the LGBTQ+ community. The statutory frameworks and the effectiveness of their provisions will be examined, and the case law that has emanated from them. The Equality Act 2010 and its success in practice will be explored by assessing governmental policies and bodies like the role of the Equality and Human Rights Commission and the 2011 and 2018 ‘LGBT Action Plans’, where various criticisms will be examined. Finally, examples of social change such as the increased use of the internet, rise of campaign groups and their influence, the ‘toilet debate’ and the Coronavirus pandemic will be discussed in light of how UK equality and anti-discrimination law has reacted to benefit the LGBTQ+ community.

Introduction

This article is focused on analysing whether UK equality law and anti-discrimination law has kept up with social change with regard to the LGBTQ+ community since the enactments of two major pieces of legislation: The Human Rights Act 1998 and the Equality Act 2010 (Acts). To fulfill these aims, the article will explore the Acts in their construction, enforcement bodies and government policies surrounding them and how the law has reacted to changes in society. Before proceeding with this analysis in subsequent chapters, it is necessary to define and distinguish between the terms ‘gender’ and ‘sex’ as whilst being used interchangeably, they incur different meanings, which is important to

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highlight in the context of how they apply to the LGBTQ+ community.

Comparative definitions of 'sex' and 'gender'

The dictionary definition of 'sex' is one that is exclusive to male or female: 'either of the two main categories (male or female) into which humans are divided on the basis of their reproductive functions'.² Comparatively, the Office for National Statistics (a body that provides material which has aided UK government) adopts, that 'sex' refers to 'the biological aspects of an individual as determined by their anatomy'³ which is also categorised as 'male or female'⁴ and something that is 'assigned at birth':⁵ the common consensus is that 'sex' is determined by biological features. Contrastingly, the ordinary usage of the term gender refers to the categorisation of male and female but prioritises the expression of 'social or cultural distinctions and differences, rather than biological ones'.⁶ Similarly, the legal definition highlights that gender is a 'social construction relating to behaviours and attributes'⁷ and that gender is a spectrum between man and woman: therefore, indicating that 'gender' is not restricted to the classification of male or female. The importance of highlighting these distinctions, is that case law prior to the Human Rights Act 1998 (HRA 1998) and the Equality Act 2010 (EA 2010), emphasised a struggle to protect transgender rights, due to the fixation by the legislature, executive and judiciary that biological factors determine the legal status of an individual: for example, *Corbett v Corbett*⁸ which will be examined as an example of social change in the LGBTQ+ Community. However, the acceptance of gender dysphoria as a diagnosable condition in 1980, and the enactment of the Gender Recognition Act 2004 demonstrate a shift in attitudes.

'LGBTQ+': what does it mean?

It is helpful to briefly examine the acronym of the LGBTQ+ community, which will be frequently referred to. The acronym is split into two categories, with 'lesbian, gay and bisexual' persons falling under 'sexual orientation' and 'transgender' falling under 'gender'.

² Oxford English Dictionary, 'Sex' <www.oed.com/view/Entry/176989>

³ Office for National Statistics, 'What is the difference between sex and gender?' (21 February 2019)

⁴ *ibid*

⁵ *ibid*

⁶ Oxford English Dictionary, 'Gender' <www.oed.com/viewdictionaryentry/Entry/77468>

⁷ Office for National Statistics (n 2)

⁸ [1970] 2 All ER 33

The 'T' stands for 'transgender' and the 'Q' refers to 'queer or questioning'.⁹ Under the EA 2010 these categories fall under different provisions, so by highlighting these differences it will be clear what provision is under discussion when looking at a group in the LGBTQ+ community. Article 14 of the European Convention on Human Rights as incorporated in Schedule 1 of the HRA 1998, the prohibition of discrimination, applies to sexual orientation and now, due to the case of *Identoba v Georgia*,¹⁰ the category of 'other status' in the prohibition extends to gender identity:¹¹ the category is inclusive to all those in the LGBTQ+ community. The EA 2010 includes separate provisions for that of 'sex' governed under section 11 and section 7 'gender reassignment'. Section 7 and its title has attracted many criticisms regarding its scope, however, these provisions and comments will be examined in more detail in later chapters.

As this article focuses on the Act's ability to keep up with social change, the context in which it refers to social change needs to be established. Common themes occur amongst different theorists: social change relates to shifts in cultural patterns over time. Leicht's definition provides that social change is 'the significant alteration of social structure and cultural patterns over time';¹² likewise, Greenwood emphasises a simplistic definition of 'shifts in attitudes and behaviours that categorise a society'.¹³

1 Progression of UK Equality and Anti-Discrimination Law

The law today is a product of many historical developments, examples of which will now be explored to provide a background as to how the HRA 1998 and the EA 2010 were implemented.

Examples of legislative developments as a result of social change

The Sexual Offences Act 1967 (SOA 1967) was the first example of legislative change regarding accepting homosexual acts between two men, both over the age of 21 in private. However discrepancies remain with the age of consent still being unequal to that of heterosexuals and no mention of women due to the Government at the time refraining from

⁹ The Lesbian, Gay, Bisexual & Transgender Community Center, 'What is LGBTQ?' <<https://gaycenter.org/about/lgbtq/>>

¹⁰ *Identoba v Georgia* App no 73235/12 (ECHR, 12 May 2015)

¹¹ European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (ECHR 2020)

¹² Kevin T. Leicht, 'Social Change' (2013) <www.oxfordbibliographies.com> accessed 30 September 2013

¹³ Jeremy Greenwood, 'Social Change' (2008) Discussion Paper No.3485

encouraging women to explore their sexuality,¹⁴ therefore, highlighting the traditional views about gender roles in society. Despite this, the SOA 1967 allowed more open conversations about homosexuality and divergence from repressive societal norms: a pivotal moment for the homosexual community.

In spite of these new positive attitudes emerging, only three years later, *Corbett v Corbett*¹⁵ which concerned the denial of a transgender individual's marriage, set legal precedent that marriage is determinable by 'sex' rather than gender due to the fixation of the court on marriage being between man and woman. As a result, a plethora of publications of homosexual material (including lesbianism), the first documentary on transgender identity 'A change of Sex' and the first UK Gay Pride emerged¹⁶, therefore increasing pressure for acceptance in society. Additionally, *Rees v UK*¹⁷ demonstrates reluctance by the judiciary to interfere with parliamentary powers concerning transgender status, but crucially, the judges realised the seriousness of issues faced by the transgender community and indicated change was needed. Contrastingly, in *Goodwin v UK*,¹⁸ a new willingness emerged by the judiciary to favour the rights of a transgender person as the courts placed importance on individuals being able to live their life in their preferred gender: this gave a glimpse of hope to the LGBTQ+ community. These changes in attitudes portray the living instrument doctrine: that the European Convention is interpreted in the light of present day conditions.¹⁹ *Goodwin* impacted the implementation of another major legislative change, the Gender Recognition Act 2004, which prima facie helped those undergoing gender reassignment to be recognised in law in their new gender.

Despite the judicial decisions in favour of the LGBTQ+ community, the implementation of section 28 of the Local Government Act 1988 which prohibited the promotion of homosexuality in schools as a way of silencing the LGBTQ+ community, demonstrates a stark retraction of attitudes. However, in 1992 the World Health Organisation removed homosexuality from its list of mental disorders. This ultimately led to the reduction in the age of consent for homosexual activity between men being equal to that of heterosexuals by the Labour Government in 2001. Regarding the legislative frameworks that were in place, there was minimal protection to those in the transgender community and this was

¹⁴ British Library, 'A timeline of LGBTQ+ communities in the UK' <www.bl.uk/lgbtq-histories/lgbtq-timeline>

¹⁵ (n 7)

¹⁶ *British Library* (n 13)

¹⁷ (1987) 9 EHRR 56

¹⁸ App no 28957/95 (ECHR, 11 July 2002)

¹⁹ Luzius Wildhaber, 'The European Court of Human Rights in action' (2004) R.L.W 21

highlighted in the case of *P v S & Cornwall County Council*.²⁰ This case identified that the Sex Discrimination Act 1975 (SDA 1975) did not afford sufficient protection to these individuals, thus leading to the Sex Discrimination (Gender reassignment) Regulations 1999 which led to an amendment of SDA 1967 to include gender reassignment. After the implementation of the Human Rights Act 1998 (HRA 1998), two important judicial decisions in *Bellinger v Bellinger*²¹ and *Ghaidan v Godin Mendoza*,²² highlighted the discomfort of the judiciary to interfere with social policy, particularly on matters, such as transgender identity, which were broad and very new and to them.

