CLAIM NO: CO/ /2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

AUTHENTIC EQUITY ALLIANCE C.I.C.

Claimant

-and-

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

STATEMENT OF FACTS AND GROUNDS FOR JUDCIAL REVIEW
(sections 5 and 8 of N461)

Note: References to **[CB/123]** are to pages in the Claimant's bundle served in these proceedings.

Essential Reading:
(i) The attached grounds.
(ii) The references to the Claimant's bundle marked **[CB/].**

The Claimant

1. The claimant is Authentic Equity Alliance C.I.C., a community interest company registered in England and Wales with company number 11596085. As set out in the Community Interest Statement declared on its formation, and as described in the witness statement of Ann Sinnott, AEA was set up to further the personal and professional interests of women and girls (AEA's 'designated community') and thus provide benefit to females in the Equality Act 2010 ("EA 2010") protected characteristics of 'Age', 'Disability', 'Pregnancy and maternity', 'Race', 'Religion or belief', 'Sex' and 'Sexual orientation', including by providing bespoke in-house training in equality legislation to achieve increased awareness and understanding of both the designated community's needs and relevant EA 2010 protected characteristics.

The Defendant

2. The Defendant is the Commission for Equality and Human Rights ("EHRC"), a statutory corporation established under section 1 of the Equality Act 2006.

3. EHRC has both general duties under section 3 of the Equality Act 2006, and specific duties in respect of Equality and Diversity (section 8) and Human Rights (section 9). These duties include encouraging good practice, promoting awareness and understanding, and particularly significant, a duty to promote "awareness and understanding of rights under the Equality Act 2010" (see section 8(d)). Allied to that duty is a power under section 13 to publish advice and guidance including (under section 13(d)) advice or guidance about the effect or operation of an enactment.

4. EHRC describes its Codes of Practice as "authoritative, comprehensive and technical guides" and explains that they are "approved by Government" and laid before Parliament to bring them into force. Courts and Tribunals are obliged to take them into account in their decision making[1] and their intended purpose is to help lawyers, advisers, trades union representatives, human resources departments and others who need to apply the law[2]. Courts and Tribunals will give guidance in a code of practice significant weight: the Guidance may be departed from only if there are cogent reasons for doing so (See *R (Munjaz) v. Mersey Care NHS Trust* [2006] 2 AC 148 at 21 – a case concerning the Mental Health Act Code of Practice issued under s.118 of the Mental Health Act 1983). Hence any clear error in such guidance is liable to have wide-reaching effects.

5. If guidance (whether statutory or non-statutory) issued by a body such as EHRC is shown to be legally flawed it is liable to be quashed on judicial review, or declaratory relief may be granted to the effect that certain parts of relevant guidance are incorrect in law – see by way of example, *R (Independent Schools Council) v. Charity Commission*

[1] Equality Act 2006, section 15
[2] see PAP response 23 September 2020 paragraph 4

[2012] Ch. 214[3] and *R (Secretary of State for the Environment ex p. London Borough of Tower Hamlets)* [1993] QB 632[4]

Factual background

6. On 17 February 2020, the Claimant wrote to Ms Hilsenrath, CEO of EHRC, outlining that incorrect guidance, incorrect terminology and prescriptive language was included in an extensive range of EHRC guidance, which had been accessed by and further disseminated to multiple other organisations. AEA enclosed a list of the guidance in question and requested that this be rectified so as to be consistent with the EA 2010. AEA copied others into the letter including Ms McCaffrey, interim director of the Government Equalities Office ("GEO"), EHRC's sponsor department. AEA followed up with an email on 19 February 2020 highlighting its aim of getting the guidance amended and the amendments widely publicised.

7. After chasing EHRC, the Claimant received a substantive response on 23 March 2020. EHRC indicated that a review was underway and stated its intention to make the appropriate amendments before its new website was created. EHRC stated that its position was as per its guidance document '*Core guidance: Businesses*'. However, the Claimant pointed out in an email on 26 March that '*Core guidance: Businesses*' was one of the documents which used overly prescriptive language beyond the terms of the EA 2010. The Claimant made clear that rectification of guidance going forward would not be sufficient to remedy the position and that EHRC should issue a public statement listing the rectifications and should inform individual organisation of the rectifications if possible. The Claimant criticised EHRC's handling of the matter up to that point and logged a complaint with GEO via email that same day.

