



The Equal Treatment Bench Book: pronouns and principle

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The Equal Treatment Bench Book, first produced by the Judicial College in the early years of this century, has the commendable aim of assisting judges ensure that they manage hearings in a manner that is sensitive to the diversity of parties and witnesses.

I practise these days almost exclusively in the ‘gender wars’, the cluster of issues arising out of the tensions between the protected characteristics of sex and gender reassignment, the consequences of gender recognition and related matters. In that area of practice, guidance given at chapter 12 of the Equal Treatment Bench Book (ETBB), ‘Transgender People,’ has taken on an urgent practical importance. I first outline the changes between 2003 and 2026 and then draw some conclusions for practitioners in this area.

How chapter 12 has changed

The earliest version of the ETBB I have been able to find, archived online in 2003, deals with ‘Transsexual and transvestite people’ in five paragraphs. By 2021, the relevant section (by now the whole of chapter 12) had ballooned to 20 pages. In the current version (the February 2026 update to the 2024 edition), chapter 12 is pruned back to seven pages.

A comparison of the 2018–2021 edition and the 2026 version shows extensive cuts. The whole introductory ‘overview’ section running to a little over two pages has gone. Four paragraphs headed ‘Discrimination, harassment and violence experienced by transgender people’ have been cut to four lines. Another four-paragraph section headed ‘Disclosure of protected information under section 22 of the Gender Recognition Act’ in the 2018–2021 version has been cut to five lines. One paragraph in the previous version speculated about the policy intention behind the legal proceedings exception to s.22 of the Gender Recognition Act 2004 (GRA 2004), the provision which protects information about the status of a holder of a Gender Recognition Certificate (GRC) from disclosure, in a manner that could be seen as encouraging judges to interpret the exception narrowly. That too has been cut.

The 2021 section on the GRA 2004 observed that the legislation was 15 years-old and ‘now regarded by some as out of date’, and concluded: ‘Following a government consultation on how to reform the GRA, it has been decided not to do so.’ The current version simply describes the effect of a GRC.

A whole section on diagnosis and treatment of gender dysphoria has been removed, as have complaints about long waiting times for gender reassignment surgery, the supposedly onerous and bureaucratic nature of the process of applying for a GRC and the failure of the GRA 2004 to accommodate people who have ‘a permanent non-binary gender, or a fluid gender’. Twelve paragraphs on transgender offenders have been pruned to four, and the impact of For Women Scotland acknowledged.

Substantive advice

The substantive advice of the most practical importance in chapter 12 relates to language.

In 2021, the ETBB warned: ‘It should be possible to recognise a person’s gender identity and their present name for nearly all court and tribunal purposes.’ It acknowledged no concrete circumstances in which it

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might be permissible to refer in court to a trans person's biological sex, leaving it to the user to guess what an exception to 'nearly all' might look like.

Consistent with that, before the latest changes, compliance in courts and tribunals with trans individuals' 'preferred pronouns' had become near universal. Parties in cases engaging 'gender critical' belief would routinely refer to both real and hypothetical trans people by pronouns reflecting their gender identity rather than their sex, or avoid using pronouns at all. In his first instance judgment in *Forstater*, EJ Tayler (as he then was) treated the claimant's insistence that she was entitled to use masculine pronouns for a man who identified as 'non-binary' as a sign of the unacceptably 'absolutist' nature of her gender critical belief. Even more startlingly, in the criminal courts, rapists and other male sex offenders had been referred to by female pronouns, and one assault victim was chided by the judge and refused compensation for complying with an instruction to refer to her male assailant by feminine pronouns 'with a bad grace' (reported in the *Standard*, 13 April 2018).

The current edition of the ETBB warns that:

'There will be other situations where the judge may decide not to use the trans person's preferred name/pronouns to ensure a witness can give best evidence, eg a female rape victim may find it incomprehensible if the judge and others in court refer to her biologically male attacker as 'she' ...

'Witnesses should never be compelled to use the trans person's preferred pronouns. It should always be permitted for them to refer to a person how they presently understand or previously knew them (as in any case, eg a fraud where a defendant has used multiple identities) ... To do otherwise, and place additional or artificial barriers on a witness, is likely to detract from their ability to give best evidence.'

A similar reversal is evident in relation to 'deadnaming', using the name by which a person with a trans identity went before assuming that identity. Between 2018 and 2021, the ETBB simply condemned 'deadnaming' as 'highly disrespectful'. In 2026, the guidance acknowledges that witnesses must be permitted to speak of others as they knew them at the relevant time:

"Deadnaming" is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or where their birth name is otherwise referred to, instead of their chosen name. In court, witnesses may refer to a person by their deadname if this is how they knew them.'

Implications for practitioners

Tensions about the use of language in employment cases often arise where a party or a witness or another member of the cast asserts a trans identity and another party insists either that the trans person's biological sex is relevant to the case, or just that a commitment to using language that acknowledges sex is an important aspect of his or her gender critical belief.

If the client uses pronouns consistent with sex, advocates should think hard about what message it will convey to tribunal if their own choice is to avoid pronouns altogether, or comply with preferred pronouns. They should also consider whether they can really argue persuasively, for example, for single-sex facilities to be made available on the basis of biological sex while referring to the people they say should be excluded from women's facilities not as 'men' or 'men who identify as women' but as 'trans women'. Advocates more than anyone else should be aware of the potential power of language to frame the issues in a favourable or unfavourable light and should always choose the language that best furthers and expresses their client's case. 'Misgendering' may be met with vociferous objections, but recent experience has shown that courts and tribunals have little appetite to try to control the language in which advocates advocate for their clients.

'the ETBB ... is not a source of law. The duty to the client comes first'

The ETBB in its current form provides some comfort to advocates in framing their approach as appropriate for the client's case. But whatever its content now or in the future, it must be remembered that it is not a source of law. The duty to the client comes first.

KEY:

ETBB	Equal Treatment Bench Book	GRC	Gender Recognition Certificate
GRA 2004	Gender Recognition Act 2004	<i>Forstater</i>	<i>Forstater v CGD Europe</i> ET2200909/2019