Despite the introduction of the HRA 1998, those within the LGBTQ+ community were still facing discrimination in aspects of their everyday life. Therefore, an examination into why the HRA 1998 was insufficient in protecting their rights and what was required by the UK government in order to reduce the discrimination they were facing, is required.

Human Rights Act 1988: a step in the right direction?

The HRA 1998 was introduced as a way of incorporating the rights under the European Convention of Human Rights (ECHR) into a framework within UK domestic law: a way to “bring rights home” in the UK as expressed in the Human Rights Bill.²³ The implementation of the HRA 1998 allowed for three main effects in UK domestic law: the ability to bring proceedings for human right violations in the British courts rather than the Strasbourg courts; the requirement that all those carrying out public functions must respect your rights, and that the courts will read and give effect to legislation in a way in which is compatible with the rights set out in the ECHR: contained in section 3 HRA 1998. However, as Parliament remains sovereign this provision is not absolute, meaning that legislation could be introduced despite being incompatible with the ECHR. Whilst the likelihood of this happening is minimal, section 3 has not been insignificant as seen by the successful challenges to statutory law in landmark cases such as *Bellinger*, *Ghaidan* and *Goodwin*.

The Article that is of specific relevance here is Article 14: the prohibition of discrimination, which provides that:

‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

²⁰ Case C-13/94 *P v S and Cornwall County Council* [1996] IRLR 347

²¹ [2003] UKHL 21

²² [2004] UKHL 30

²³ Rights Brought Home: The Human Rights Bill (White Paper, Cm 3782, 1997)

*political, or other opinion, national or social origin, association with a national minority, property, birth or other status.*²⁴

The scope of the application of Article 14 is questionable as it can only be used in connection with a violation of another Convention right. The claimant must show that they have been discriminated against on one of the grounds listed in Article 14.²⁵ The courts in conducting a proportionality exercise will examine if the difference in treatment has no objective or reasonable justification.²⁶ The introduction of this prohibition which must be 'taken into account' by those in the judiciary under section 2 of the HRA 1998, alongside the decisions in European Court of Human Rights case law, was a major step forward for not only the LGBTQ+ Community but all the minorities afforded protection under Article 14.

Sections 3 and 6: significance and implications in domestic law

Alongside the articles contained in the ECHR and incorporated in the HRA 1998, there are sections governing the weight that must be afforded to the ECHR by the judiciary and those that exercise public functions. Section 3 of the HRA 1998 governs the interpretation of legislation, in which it states 'so far as it is possible to do so, primary legislation and subordinate legislation, must be read and given effect in a way in which is compatible with the Convention rights'.²⁷ Part of judicial functions is interpretation of legislation when delivering judgements, therefore this statement gives judges an ability to alter the meanings of provisions in a statute via interpretation. However, the judges in their decision-making have been apprehensive to use this power as seen in the case of *Bellinger* whereby the court refused to render a transsexual couples marriage as lawful due to the classification of the transsexual female being male at birth. Contrastingly, only a year later, the case of *Ghaidan*²⁸ shows an important shift by the judges as they used their power under section 3 to alter the meaning of the Rent Act 1977 to 'as if they were his or her wife or husband', to favour the surviving partner of a homosexual relationship.

The introduction of section 6 in the HRA was hopeful at the time, as public authorities would be held accountable for any decisions they make in light of the Convention articles, as 'it is unlawful for a public authority to act in a way which is incompatible with a

²⁴ The Human Rights Act 1998, Schedule 1, Article 14

²⁵ Nicholas Bamforth, Maleiha Malik and Colm O'Connell, *Discrimination Law: Theory and Context* (Sweet & Maxwell, 2008) 250

²⁶ *Ibid*

²⁷ Human Rights Act 1998, s3(1)

²⁸ [2004] UKHL 30

Convention right'.²⁹ However, there are exceptions where section 6(1) will not apply, including; as a result of provisions in primary legislation, the public authority could not have acted differently³⁰ and these provisions were not able to have been read or given effect in a way which is compatible with the Convention, so the public authority were acting so as to give effect to or enforce these provisions.³¹ Under this section a 'public authority' is any court or tribunal³² and any person certain of whose functions are of a public nature.³³ In *R (Beer) v Hampshire Farmers Market Ltd* [2004],³⁴ the courts stated a careful consideration of the nature of the function and whether it has a public character will be assessed when deciding whether it is eligible for judicial review. Arguably this is wide in scope, but the exceptions allow for provisions in primary legislation created by Parliament to prevail even where this may result in an act that is incompatible with the ECHR.

An additional problem with both provisions is that they can only be enforced vertically: only able to protect the individual against violations by public bodies rather than against individuals.³⁵ These flaws and the impact of the decisions in *Bellinger* and *Ghaidan*, called for legislative improvement to better the ability of individuals to enforce their rights in the UK. As a way of reforming the SDA 1975, the Government implemented the EA 2010, which provided a framework in which individuals with a protected characteristic could bring proceedings against private individuals: an element which was missing from the HRA 1998. The effectiveness of its provisions in affording sufficient protection to those in the LGBTQ+ community will now be explored.

Equality Act 2010: enforcement for those with protected characteristics

The EA 2010 was introduced to bring together all the previous muddled legislation into one legislative framework that would enable a single approach to discrimination. The enactment of the EA 2010 has been described as representing the 'culmination of years of debate about how to improve British Equality law',³⁶ thus it is plausible that previous UK equality law needed improving. The EA 2010 has been seen as offering individuals stronger protection against discrimination in the private sphere due to enabling actions to be brought

²⁹ Human Rights Act 1998, s6(1)

³⁰ Human Rights Act 1998, s6(2)(a)

³¹ Human Rights Act 1998, s6(2)(b)

³² Human Rights Act 1998, s6(3)(a)

³³ Human Rights Act 1998, s6(3)(b)

³⁴ 1 WLR 233

³⁵ Jennifer Corrin, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post-Colonial Legal Systems of the South Pacific' (2009) 1 I.C.L 31

³⁶ Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011)

privately as well as publicly, for example, in employment situations, which was not applicable under the HRA1998.