[3] [2012] Ch. 214
[4] [1993] QB 632

8. The Claimant chased EHRC for a response on 5 April and wrote to EHRC again on 7 April restating the issues previously raised and the need for those to be addressed in a timely manner. EHRC provided a substantive response on 3 July. It outlined some amendments which it intended to make to its guidance which included the removal of the phrase "*Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes and therefore should not be excluded from single-sex services*" and amendments to refer consistently to "*sex*" rather than "*gender*" where appropriate, reflecting that "sex" is a protected characteristic under section 4 of the EA 2010 whereas "gender" is not. It said it intended to make the amendments by the end of July 2020. It denied that EHRC had breached the EA 2010 and said that as part of updating its guidance it would ensure that it does not go beyond the EA 2010.

9. After further correspondence from AEA seeking confirmation that the promised changes had been made, on 14 August 2020 EHRC provided AEA with a list of amendments it had made to guidance and deletions which it had made to EHRC's web pages.

Pre-action correspondence

10. By way of a pre-action protocol dated 26th August 2020 **[CB/ 204 – 221]** the Claimant challenged 4 categories of Guidance issued by EHRC as being ultra vires and unlawful. In particular the Claimant identified that EHRC Guidance containing the following (or substantially the same wording was unlawful):

> "*Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes and therefore should not be excluded from single sex services.*"

11. This was described as "*category one*" guidance in the pre-action letter. The Claimant explained that this wording does not reflect the law. The right of a 'TPC' (a transsexual person with a Gender Recognition Certificate ("GRC")) to be treated in their acquired gender for all purposes is subject to the provision made by the Gender Recognition Act 2004 (GRA) or other enactments or subordinate legislation,

including Schedule 3, paragraph 28 of the EA 2010. A Transsexual Person with such a certificate (TPC) can be excluded from a single-sex service where this is a proportionate means of achieving a legitimate aim. Indeed there are good examples of cases where a TPC should (for legitimate reasons which are proportionate) be excluded from single-sex services.

12. The second category of identified unlawfulness in the PAP letter was EHRC Guidance which in the context of single-sex services uses the term "gender" or "gender segregation" when referring to protected characteristics, rather than the correct terminology of "sex", "separate sex" or "single-sex". For example:

> "*Gender segregation is permitted for a few specifically defined purposes. For example there is an exemption permitting gender segregation in certain situations where it is necessary to preserve privacy and decency. However, unless a specific exemption applies, segregation connected to gender will be unlawful.*"[5]

Defendant's response to Category 1 and 2 Guidance

13. In its pre-action response at paragraphs 9-15, **[CB/ 267 – 271]** the Defendant acknowledged the relevant wording in Categories 1 and 2 required amendment, and confirmed that all such Guidance had now been amended. However in respect of two further aspects of the Statutory Guidance which have far reaching influence and effects, the Defendant has refused to amend or correct Guidance which, the Claimant contends, frankly misstates the law such that the Guidance is unlawful and ultra vires. These aspects of the Guidance were identified in the PAP letter as "Category 3" and "Category 4" guidance, are the subject of this challenge, and are as follows:-

[5] EHRC Guidance: 7. Your rights to equality from the criminal and civil justice systems and national security

Category 3

14. The Claimant maintains that the aspects of the EHRC Services, public functions and associations Statutory Code of Practice ("the Statutory Code of Practice")identified in Category 3 (as identified in the PAP letter) are unlawful and ultra vires namely: Guidance which is prescriptive concerning the application of the single-sex exemption in relation to the provision of services:

> *"If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men,* ***they should treat transsexual people according to the gender role in which they present****."*[6]*;*

Category 4

15. The Claimant also continues to maintain that the aspects of the Statutory Code of Practice identified in Category 4 (as identified in the PAP letter) are unlawful and ultra vires namely: Guidance which includes words to the effect that the ability of a transsexual person ("TP") to access separate sex or single-sex services depends on whether they are "*visually and for all practical purposes indistinguishable from someone of their preferred gender*".

