



TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 19 July 2023
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DE/FROM: Beatriz Balbin
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A handwritten signature in blue ink that reads "Beatriz Balbin".

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PAGES: 5 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

COPIES:

OBJET/SUBJECT: **Letter from Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz**

Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

19 July 2023

Dear Baroness Falkner,

I am writing in response to your letters of 23 May and 10 July 2023, regarding the end-of-mission statement of my visit to the United Kingdom of Great Britain and Northern Ireland. In these, you refer to my observations on advice provided by the Equality and Human Rights Commission (EHRC) to the Government on 3 April 2023.

I want to thank you for your offer of continued engagement in the preparation of my final report, which I gladly accept.

In its letter of 3 April, the EHRC advised the Government to clarify that the protected characteristic of “sex” in the Equality Act 2010 (EqA) is “biological.” I was concerned by this advice while preparing for my country visit: the term “biological sex” does not have an agreed definition in human rights law but it does have very clear implications in the social and political debate.

In your 23 May letter, you clarified that the EHRC purposely did not offer a definition of “biological sex.” Nevertheless, in its advice to Government the EHRC did state that the redefinition would specifically have impact relating to trans women, strongly suggesting that its objective would be to establish a difference between trans women and others. The redefinition *inter alia* would *allow* lesbian support groups and clubs to *restrict membership* and *not have to admit* trans women (cfr. 3 April letter, paras. 8.2 and 8.3); it would correct the *perceived anomaly* of having women-only roles *open* to trans women (cfr. para. 8.5); it would make it *simpler* to *exclude* trans women from separate sex services (cfr. para. 8.6); and it would *allow* organizers to *exclude* trans women from women’s sport (cfr. para. 8.7). In this context, I also noted that the EHRC described the non-discrimination test identified uniformly by all international and regional human rights bodies (cfr. UN Human Rights Committee, General Comment No 18: Non-discrimination (1989), para. 13) as an *additional burden* without which some of

Baroness Kishwer Falkner
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the cited exclusions would be *simpler*; it also placed these measures in the wider context of “balancing competing rights” (*cfr.* para. 3).

I was also concerned that the EHRC appeared to present as a given that these outcomes, made possible through a redefinition of the EqA category of “sex,” are necessary and positive: the redefinition would “create rationalisations, simplifications, clarity and/or reductions in risk” (*cfr.* para. 19), bring “greater legal clarity” (*cfr.* para. 7); and in the view of the EHRC, it might even be required under human rights law (*cfr.* para. 10).

* * *

During my country visit, I requested an official meeting on 4 May with the EHRC to share my concerns about your advice. I regret that you were not able to join the meeting on 4 May, but the EHRC was nonetheless represented by several Commissioners, its CEO, the chief policy and strategy officer, and the policy lead on sexual orientation and gender reassignment. They all deferred to one Commissioner to present the rationale and intended legal consequences of the EHRC’s advice.

After a fair measure of conversation on the legal implications of referring to the term *biological women* in any legislative framework, the Commissioner confirmed that the only way to understand it in the context of your 3 April letter was as referring to “women who are not trans.” That is the *verbatim* transcription of the term as it was confirmed. None of the other representatives took issue with that characterization or gave me any indication that this was not the position advocated by the Commission. I faithfully represented that finding in my end-of-mission statement, along with the preliminary conclusions to which it led me.

I will be glad to register our subsequent exchanges in my report; I am also committed to placing my considerations in the context of the wider mandate of the EHRC on equality for all persons regardless of sexual orientation and gender identity, in relation to which you provided examples of your work in your letter of 23 May.

* * *

In your 23 May letter, you firmly inform me that the EHRC did not have the objective of offering a formula for the exclusion of trans women from protections that they have under the EqA. My concerns are greatly assuaged by that statement, for which I thank you.

I must however respectfully maintain my observation that, in the language of the 3 April letter, I see no room for understanding the term “biological women” in a manner different than the one confirmed by the EHRC representative during our meeting. The letter also leads to the conclusion that the EHRC does support that definition and its consequences in law and policy, considering them to be necessary, positive, and possibly required by human rights law. In my view, that appears to significantly restrict the scope that any reader could possibly attribute to your advice.

I remain available to you and the EHRC. I hope that you and your colleagues will consider these observations to your 3 April letter and the information on international

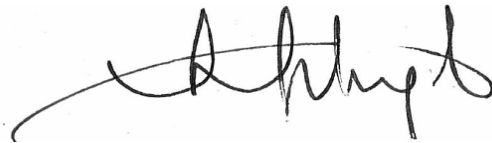
standards and good practice in the knowledge stock of my mandate, in relation to which I will be glad to provide as much detail as you deem useful. I also take this opportunity to present my sincere excuses for the delay in answering your initial letter.

* * *

Finally, I note your letter's observation that the EHRC raised its concerns with the UK Government Equalities Office as part of the State's substantive review and commentary on my preliminary observations, which I provided in advance of their publication. This is the usual process by which you relayed your views. Prior to the publication of my end-of-mission statement, on 9 May 2023, I provided a technical briefing to State representatives to review any concerns about the contents, in addition to its written feedback. The State made no substantive objections to the accuracy of the preliminary observations to which your letters refer.

Following the same practice, and without detriment to our direct dialogue, the EHRC may wish to convey any remaining observations to the State entity that will coordinate the process of review of my draft report. The State will have the opportunity to offer its views in advance of its publication; subsequently, it can request to append them to the final report as transmitted to the Human Rights Council.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Victor Madrigal-Borloz', with a long, sweeping underline that extends to the left.

Victor Madrigal-Borloz
Independent Expert on protection against violence and discrimination
based on sexual orientation and gender identity