The types of protection afforded under the EA 2010 relate to the types of discrimination that minority groups may encounter: direct discrimination, indirect discrimination, harassment and victimisation. Direct discrimination is where the treatment experienced by the victim must be different from that of another person and less favourable because of a protected characteristic.³⁷ The protected characteristics enlisted in the EA 2010 are: age;³⁸ disability;³⁹ gender reassignment;⁴⁰ marriage and civil partnership;⁴¹ race;⁴² religion or belief;⁴³ sex⁴⁴ and sexual orientation.⁴⁵ 'Less-favourable treatment' is a broad concept but one where it is not enough to show unreasonable treatment, it must be less favourable.⁴⁶ Indirect discrimination is governed by section 19 of the EA 2010: where a provision, criterion or practice places people with a protected characteristic at a particular disadvantage, it will be considered discriminatory unless it can be justified, and they cannot show it to be a proportionate means of achieving a legitimate aim. The EA 2010 does not attempt to define what constitutes a criterion, provision or practice, and this may be intentional due to the need of considering these terms broadly. This allows the inclusion of those practices that have not yet been put into practice but would be indirectly discriminating if used. Harassment is when someone is made to feel humiliated, offended or degraded due to their protected characteristic.⁴⁷ Victimisation is when the victim may have made a complaint of discrimination regarding their protected characteristic and because of this they were treated badly. This also relates to when the victim may not be the person themselves, but they may be supporting someone who has made a complaint and are being treated badly as a result.⁴⁸

Section 7 of the EA 2010 is important here, as it concerns gender reassignment as a protected characteristic. This section provides that a person would be afforded protection if they are 'proposing to undergo, is undergoing or has undergone a process (or part of a

³⁷ Blackstone's Guide to The Equality Act 2010 (3rd edn, OUP 2016) 32

³⁸ Equality Act 2010, s5

³⁹ *ibid*, s6

⁴⁰ *ibid*, s7

⁴¹ *ibid*, s8

⁴² *ibid*, s9

⁴³ *ibid*, s10

⁴⁴ *ibid*, s11

⁴⁵ *ibid*, s12

⁴⁶ *Bahl v The Law Society & Anor* [2004] EWCA Civ 1070

⁴⁷ Equality and Human Rights Commission, 'Sexual Orientation discrimination' (2016)

<www.equalityhumanrights.com/en/advice-and-guidance/sexual-orientation-discrimination>

⁴⁸ *ibid*

process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.⁴⁹ The inclusion of a provision relating to gender reassignment affords greater protection to those in the transgender community as section 12 of the EA 2010 ('sexual orientation' provision) does not include transsexual persons.

Due to the nature of this article being concerned with whether UK equality and anti-discrimination law has kept up with social change, the 'Public Sector Duty' under Part 11, section 149 of the EA 2010 is significant. This duty consolidates the specific duties⁵⁰ in respect of gender and other protected characteristics. It has been described as 'integral and an important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation'.⁵¹ An aim is 'ensuring that considerations of equality of opportunity are placed at the centre of formulation of policy by all public authorities'.⁵² Although the duty is one that is important in society for the aims mentioned above, the duty does not detract from the Government's powers to take decisions that may bear harshly on some of the most disadvantaged in society. However, it does require the Government to consider and confront the consequences of these decisions and how they will impact the equality objectives, for example, advancing equality of opportunity for those with protected characteristics.⁵³ Creating this duty is a step in the right direction as it increases pressure on the Government to consider important equality objectives which will benefit minorities. However, the removal of equality impact assessments in law, which examine whether a policy has a disparate impact on persons with protected characteristics,⁵⁴ dilutes the impact of this duty.

Whilst both the HRA 1998 and the EA 2010 share the aims of advancing equality and anti-discrimination law, they have differences between them. Article 14 of the HRA 1998 is the prohibition on discrimination; whilst the EA 2010 encompasses different strands, such as indirect and direct discrimination, victimisation and harassment. Also, introducing the ability for judges to amend primary legislation under section 3 of the HRA 1998 has been significant, along with the ECtHR rulings such as *Ghaidan* and *Bellinger*, in stimulating new legislative schemes and precedents. However, not being able to enforce the HRA 1998 horizontally is an issue in which the EA 2010 when building on the legislative reforms of the

⁴⁹ Equality Act 2010, s.7(1)

⁵⁰ Blackstones (n 36) 159

⁵¹ *R (on the application of Elias) v Secretary of State for Defence* [2006] IRLR 934

⁵² *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

⁵³ Blackstones (n 36) 165

⁵⁴ House of Commons Library, *The Public Sector Equality Duty and Equality Impact Assessments* (Cmd 06591, 2020)

1960s and 1970s such as the Sex Discrimination Act 1975, set out to rectify. It allows for individuals to enforce their rights horizontally: against other individuals, which ultimately makes bringing an action cheaper than under the HRA 1998.

2 Deconstruction of Sections 7 and 149 of the Equality Act 2010

Although the case law governing the rights of the LGBTQ+ community has been filled with uncertainty, it can also be seen that there has been adaptation to the law. Through the discussion of the relevant powers contained in sections 3 and 6 of the HRA 1998 and their impact, it can be argued that the HRA 1988 has largely made a positive contribution to the rights of LGBTQ+ persons.

The introduction of the EA 2010 has been argued as a huge step forward for the protection of transgender people,⁵⁵ however, despite this significant legislative progress, LGBTQ+ individuals throughout the jurisdiction continue to experience discrimination and harassment.⁵⁶ In 2018 the Government Equalities Office published the LGBTQ+ survey which involved statistics that 70% had hidden their sexual orientation at some point, 68% with a minority sexual orientation avoided holding a partner's hand in public and 40% had experienced an LGBTQ+ related incident.⁵⁷ These findings call into question the effectiveness of the statutory frameworks in place in offering protection to these individuals, and they 'paint a stark picture of the lived reality for LGBTQ+ communities in the UK'.⁵⁸ Therefore, it is questionable whether the EA 2010 and the HRA 1998 keep up with the needs of the ever-developing LGBTQ+ community. To provide an answer to this, it is necessary to look at the construction of the EA 2010.

Section 7: protection for all?

As outlined in Chapter 1, section 7 of the EA 2010 contains the provision 'gender reassignment' which offers protection for those:

*'proposing to undergo, 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.'*⁵⁹

⁵⁵ Women and Equalities Committee, *Transgender Equality* (House of Commons, 2015-2016)

⁵⁶ Peter Dunne, 'Equality for all? LGBTI rights and the future priorities of the Government Equalities Office' (2020) E.H.R.L.R 4

⁵⁷ Government Equalities Office, *National LGBT Survey* (2018) 11

⁵⁸ Peter Dunne (n 55)

⁵⁹ Equality Act 2010, s7(1)

Arguably, the inclusion of the protected characteristic 'gender reassignment' in the EA 2010 made an appreciable difference to the lives of trans people.⁶⁰ However, whilst seeming wide in scope, the title 'gender reassignment' has been criticised by the Women and Equalities Committee as being misleading and outdated,⁶¹ resulting in wider members of the transgender community potentially falling outside the definition. This can be supported by Claire McCann, who indicated that when the Equality Bill proceeded through Parliament, the then Official Solicitor made it clear that it was only discrimination by perception which would protect those in the wider transgender community that did not fall under the protected characteristic of gender reassignment.⁶² The Equality and Human Rights Commission (the body responsible for enforcing and promoting equality and human rights in the UK) provided a reason for this: as the EA 2010 bases its protection on the process of undergoing gender reassignment, many transgender people- such as those who do not live full time in their preferred gender; those who do not intend to undergo gender reassignment because of age/medical condition; children whose gender identity is less well-developed or self-understood than that of an adult and intersex people – may not have legal protection.⁶³ This uncertainty regarding the scope of its protection can allude to the conclusion that section 7 EA 2010 is unable to keep up with the expanding scope of transgender identity.

Contrastingly, whilst this uncertainty will raise concerns amongst the LGBTQ+ community, the Government has afforded some clarity to the meaning of section 7 of the EA 2010 which has seemed to have been overlooked by its criticsers. In the Explanatory notes that accompany the EA 2010 it is made clear that the alteration of the provision governing gender reassignment in the Sex Discrimination Act 1975 was that medical supervision was no longer needed to be afforded protection under the EA 2010.⁶⁴ Despite this clarification there is still unpredictability about whether this includes inter-sex and non-binary persons. To rectify this, recommendations have been made to avoid leaving the law unclear and uncertain.