16. The Defendant's decision (contained in its PAP response) to refuse to amend such Guidance as requested in the Claimant's PAP letter is likewise unlawful.

17. This is in particular because Category 3 and Category 4 Guidance is contained in numerous items of EHRC guidance including the Statutory Code of Practice (passages emboldened) which (in full) provides as follows:-

13.57 ***If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present.*** *However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender* **Sch. 3 para 28**

[6] EHRC Statutory Code of Practice: Services, public functions and associations, paragraph 13.57 -13.60

reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate.

13.58 The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex which are otherwise provided only to people of that sex. For example, a transsexual man may need access to breast screening or gynaecological services. In order to protect the privacy of all users, it is recommended that the service provider should discuss with any transsexual service users the best way to enable them to have access to the service.

***Example:** A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles.*

13.59 Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.

*13.60 As stated at the beginning of this chapter, **any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.** A service provider can have a policy on provision of the service to transsexual users **but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances**. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available."*

18. The Defendant has sought to maintain that there is nothing unlawful about the wording emboldened in the Guidance in the Statutory Code of Practice and has refused to amend or withdraw it, saying specifically:-

    (i) The section should be read as a whole (PAP response §20).

    (ii) It should not be contentious that service providers should respect the gender identity of a trans-person (PAP response §20).

    (iii) The words: "*However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate."* make clear that the EA 2010 permits service providers to offer a different service or to exclude a trans-person if this can be objectively justified.

    (iv) That the rest of the text (with examples) is intended to explain, with the assistance of examples, how EHRC considers that the proportionality exercise is likely to be approached in practice. (PAP response §22).

19. This is not an adequate answer to the Claimant's claim but nonetheless it is of note that the Defendant has, in its PAP response, made the following concessions:-

- That it is fully supportive of the EA provisions enabling effective services and spaces that protect the safety, privacy and dignity of women (introduction, page 2)

- That its **first priority** is to provide information, support and encouragement so that organisations can get it right in the first place (para 3) – the Claimant agrees

- Statutory codes of practice are intended to be "*authoritative, comprehensive and technical guides*"(para 4) – the Claimant agrees

- That service providers and others should be inclusive of trans persons so far as it is possible, while taking account of and giving due weight to the rights of others (para 5) – the Claimant agrees

- That the Statutory Code of Practice must accurately reflect the current law (para 13) **and not misstate the law** (para 18) – the Claimant agrees

- That if guidance contained fundamental errors which were being widely and erroneously relied upon leading to the commission of unlawful acts, it might be appropriate to take steps to draw the attention of relevant bodies to changes by making a public statement (para 15) – the Claimant considers that such fundamental errors are present and that such steps should be taken.

20. The Claimant's criticisms above are not mere technicalities nor are they cavils about looseness of expression in the Statutory Guidance. The issue is not, as the Defendant suggests, that the Claimant is treating the Statutory Code of Practice as a "*detailed treatise of the law*" when its aim is to provide practical guidance. The Claimant's case is that the Defendant's approach is underpinned by a fundamental misconception that there is no relevant distinction, when applying the separate sex and single-sex exceptions to people with the gender reassignment protected characteristic, between TPCs and TPNCs (TPs who have not been granted a full GRC.)

21. Put shortly, a person who is proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning that person's sex by changing physiological or other attributes of sex but who has NOT sought, applied for, or been granted a full GRC from the Gender Recognition Panel, may undoubtedly rely on the EA protected characteristic of "*gender reassignment*" but they otherwise remain, for the purposes of the law generally and specifically the sex discrimination provisions of the EA 2010, in their originally attributed biological sex even if they are otherwise living in, presenting as, or identifying as of the opposite sex.

22. The PAP response does not contain a single reference to the GRA or whether a TP has a GRC. While the scope of the EA 2010 gender reassignment protected characteristic is clearly broader in scope than the category of TPCs, it does not follow that the fact of having or not having a GRC is irrelevant to the application of the separate sex single-sex exceptions. In short, if a separate sex or single-sex service can be justified in accordance with Schedule 3, paragraphs 26 - 27 EA 2010, then <u>all</u> those who are in law of the opposite sex can lawfully be excluded. This is because a TPNC

remains in law a person of their birth sex and cannot therefore have a right to access a separate sex or single-sex service provided for the opposite sex. The suggestion that their exclusion from such a service requires separate justification as a proportionate means of achieving a legitimate aim (applying Schedule 3, paragraph 28) is a fundamental error of law.