Recommendations regarding section 7

As a response to the rise of anxiety among those who do not fit in the arguably highly

⁶⁰ Women and Equalities Committee (n 54)

⁶¹ *ibid*

⁶² *ibid*

⁶³ Equality and Human Rights Commission, *Written evidence submitted by EHRC to the Transgender Equality Inquiry (2015)*

⁶⁴ Explanatory Notes to the Equality Act 2010, para 43

restrictive terminology contained in section 7 EA 2010,⁶⁵ the Women and Equalities Committee provided recommendations as to how the provision could be improved to ensure all those in the LGBTQ+ community were afforded protection. They proposed to Government that an amendment of the term 'gender reassignment' to a broader definition would be beneficial, which was supported by the Equality and Human Rights Commission in their written evidence: 'a broader definition of who is protected from transgender discrimination would provide more clarity and certainty for those with responsibilities and rights under the Act.'⁶⁶ Regarding a broader definition, the Women and Equalities Office in their report gained legal evidence provided by Claire McCann who provided that changing the provision to 'gender identity' and referring to each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, will widen the protected characteristic within section 7 EA 2010 to include elements of the transgender community more widely.⁶⁷

Despite the consensus demonstrated above that altering section 7 EA 2010 to contain a broader definition would at least reduce the possibility of the wider transgender community falling outside the scope of protection, the Government's response to this was somewhat unsatisfactory. By asserting that as the provision does not specifically require that to be protected under the provision you must have a gender recognition certificate, the provision is wide enough in scope and compliant with the Equal Treatment Directive 2006/54/EC,⁶⁸ thus, requiring no further improvement. In the response, it is reinstated those wider members of the transgender community, such as gender fluid, non-binary individuals, may be protected if they have suffered discrimination by perception,⁶⁹ but fails to mention any other ways in which they can be protected under section 7 EA 2010. Denying this amendment questions governmental attitudes towards progressing equality and anti-discrimination law in the UK in order to minimise the discrimination suffered by all in the LGBTQ+ community; thus, failing to enable section 7 EA 2010 to keep up with the current societal definitions of transgender. A further analysis into equality governmental policies will be explored in subsequent chapters.

Whilst the government states that changing section 7 EA 2010 is not needed due to being

⁶⁵ Gender Identity Research and Education Society, Written Evidence submitted by GIREs to the Transgender Equality Inquiry (2015)

⁶⁶ Equality and Human Rights Commission (n 62)

⁶⁷ Women and Equalities Committee (n 54)

⁶⁸ Government Equalities Office, Government Response to the Women and Equalities Committee Report on Transgender Equality (Cm 9301, 2016)

⁶⁹ *ibid*, 12

sufficiently clear and wide in scope, this view is not reciprocated in practice, specifically when looking at transgender issues in the workplace. Following reports from Stonewall (a leading campaign group for LGBTQ+ rights), it has been discovered in related findings from legal professionals that 23% of surveyed employers were aware of the laws protecting transgender workers, 77% of surveyed employers were wrong when asked which transgender characteristics are protected against discrimination and a third of all surveyed employers thought that all transgender workers are legally protected against discrimination.⁷⁰ Therefore, it cannot be said that section 7 is sufficiently clear as those that have responsibilities under the EA 2010, such as employers, are not aware of those whose rights they are obliged to protect.

Effectiveness of public sector equality duty under section 149

This duty introduced that all public authorities must 'have due regard to the need to' eliminate prohibited conduct under the EA 2010, such as discrimination, victimisation and harassment;⁷¹ advance equality of opportunity⁷² and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.⁷³ Problems have arisen with the scope of the duty relating to eliminating prohibited conduct. It has been described by the House of Commons in their Briefing Paper on the Public Sector Equality Duty (PSED) that it is restricted in its focus as any conduct that is not prohibited by the EA 2010 falls outside its scope.⁷⁴ Additionally, public authorities are not required to have 'due regard' to the need to eliminate discrimination relating to protected characteristics in respect of services and public functions:⁷⁵ this questions how often is the PSED considered by those who have responsibilities under it.

A factor that adds to the uncertainty of how widely the PSED is considered, is the lack of clarification of the term 'have due regard'. The EA 2010 itself does not provide a definition but *R (Brown) v Secretary of State for Work and Pensions*⁷⁶ derived the 'Brown Principles' which state that the duty involves a 'conscious approach and state of mind'⁷⁷ and must be approached in substance, with rigour and an open mind rather than a question of ticking

⁷⁰ Crossland Solicitors, 'Transphobia rife among UK employers as 1 in 3 won't hire a transgender person' (*Crossland Solicitors*, 18 June 2018)

⁷¹ Equality Act 2010, s149(1)(a)

⁷² *ibid* s149(1)(b)

⁷³ *ibid* s149(1)(c)

⁷⁴ House of Commons Library, (n 53)

⁷⁵ *ibid*, 8

⁷⁶ [2008] EWHC 3158

⁷⁷ House of Commons Library (n 53) 91

boxes. This judicial assistance, whilst referring to a settled group of principles, their application to the facts yields far from consistent outcomes.⁷⁸ Therefore, this ambiguity will undoubtedly add to the issues faced by those in the LGBTQ+ community.

Whilst partial efforts have been made by the Government to aid the understanding of transgender issues, ultimately, trans identity is more complex than the law currently recognises.⁷⁹ Now that the law has been criticised, it is necessary to look at whether the law in practice keeps up with social change, by looking at enforcement and governmental policies.

3 Effectiveness of the enforcement methods and governmental policies surrounding UK equality and anti-discrimination law

The passing of the EA 2010 marked a shift in focus towards the implementation of the law and the function of bodies, which are designed to achieve equality for the LGBTQ+ community in areas such as employment and minimising hate crime.⁸⁰ The Equality and Human Rights Commission (EHRC) and various governmental policies were created to reach the aim of achieving equality for minorities: each will be considered in turn.

Equality and Human Rights Commission

The EHRC is an independent statutory and regulatory body responsible for enforcing the EA 2010.⁸¹ Its duties include promoting understanding of equality and diversity,⁸² work towards the elimination of unlawful discrimination⁸³ and promote and encourage good practice in relation to human rights.⁸⁴ Among their duties as an information provider; a body which influences public policies and evaluates the effectiveness of the law,⁸⁵ the EHRC is also responsible for enforcement of the EA 2010 using their extensive powers laid out in section 20 of the Equality Act 2006. These include carrying out inquiries,

⁷⁸ Sandra Fredman, 'The Public Sector Equality Duty' [2011] ILJ 4

⁷⁹ Crossland Solicitors (n 69)

⁸⁰ Divya Jalan, 'Trans Gender Justice: Critical Reflections on the Conceptual limitations of English law, Implementation of the Law, and the Relationship with Social Progress' (2016) 4LIH.43 <www.law.cmu.ac.th/law2011/journal/e1535692639.pdf>

⁸¹ Equality Act 2006, s1

⁸² *ibid* s8(1)(a)

⁸³ *ibid* s8(1)(f)

⁸⁴ *Ibid* s9(1)(b)

⁸⁵ Equality and Human Rights Commission, 'What we do' (2019) <www.equalityhumanrights.com/en/about-us/what-we-do>

investigations, agreements and assessments. Whilst there have been some case studies on inquiries into deaths in detention; disability-related harassment; investigations into the Metropolitan Police Service on unlawful discrimination of their employees,⁸⁶ there has been a lack of enforcement of LGBTQ+ related issues as shall now be discussed.

To date, the EHRC has been widely held to be more concerned with the 'soft' promotional tasks than with controversial enforcement work:⁸⁷ a view that can be supported by the Women and Equalities Committee's critique of the EHRC's role in enforcing the EA 2010.⁸⁸ In their research they found that many wanted the EHRC to be more proactive in taking enforcement action.⁸⁹ Barbara Cohen, a former legal officer at the Commission for Racial Equality, strongly criticised the fact that the EHRC 'does not advertise itself as an enforcer', and that instead it 'funds interesting research' or 'will have one announcement and nothing more will happen'.⁹⁰ On the contrary, its work has been deemed 'incredibly effective',⁹¹ in discrimination court proceedings. However, as will be explored below, these times are few and far between. Consequently, this undermines confidence that individuals can enforce their rights under the EA 2010 when faced with discrimination.

The 'Tailored Review of the Equality and Human Rights Commission' emphasised that there is a perception that the EHRC does not strike the right balance between provision of research and information and enforcing the law.⁹² This is strikingly clear in the comparison between publication and enforcement of certain protected characteristics: protected characteristic 'disability' having 16 publications whilst 'gender reassignment' has one and 'sexual orientation' with none.⁹³ Whilst this is only based on a year, it suggests that the EHRC has made choices about which areas of inequality it will pursue over others, ultimately resulting in the burden of enforcement being placed on individuals which is too much to expect to bring about a change in a workplace, a police force or a government department or a public sector.⁹⁴ Whilst the EHRC agree in their response to the Women and Equalities Office Report that the burden for EA 2010 compliance needs to be shifted

⁸⁶ Equality and Human Rights Commission, 'Inquiries, investigations and wider powers' (2020) <www.equalityhumanrights.com/en/our-powers/inquiries-investigations-and-our-wider-powers>

⁸⁷ Judith Squires, 'Is the EHRC working?' (21 July 2009)

<www.theguardian.com/commentisfree/libertycentral/2009/jul/21/equality-human-rights-commission>

⁸⁸ Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission* (HC 2017-2019, 10)

⁸⁹ *ibid*, 15

⁹⁰ *ibid*, 16

⁹¹ *ibid*, 18

⁹² HM Government, *Tailored Review of the Equality and Human Rights Commission* (2018)

⁹³ *ibid*

⁹⁴ Women and Equalities Committee (n 87)

away from individual enforcement, they reinforce that they cannot, and were never intended or resourced to, enforce against all breaches of the EA 2010.⁹⁵ However, issues arise when other bodies enforce the EA 2010: courts are limited to the issue before them and so cannot tackle systemic issues and sector-specific enforcers can only focus on issues within their sector.⁹⁶ The EHRC can highlight and tackle equality and rights concerns at a societal level,⁹⁷ which makes them the only enforcer which can effectively adapt and contribute to social change. Whilst the EHRC commented that there have been three inquiries and two major investigations which is a record for the Commission,⁹⁸ this seems somewhat a small victory in contrast to the amount of discrimination faced by those due protection under the EA 2010. This attitude from the EHRC has placed the burden on individuals which is insufficient when dealing with systematic and routine discrimination,⁹⁹ and will inevitably be a contributory reason for the discrimination still faced by the LGBTQ+ community. Therefore, unless the EHRC resets its vision to focus on use of its unique powers as an enforcer and regulator of equality law,¹⁰⁰ it is difficult to conclude that this body keeps up with the needs of those with protected characteristics.

As has been discussed above, there has been a lack of enforcement by the EHRC. However, when it has used their enforcement powers, another issue arises: an absence of publication of their enforcement successes. In the Women and Equalities Office' findings, it notes that the EHRC publishes information on a selection of enforcement action on its website but does not routinely publish data on the numbers and outcomes of enforcement actions that it takes.¹⁰¹ It was recognised by the EHRC in their response that the more vocal they can be about successful enforcement activity the better,¹⁰² which will raise public confidence in enforcement action. The EHRC provided evidence that they were cited in the mainstream media more than 1,200 times in 2018/19, which was a 40% increase than the previous year.¹⁰³ Additionally, action was taken by the EHRC in establishing a new compliance team whose role includes ensuring that important court judgements are

⁹⁵ Equality and Human Rights Commission, *Response to the Women and Equalities Committee's report into Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission* (2019)

⁹⁶ David Barrett, 'The regulatory space of equality and human rights in Britain: the role of the Equality and Human Rights Commission' (2019) <<https://www-cambridge-org.plymouth.idm.oclc.org/core/journals/legal-studies/article>>

⁹⁷ *Ibid*

⁹⁸ Equality and Human Rights Commission (n 94)

⁹⁹ Women and Equalities Committee (n 87) 19

¹⁰⁰ HM Government (n 91)

¹⁰¹ Women and Equalities Committee (n 87) 22

¹⁰² *Ibid*

¹⁰³ Equality and Human Rights Commission, (n 94) 7

followed up with communication to relevant organisations to help ensure they meet the requirements of the law.¹⁰⁴ Following this, a new case database is provided on the EHRC website to enable people to have a deeper understanding of their enforcement work,¹⁰⁵ however, individuals are still facing discrimination because employers and service providers are not afraid to discriminate, knowing that they are unlikely to be held to account.¹⁰⁶ This arguably is a result of the EHRC's failure to publicise widely their enforcement procedures.

Government responses to LGBTQ+ inequalities: 'action plans'

As the first action plan dedicated to advancing transgender equality, the '2011 Advancing Transgender Equality Action Plan'¹⁰⁷ demonstrates a recognition that improvements need to be made to reach transgender equality in the UK. Prioritising the healthcare sector and transgender safety, government departments and other government bodies committed to a broad range of detailed actions, with target dates, which aimed to 'improve the lives of transgender people'.¹⁰⁸ Several significant advancements had been made following the 2011 action plan, including: investment into a multi-million-pound project to tackle homophobic and transphobic bullying in schools; starting to collect hate crime data on sexual orientation and transgender status and launching the world's largest ever national survey of LGBT people.¹⁰⁹ Although these are notable changes, the effect of this plan is questionable. The Minister for Women and Equalities acknowledged that there are still issues that have not been widely discussed in society and 'just because there is an action plan, that does not mean there is change or cultural change or necessarily a dialogue'.¹¹⁰ Additionally, in a 'Transgender Equality Report' conducted by the Women and Equalities Committee, it was noted that 'across the board, government departments are struggling to support trans people effectively, with the 2011 Advancing Transgender Equality Action Plan remaining largely unimplemented.'¹¹¹ The consequences of the lack of implementation translates to the LGBTQ+ community as shown by the concerns in the LGBT survey results, which support that there is still more to do before it can be said that we have

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*, 11

¹⁰⁶ *Women and Equalities Committee*, (n 87) 23

¹⁰⁷ HM Government, *Advancing transgender equality: a plan for action* (2011)

¹⁰⁸ *Women and Equalities Committee* (n 54)

¹⁰⁹ Government Equalities Office, *Improving LGBT Lives: Government Action since 2010* (2018)

¹¹⁰ *ibid* 10

¹¹¹ *Women and Equalities Committee* (n 54)

achieved equality for LGBTQ+ people.¹¹² The Government's response to this was producing the 'LGBT Action plan 2018' which will now be discussed.

Following the 108,000 responses to the LGBTQ+ Survey,¹¹³ the Government Equalities Office (GEO) produced the LGBTQ+ Action plan 2018 with the vision of everyone, regardless of their sexual orientation, gender identity or sex characteristics, to be able to live safe, happy and healthy lives where they can be themselves without fear of discrimination.¹¹⁴ There is particular focus on tackling issues relating to education and health. An important improvement for education is the announcement of a further £1million added to the £3million project of support for anti-homophobic, biphobic and transphobic bullying interventions in schools, some of which being awarded to leading campaign organisations such as Stonewall to assist in extending the existing programme that has supported more than 1,800 schools.¹¹⁵ Additionally, following the 2018 action plan, in March 2019 the GEO announced the appointment of the first National Adviser for LGBTQ+ Health,¹¹⁶ and an appointment of a new LGBT Advisory panel, whose purposes include: to help the GEO to understand issues relating to the LGBTQ+ community; act as a link between the Government and society allowing the Government to hear the views of the public and keeping them focused on addressing the biggest issues affecting LGBTQ+ people.¹¹⁷ Unfortunately, these actions come from the findings that many respondents in the LGBTQ+ survey had difficulties accessing healthcare and experienced inappropriate questioning and curiosity from healthcare staff,¹¹⁸ and in the education sector very few respondents felt that their education had prepared them for life as an LGBTQ+ person.¹¹⁹ Prima facie these improvements seem monumental for the LGBTQ+ community, but major retractions and levels of inactivity amongst those responsible for implementing the actions set out within, question the impact that these two 'Action Plans' have had on the LGBTQ+ population. Examples of these retractions and their criticisms will now be explored.