23. Thus for reasons set out in the Grounds below, the Claimant maintains that the Statutory Code of Practice (and related guidance) so expressed continues both to:-

    (i) Misstate the law; and is ultra vires and unlawful

    (ii) Misstates the correct approach to the question of proportionality and is also for that reason ultra vires and unlawful.

24. In saying so the Claimant makes it clear that it supports the protection of TPs' rights not to be discriminated against. The key issue from the Claimant's perspective is the importance of proper guidance being given as to the balancing of the rights of women and TPs and in particular how that balance is lawfully struck when they are in conflict. For these purposes, consideration of the rights of women requires consideration, in particular, of vulnerable women and girls as well as women of the protected characteristic religion or belief whose religion (e.g. Muslim or Orthodox Jew) means that without single-sex services they would be deprived of those services. It is the Claimant's case that the existing law as set out in EA 2010 and the GRA 2004 provides the appropriate mechanism for that balancing of the competing rights of TPs and others deserving of protection e.g. women, including those particularly vulnerable and does so by a combination of the GRA 2004 and the separate/single-sex exceptions in Schedule 3 to the EA 2010 which are subject to the four stage proportionality test. However this legal balance is **not** reflected accurately and indeed is fundamentally mis-stated in EHRC Guidance and the Statutory Code of Practice Guidance. The consequence is that the Guidance promotes an approach that gives disproportionate weight and emphasis to the protection of TPs' rights to the detriment of vulnerable women and girls whose rights (including those under Article 8 and Article 3) are equally deserving of protection.

Statutory Framework

Equality Act 2010 ("EA 2010")

Gender reassignment

25. Gender reassignment is a protected characteristic.[7] Section 7 of the EA 2010 provides:

> *"(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*
>
> *(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*
>
> *(3) In relation to the protected characteristic of gender reassignment—*
> *(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person[8];*
> *(b) a reference to persons who share a protected characteristic is a reference to transsexual persons."*

Sex

26. Sex is a protected characteristic.[9] Section 11 of the EA 2010 provides:

> *"In relation to the protected characteristic of sex—*
> *(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."*

27. Section 212 of the EA 2010 provides:

> *"In this Act—*
> *…*
> *"man" means a male of any age;*
> *…*
> *"woman" means a female of any age."*

[7] Equality Act 2010, section 4

[8] The Claimant refers to a person with the protected characteristic of gender reassignment as a transsexual person ("TP").

[9] Equality Act 2010, section 4

Prohibition on discrimination in the provision of services or the exercise of a public function

28. Section 13 of the EA 2010 defines direct discrimination: "*A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

29. Section 29(1) and 29(2) of the EA 2010 prohibit service providers from discriminating against a person by not providing the person with a service or in the provision of a service. Section 29(6) of the EA 2010 provides that a person must not do anything in the exercise of a public function that constitutes discrimination.

30. Section 31(10) of the EA 2010 gives effect to Schedule 3.

The separate services for the sexes and single-sex services exceptions

31. Schedule 3 of the EA 2010 provides (so far as relevant for present purposes):

> *"**PART 7***
> ***Separate, single and concessionary services, etc***
>
> ***26 Separate services for the sexes***
>
> *(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—*
> *(a) a joint service for persons of both sexes would be less effective, and*
> *(b) the limited provision is a proportionate means of achieving a legitimate aim.*
>
> *(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—*
> *(a) a joint service for persons of both sexes would be less effective,*
> *(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and*
> *(c) the limited provision is a proportionate means of achieving a legitimate aim.*
>
> *(3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.*
>
> ***27 Single-sex services***
>
> *(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—*

(a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and
(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—
(a) the service is also provided jointly for persons of both sexes, and
(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—
(a) a joint service for persons of both sexes would be less effective, and
(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—
(a) a hospital, or
(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—
(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—
(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and
(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

28 Gender reassignment

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—
(a) the provision of separate services for persons of each sex;
(b) the provision of separate services differently for persons of each sex;
(c) the provision of a service only to persons of one sex."