¹¹² *ibid* 4

¹¹³ Government Equalities Office, *LGBT Action Plan: Improving the lives of Lesbian, Gay, Bisexual and Transgender People* (2018)

¹¹⁴ *ibid* 5

¹¹⁵ *ibid* 10

¹¹⁶ Minister for Women and Equalities, *LGBT Action Plan: Annual progress report* (CP 115, 2019) para 20.1

¹¹⁷ HM Government, 'LGBT Advisory Panel Terms of Reference' <<https://assets.publishing.service.gov.uk>>

¹¹⁸ Minister for Women and Equalities (n 115)

¹¹⁹ *ibid* 13

Criticisms of the 'action plans'

The 2011 Action plan has been conceptualised as a key moment of coming forward, whereby LGBTQ+ citizens have gained new public visibility,¹²⁰ however both plans have attracted similar criticism that they remain largely unimplemented. LGBTQ+ communities continue to confront negative attitudes and experiences across the UK despite two decades of statutory intervention to enhance the rights of the LGBTQ+ population.¹²¹ Continuing moments of legislative and policy stasis- and subsequent forestalling of advancing equalities- have been evident since the publication of the plan.¹²² An example being the collapse of the LGBTQ+ Advisory Panel, highlighted by Stonewall, an organisation that campaigns for LGBTQ+ rights, in their submitted written evidence to the Government Equalities Office in 2021.¹²³ The LGBTQ+ Advisory Panel suffered several resignations due to the advisors accusing ministers of creating a hostile environment for LGBTQ+ people and criticising Liz Truss, the Equalities Minister, of being ignorant on key issues.¹²⁴ A further concern is that there is no successor advisory body in place to deal with present issues.¹²⁵ Following the multiple resignations, the LGBTQ+ Advisory Panel has now been disbanded with a replacement panel being 'set out in due course'.¹²⁶ The LGBTQ+ Advisory Panel provided an expectation for an improved understanding and expertise on LGBTQ+ issues, instead LGBTQ+ persons were faced with an inactive Panel who failed to formally meet with senior government representatives for a year.¹²⁷ The deterioration of the Advisory Panel is a crucial example of a body created as a result of governmental policies not keeping up with LGBTQ+ issues.

The announcement by the GEO that a further £1million would be added to the anti-homophobic, biphobic and transphobic bullying programme will have undoubtedly provided LGBTQ+ children to feel safer in their school. However, in March 2020 the Government quietly ended its funding of LGBTQ+ anti-bullying initiatives.¹²⁸ Whilst the Government was

¹²⁰ Matson Lawrence, Yvette Taylor 'The Government LGBT Action Plan: Discourses of progress, enduring stasis, and LGBTQI+ lives 'getting better' (2019) <<https://journals-sagepub-com.plymouth.idm.oclc.org/doi/full/10.1177/0261018319877284>>

¹²¹ Peter Dunne (n 55)

¹²² Matson Lawrence and Yvette Taylor, 'It gets better? Intersectional LGBTQI+ inequalities and the UK Gov LGBT Action Plan' (2019) <<https://esbritsoc.co.uk/it-gets-better-intersectional-lgbtqi-inequalities-and-the-UK-governments-lgbt-action-plan>>

¹²³ Stonewall, Written Evidence [GEO0046] (2021)

¹²⁴ Aubrey Allegretti, 'Three UK government LGBT advisers quit with rebuke of 'ignorant' ministers', *The Guardian* (11 March 2021)

¹²⁵ Stonewall, (n 122) para 11

¹²⁶ Jessica Parker, 'Government's LGBT advisory panel disbanded', BBC News (13 April 2021)

¹²⁷ Ibid

¹²⁸ Ben Hunte, 'School LGBT bullying projects axed by government', *BBC News* (19 November 2020)

said to acknowledge the serious impact of anti-LGBT bullying on educational attainment, absence levels, emotional wellbeing and mental health,¹²⁹ the GEO further stated that ‘the anti-bullying grant fund, which provided 2,250 schools across the country with materials and training was always due to end in March 2020.’¹³⁰ Nevertheless, Nicky Morgan, the previous Minister for Women and Equalities, stated ‘that this is the first time that the funding has not been extended since it was originally announced in October 2014’.¹³¹ Given the date of removal of the funding being simultaneous with when the UK announced the first national lockdown resulting from the transpiring Coronavirus (Covid-19) pandemic, it is plausible to question whether the financial impact of Covid-19 contributed to the ending of this vital funding. The effects of the Coronavirus pandemic on the LGBTQ+ community and whether UK equality and anti-discrimination law has kept up with this will be explored below.

Whilst both ‘Action Plans’ had a focus on specific sectors, some areas such as the experiences of LGBTQ+ people seeking asylum, LGBTQ+ rights post-Brexit, and equality issues in devolved UK states were completely excluded.¹³² Matson Lawrence and Yvette Taylor, both research associates in LGBTQ+ rights, argue that this exclusion reproduces existing absences, silences and endures ‘sticking points’ in policy and politics.¹³³ Therefore, the extent to which the LGBT Action Plans represents shifts beyond policy status quo is questionable.

The discussion above has focused on the analysis of the impact of enforcement bodies and changes to governmental policies to reduce the amount of discrimination faced by the LGBTQ+ community in their everyday life. Significant changes were made: the creation of the Equality and Human Rights Commission and the noteworthy changes made as a result of the LGBTQ+ Action Plan 2018. However, cracks have been found and as a result the positive changes to LGBTQ+ lives are likely to be minimal.

4 The Law’s Reaction to Changes in Society

The discussion below will explore the impact of media on advancing LGBTQ+ rights, campaign organisations and the analysis of modern progressions, like the ‘toilet debate’ and the Coronavirus pandemic. Providing a digital platform to campaign groups like

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² Matson Lawrence, Yvette Taylor (n 119)

¹³³ *Ibid*

Stonewall and Press for Change allows another way to increase pressure on UK government, to ensure that equality and anti-discrimination law keeps up with social change, as any highlighted issues will be projected to a wider audience. Whether the UK has adapted to these examples of social change will also be examined.

The rise of the internet and Web 2.0

It may seem difficult for some to imagine society today without the internet and social networking, due to its impact and now widescale use. However, many will know that the emergence of the internet and social networking is a relatively new phenomenon. The commercial internet was created during the 1960s and 1970s.¹³⁴ The second-generation internet (known as Web 2.0) surfaced in the 1990s. Web 2.0 encompasses social networking website applications, encyclopedias, content-sharing websites and mainstream political campaigning via social networking.¹³⁵ The first social networking site, SixDegrees, was created in 1997, with Myspace following in 2003 and Facebook in 2004.

Social media has been described as the most powerful thing on the planet,¹³⁶ with the scale of its popularity being quite staggering.¹³⁷ Zarkesy describes social networks as 'websites that allow individuals to exchange messages and information, and in some instances to work together as a group or team toward various objectives'.¹³⁸ The modern internet has provided a digital platform and safe space, a place intended to be free of bias, criticism or potentially threatening ideas or conversations,¹³⁹ to those that feel out of place; a common consensus among the LGBTQ+ community. The internet has played a considerable role in the development and organisation of the LGBTQ+ community.¹⁴⁰ It represents an empowering tool for LGBTQ+ persons to build networks, access information and acquire knowledge about vital healthcare issues, as well as to express, spread and strengthen their political claims.¹⁴¹ This is demonstrable through the expansion of two influential organisations campaigning for LGBTQ+ rights: Stonewall and Press for Change (PFC).

¹³⁴ Paul Lambert, *Social Networking: Law, Rights and Policy* (published 2014) 11

¹³⁵ *ibid* 12

¹³⁶ *ibid* 13

¹³⁷ *ibid*

¹³⁸ *ibid* 14

¹³⁹ Merriam- Webster, 'Definition of safe space' (Last updated 20 April 2021) <<https://www.merriam-webster.com/dictionary/safe/space>>

¹⁴⁰ EDRI, 'The digital rights of LGBTQ+ people: When technology reinforces societal oppressions' (2019) <<https://edri.org/our-work/the-digital-rights-lgbtq-technology-reinforces-societal-oppressions>>

¹⁴¹ *ibid*

Social networking has been a fundamental contributor to the increased awareness of LGBTQ+ issues due to its widespread use. It has allowed organisations such as Stonewall and PFC to expand and contribute to the effectiveness of current UK equality law via their own websites due to their online presence. Stonewall is frequently using their online platform to produce media statements commenting on pressing issues and the work of government officials, for example, banning conversion therapy. Therefore by using media, Stonewall are able to challenge governmental attitudes and policy through another means. Both organisations and their contribution to UK equality and anti-discrimination law will now be explored.

Stonewall

Stonewall was formed in 1989 by a group of individuals who had been active in the struggle against section 28 of the Local Government Act 1988.¹⁴² Stonewall aimed to create a professional campaigning and lobbying group that would prevent such attacks like section 28 on the LGBTQ+ community from reoccurring.¹⁴³ Today, with the help of their influence on social media with 219,800 followers on Twitter, they have garnered government attention and been able to help with major legislative changes: the repeal of section 28; helping to achieve the equalisation of the age of consent; securing legislation which allowed same-sex couples to adopt and helped to ensure that the EA 2010 protected LGBTQ+ persons in terms of goods and services.¹⁴⁴ By putting the case for equality on the mainstream political agenda through winning support within all the main political parties,¹⁴⁵ Stonewall has been able to contribute to these legislative developments. Enabling influential and knowledgeable organisations to have a strong impact on UK equality and anti-discrimination law demonstrates willingness from the Government to advance LGBTQ+ equality.

Press for Change

Press for Change UK (PFC) is described as the UK's leading experts in transgender law. Formed in 1992, the lobbying and legal support organisation aims to 'seek respect and

¹⁴² Section 28 allowed the government to stop promoting the teaching of accepting homosexuality as a pretended family relationship, and that local authorities shall not intentionally promote or publish material on homosexuality.

¹⁴³ Stonewall, 'Stonewall's history' <www.stonewall.org.uk/about-us/stonewalls-history>

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

equality for all trans people in the UK, through case law, legislation and social change'.¹⁴⁶ PFC also provides legal advice, training, and research to trans people, their representatives and public and private bodies.¹⁴⁷ PFC's main objective is to address both the immediate legal needs of trans people who have faced unlawful discrimination, or abuse of their human rights, as well as focusing on the needs of society, business, the public service sector and government to move forward in its understanding of trans people and their lives: achieved through engagement, education and training.¹⁴⁸

The various LGBTQ+ Action Plans have been discussed above, which PFC regularly worked with the government to produce. The Equality and Human Rights Commission has also worked closely with PFC and in 2009 awarded them funding to develop the Trans Equality Project, which provided professional legal support to trans people in key areas of the law, as well as advice to businesses and other non-profit organisations.¹⁴⁹ Like Stonewall, PFC has significantly contributed to developing UK equality and anti-discrimination law.

The Government are not experts on the needs of the ever-developing LGBTQ+ community so by collaborating with campaign groups such as Stonewall and PFC which not only have a wide following by the LGBTQ+ community, but also the expertise on LGBTQ+ issues, the Government are partnering with knowledgeable and representative groups to improve the lives of LGBTQ+ persons in the UK.

Despite these improvements in law and policy which have contributed to advancing LGBTQ+ rights, including the emotional safe space and a way to strengthen political claims that the media can now provide, controversial areas remain concerning LGBTQ+ persons which the law has struggled to adapt to due to significant negative attitudes: the debate concerning gender-neutral toilet spaces, which will now be discussed.

'The Toilet Debate'

The importance placed on maintaining single sex spaces has not only been seen in the UK, as will be discussed, but also in the US; specifically with Donald Trump in February 2017 revoking guidance to US schools that allowed transgender students to use toilets matching

¹⁴⁶ Press for Change UK, 'Welcome to Press for Change' <www.pfc.org.uk>

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

their gender identity.¹⁵⁰ This was a decision that received backlash from the American Federation of Teachers, who called the move a major setback for trans rights by ‘compromising the safety and security of some of our most vulnerable.’¹⁵¹ A common theme occurs for the sanctity of protecting women-only spaces which emerges from the primary focus of debates about toilet use in the UK being directed towards a perceived increase in primarily trans women’s use of separated facilities that align with their gender.¹⁵² In February 2020, the House of Lords debated on this topic and many of the views expressed by the Lords are key examples as to why UK equality and anti-discrimination law is struggling to keep up with societal changes, the reasons for which will now be discussed.

Firstly, it is surprising to see Stonewall, an influential campaign organisation, being advised to ‘put away its kimono and baseball bat and settle down to the idea that maybe it needs to modify its rather extreme views’.¹⁵³ Secondly, Lord Blencathra in delivering his ‘blunt message to the Government’ stated, ‘when will you stand up to the small, militant, transgender fascist lobby and say that the rights of 32 million real women and 800,000 wheelchair users are more important than the rights of tens of thousands who identify as transgender?’¹⁵⁴ These comments show a blatant disregard for the rights of transgender people and the work of organisations whose aim is to campaign for those who are regarded as, evidently, at the bottom of the heap. A consensus among the members of the House of Lords is the concern for the safety of women being eroded by introducing gender neutral toilets, expressed by Lord Blencathra as ‘a big, hulking male brute comes in demanding to use the facilities because he has decided that he wants to identify as a woman that day’,¹⁵⁵ with an emphasis on the fear and lack of safe space that this would cause women. These views directly correlate with that of gender critical feminists, who argue that rights should be based on essentialist understandings of male/female sex categories;¹⁵⁶ so there would be less possibility of disturbance by Lord Blencathra’s ‘big, hulking male brute’. However, these fear-based views are not evidentially certain as Baroness Brinton underlines: there is considerable evidence that LGBTQ+ people, especially trans people, are more likely to be

¹⁵⁰ BBC News, ‘Trump rescinds transgender bathroom rules from Obama era’ *BBC News* (23 February 2017)

¹⁵¹ *ibid*

¹⁵² Charlotte Jones, Jen Slater, ‘The toilet debate: Stalling trans possibilities and defending ‘women’s protected spaces’ (first published August 2020)

<<https://journals.sagepub.com/doi/full/10.1177/0038026120934697>>

¹⁵³ HL Deb 24 February 2020, vol 802, col 81

¹⁵⁴ *ibid* col 84

¹⁵⁵ *ibid*

¹⁵⁶ Charlotte Jones, Jen Slater (n 151)

attacked,¹⁵⁷ rather than the attacker.

Whilst recognising having an appropriate number of gender-neutral toilets will be beneficial for those that need them, the consistent negative attitudes towards LGBTQ+ persons emphasises that the UK is far from reaching full equality for the LGBTQ+ community. Perhaps more importantly these attitudes may influence laws governing the use of public amenities which will undoubtedly further segregation of individuals, adding to the isolation that most in the LGBTQ+ population already feel. Ultimately, this debate raises doubts about how UK equality and anti-discrimination law can keep up with social change.