32. The Explanatory Notes to the EA 2010 describe the effect of paragraph 28 in the following terms:

"This paragraph contains an exception to the general prohibition of gender reassignment discrimination in relation to the provision of separate- and single-sex services. Such treatment by a provider has to be objectively justified."

33. The following example is given:

    "• *A group counselling session is provided for female victims of sexual assault. The 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. This would be lawful."*

Gender Recognition Act 2004 ("GRA")

34. The GRA provides for the issue of GRCs where certain conditions are met. Section 9 of the GRA provides (so far as relevant):

    "*(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*

    …

    (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

The Legal Framework in relation to proportionality

35. The status of being a TP is an "other status" for the purposes of Article 14 of the European Convention on Human Rights (see *R v. SoS Work and Pensions*[10]). The rights of TPs must be understood and interpreted in the context of the exercise of the rights and freedoms of others who have corresponding rights protected under other Articles of the Convention including under Article 8, personal privacy, and autonomy and arguably in some circumstances (vulnerable or abused girls or women) Article 3 (inhuman and degrading treatment). The rights of TPs not to be discriminated against are qualified rather than absolute rights as is clear from the EA 2010.

[10] [2017] 1 WLR 4127 per Lady Hale. See also PV v. Spain (2011) ECHR 35159/09 at [30]

36. On the assumption that in any given case:

(i) the facts fall within the ambit of one or more of the Convention rights;

(ii) there is a difference in treatment in respect of that right between the complainant and others on one or more of the grounds proscribed by Article 14; and

(iii) those others were in an analogous situation,

the key question is always whether the discriminatory treatment is justified (see *Wandsworth London Borough Council v. Michalak*[11]; and *Ghaidan v. Godin-Mendoza*[12]).

37. As explained by Lady Hale at §33 of *R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] 1 WLR 382 the legal approach to the question of justification is now well-established from a series of cases at House of Lords/Supreme Court level, beginning with *Huang v Secretary of State for the Home Department*,[13] and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)*,[14] and *Bank Mellat v HM Treasury (No 2)*.[15]

38. The test for justification is fourfold:

(i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right;

(ii) is the measure rationally connected to that aim;

(iii) could a less intrusive measure have been used; and

(iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

[11] [2003] 1 WLR 617 per Brook LJ at [20]
[12] [2004] 2 AC 557 (HL) per Baroness Hale at [134]
[13] [2007] 2 AC 167
[14] [2012] 1 AC 621
[15] [2014] AC 700

39. It is at least arguable that in the present context where one is not dealing with one of the "suspect" grounds, and there is a clash between Article 8 and Article 14 rights, the proper test is in fact whether the purported justification is "*manifestly without reasonable foundation*"[16].

40. Such an approach would give the decision-maker the appropriate margin of discretionary judgment both as to the issue of legitimate aim and the question of proportionality – see for example *R (Elias) v Secretary of State for Defence*[17] and most recently *R (Independent Workers Union of Great Britain) v. Mayor of London*[18].

41. But the precise formulation of the test may not matter. In a case such as the present where resources of a service provider (either private or public) may be scarce to make relevant changes to the availability of services there may be no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgement of the decision-maker and the "*manifestly without reasonable foundation*" test.

42. The Guidance in the passages emboldened above suggests that providers are not entitled to have 'blanket policies' and that each case will need to be dealt with on a case by case basis. It is the Claimant's case that such advice is in error. Rather the situation of service providers and the approach to proportionality in such cases, should be akin to those cases considered in relation to social and welfare benefits. In that context, the speech of Lord Reed in *Tigere*[19] (concerning social welfare benefits) is directly on point, in particular §88-§90, (a passage recently cited with approval by Lord Sales at §85 of *Z v. Hackney London Borough Council and another* [2020] UKSC 40).

---

[16] *R. (on the application of Drexler) v Leicestershire CC* [2020] EWCA Civ 502 raises the point that where one is not dealing with one of the "suspect" grounds, there is no binding authority that prevents the appropriate test being wither the measure/policy is manifestly without reasonable foundation c.f. also *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21.