The emerging Coronavirus pandemic

March 2020 saw the first national lockdown in the UK following the outbreak of Coronavirus (Covid-19), a classified pandemic. Covid-19 has had devastating effects in the UK, and notably deepened inequality and discrimination at work, and many other sectors that minorities face. Having faced three national lockdowns, there is no surprise that mental health services have seen an increase in the use of their service. The LGBTQ+ community already experience disproportionately high rates of poor mental health: services experiencing a 50 per cent increase in calls about mental health to the LGBT Foundation's helpline during the Covid-19 crisis.¹⁵⁸ Therefore, the impact of the Coronavirus pandemic is likely to be particularly pronounced for LGBTQ+ communities.¹⁵⁹

Covid-19 has been the catalyst for the increase in UK redundancy rates being faster than during the 2008 to 2009 economic downturn.¹⁶⁰ Consequently, LGBTQ+ organisations and community groups have been under enormous pressure to maintain their services despite the disruption caused by the pandemic. The National LGBTQ+ Survey found that LGBTQ+ charities were considered the most helpful when reporting anti-LGBTQ+ incidents, which demonstrates the importance of maintaining a specialist sector.¹⁶¹ Additionally, it was found that 64% of respondents would rather receive support during this time of crisis from an LGBTQ+ specific organisation, rather than a mainstream service and this percentage rises to 78% for transgender people.¹⁶² These organisations run on funding, and

¹⁵⁷ HL Deb (n 152) col 83

¹⁵⁸ Stonewall, LGBTQ+ Consortium and LGBT Foundation, 'Written Evidence' (MRS0432) (2020)

¹⁵⁹ *ibid* para 7

¹⁶⁰ Office for National Statistics, 'Coronavirus and redundancies in the UK labour market: September to November 2020' (2021)

¹⁶¹ Stonewall, (n 122) para 35

¹⁶² *ibid* para 36

unfortunately unlike the Minister of Equalities' investment in understanding the impact of Covid-19 on Black people and people of colour, which included £4.3million of spending on six innovative research projects to better understand the links between Covid-19 and ethnicity, and an additional £4million on targeting messaging at ethnic minorities,¹⁶³ equivalent funding has not been invested in supporting LGBTQ+ communities to recover from the Covid-19 crisis.¹⁶⁴ Whilst it is accepted that during this difficult period the Government must prioritise its funding, this differential treatment when there are evidential inequalities exacerbated by Covid-19 to the LGBTQ+ community highlights a lack of concern for advancing policies surrounding UK equality and anti-discrimination law regarding LGBTQ+ rights.

There have been various examples of social change, but more needs to be done by way of changing traditional attitudes towards the LGBTQ+ community and addressing inequalities they face. Despite reaching the 10-year mark since the enactment of the Equality Act 2010, differential treatment due to gender differences is evidently still prominent in society, as has been shown through the 'toilet debate'. The response to the Covid-19 pandemic particularly highlights a lack of prioritisation by the Government to tackle inequalities that remain in the LGBTQ+ population, as a result of inadequate legislation and their surrounding policies.

CONCLUSION

The Human Rights Act 1998 and the Equality Act 2010 *prima facie* enabled equality and human rights violations to be enforced in UK courts. The effectiveness of these statutes and the policies surrounding them have been assessed alongside changes in society in order to answer the question of whether UK equality and anti-discrimination law has kept up with social change, specifically focusing on the LGBTQ+ community.

Post enactment of the HRA 1998 saw several influential cases come before UK courts such as *Bellinger* and *Ghaidan*: both demonstrating contrasting attitudes by the judiciary towards their powers under section 3 of the HRA 1998. There is no doubt that the introduction of a provision like section 3 which allows the judiciary to assume the powers of Parliament by altering the meaning of statutes is a vital tool in enabling statutory frameworks to keep up with changes in society. However, the HRA 1998 only works so far

¹⁶³ Government Equalities Office, Ministry of Housing, Communities & Local Government and Kemi Badenoch MP, 'Minister for Equalities sets out government action to tackle Covid disparities' (2020) <www.gov.uk/government/news/minister-for-equalities-sets-out-government-action-to-tackle-Covid-disparities>

¹⁶⁴ Stonewall (n 122)

in helping to eliminate discrimination and assisting UK equality law and anti-discrimination law to keep up with social change. It only allows individuals to enforce their rights against public bodies, which is a time-consuming and costly process. This is where the Equality Act 2010 steps in.

The EA 2010 allows for individuals with a protected characteristic, detailed in Part 2 of the EA 2010, to bring an action privately. However, this article has analysed specifically the effectiveness of section 7 (the protected characteristic of gender reassignment) and the Public Sector Equality Duty (PSED) and found that these inclusions are faulted and are far narrower than expected. The EA 2010 provides little assistance with the definition of 'having due regard' in the PSED and falls back on common law definitions which have not produced consistent outcomes. Therefore, to ensure full compliance by public bodies, there needs to be more guidance surrounding this term. Section 7 has been criticised as to the scope of protection it affords to those who are non-binary and intersex due to lack of clarity. To ensure that all those under the ever-developing scope of the transgender community are protected, the Government should take on board the recommendations to expand the definition to 'gender identity' rather than remain adamant that this is not needed because the section is clear now medical intervention is no longer required. This opinion is not reflective amongst the LGBTQ+ communities, as shown by the LGBTQ+ campaigning group Stonewall: listening to those with expertise and connections with the wider LGBTQ+ community like it has done with previous legislative changes will allow the EA 2010 to make a step forward in ensuring it keeps up with social change.

Policy has also been explored in relation to LGBTQ+ rights under the Equality Act 2010. The Equality and Human Rights Commission (EHRC) has faced numerous reviews and criticisms as to the effectiveness of their work: specifically, enforcement. The EHRC's unique powers of enforcement have not been used to their fullest potential in relation to gender reassignment, in comparison with other protected characteristics. Consequently, the burden of enforcement is placed on individuals, and this is not a stance to take when dealing with systemic discrimination. Increasing enforcement activity would enable the EHRC to make a significant contribution to eliminating discrimination faced by those in the LGBTQ+ community, and ultimately increasing public confidence in the enforcement of the EA 2010.

The 2011 and 2018 LGBT Action Plans have also had a far from significant impact on the LGBTQ+ community. The initial improvements in the education and health sector soon proved to be diminished in the last two years with a large amount of the actions set out,

being left in the action plans. It is clear that the LGBTQ+ community have faced a large amount of funding cuts in respect of LGBTQ+ organisations, the Coronavirus pandemic potentially being a contributing factor. However, this article has exposed the political and legislative stasis resulting from the fallout of the Action plans and can conclude that UK equality and anti-discrimination law will be no closer to keeping up with social change, with this level of inactivity.

The growth of the internet and social media has helped campaign groups achieve a wider influence on not only the LGBTQ+ community but also the Government. The acceptance of allowing Stonewall and Press for Change UK to apply their expertise in certain aspects of government policy is exactly what needs to be continued in order to advance UK equality and anti-discrimination law. However, these campaign groups are not always faced with positive attitudes, as shown in the 'toilet debate'. The desire to increase the number of gender-neutral toilets is a key example of social change in which was faced with consistent negative attitudes by the Government. The reaction to the Coronavirus pandemic also highlighted a lack of regard towards the LGBTQ+ community.

By introducing the HRA 1998 and the EA 2010 Parliament have contributed to improvements in advancing LGBTQ+ rights. These statutory frameworks have given the courts the ability to set new precedents in favour of LGBTQ+ rights, specifically through their powers under section 3 of the HRA 1998. Whilst there are flaws with the government policies surrounding the EA 2010, some progression has emanated by giving LGBTQ+ issues a new public visibility, resulting in campaign groups like Stonewall and PFC enhancing the use of the media to influence government policy and legislative reform. However, modern examples of social change have emphasised the deep inequalities that remain. Impactful improvements needed to have been made to the frameworks; policies surrounding them, and the attitudes contained by some of those in power, to allow the EA 2010 and HRA 1998 which sets the standards and principles for society and policy which is focused on how to achieve certain goals, such as the 'LGBT Action Plans', to positively influence one another to produce overall significant outcomes. At present, therefore, it cannot be concluded that UK equality and anti-discrimination law has kept up with social change regarding the LGBTQ+ community.