[17] [2006] 1 WLR 3213

[18] [2020] EWCA Civ 1046

[19] *R(Tigere) Secretary of State for Business and Skills* [2015] 1 WLR 3820.

"*88. Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self- evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable. If, as we think clear, it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the United Kingdom, it may be not only justifiable but necessary to make the distinction by reference to a rule of general application, notwithstanding that this will leave little or no room for the consideration of individual cases. In a case involving the distribution of state benefits, there are generally two main reasons for this.*

89. One is a ***purely practical*** *one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. …*

90. The second reason for proceeding by way of general rules is the ***principle of legality****. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves 'to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis': Evans v United Kingdom (2007) 46 EHRR 728, at para 89.*

Summary of relevant law

43. It follows from the terms of the legislation and the jurisprudence set out above that:

    (a) All TPs, whether or not they have a full GRC, have a right not to be discriminated against in the provision of services because of their gender reassignment protected characteristic, subject to the exceptions in the EA 2010 (including Schedule 3, paragraph 28).

(b) A TP who does not have a full GRC (a "TPNC") is treated in law as a person of the sex recorded on their birth certificate and does not have the right in law to be treated as a person of the opposite sex from their birth sex.

(c) A TP who does have a full GRC (a "TPC") is treated in law as a person of the opposite sex from their birth sex, subject to some exceptions in the GRA, EA 2010 (including Schedule 3, paragraph 28) and other statutes.

(d) A TPNC may be excluded from a single-sex service on the basis that such exclusion is a proportionate means of achieving a legitimate aim to exclude males generally from a separate sex or single-sex service for females under paragraphs 26 or 27.

(e) A TPC may be excluded from a separate sex or single-sex service for the sex to which they have legally transitioned under paragraph 28 provided that the fourfold test of justification in *Bank Mellat* is satisfied.

(f) By way of example, it would be lawful (proportionate and for a legitimate aim) for the provider of single-sex services, e.g. female changing rooms at a public swimming baths, to have a policy of general application which excluded all TPs who were male at birth (whether or not they have a GRC) from the female changing rooms in order to protect the privacy/Article 3/8 rights of females using the baths, provided such policy was arrived at for legitimate reasons and for a legitimate aim. Such a policy may, but need not necessarily (to be lawful), permit a procedure or process to cater for any specific individual who could demonstrate proper grounds for an exception to be made.

44. Having regard to those principles the Claimant advances the following grounds of claim in respect of two aspects of the Statutory Code of Practice (and related Guidance issued by EHRC which is based on it) which are, and continue to be unlawful:-

Ground 1 : Category 3 Guidance is ultra vires and unlawful

Category 3 Guidance

45. This guidance is prescriptive concerning the application of the single-sex exemption, in particular the Statutory Code of Practice provides:

> *"If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men,* ***they should treat transsexual people according to the gender role in which they present****."*[20] *However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim*
>
> *"[A]ny exception to the prohibition of discrimination* ***must be applied as restrictively as possible*** *and the denial of a service to a transsexual person* ***should only occur in exceptional circumstances****. A service provider can have a policy on provision of the service to transsexual users* ***but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances****. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available."*[21]

[20] EHRC Statutory Code of Practice: Services, public functions and associations, paragraph 13.57
[21] EHRC Statutory Code of Practice: Services, public functions and associations, paragraph 13.60

46. The wording quoted above (emphasis added) appears in the Statutory Code of Practice issued by EHRC under section 14 of the Equality Act 2006. Section 14(2) provides:

"*A code of practice under subsection (1) shall contain provision designed-*

(a) to ensure or facilitate compliance with the Equality Act 2010 or an enactment made under that Act, or

(b) to promote equality of opportunity"

47. The Statutory Code of Practice containing the language set out above supports neither objective.

48. The statutory language in Schedule 3, paragraph 28 of the EA 2010 is neutral. The adoption of prescriptive language in the Statutory Code of Practice does not reflect the law in Schedule 3, paragraph 28 of the EA 2010, which simply requires that the exclusion of a TP from a separate sex or single-sex service be a proportionate means of achieving a legitimate aim. Examples of this prescriptive language include:

> *"must be applied as restrictively as possible"*
>
> *"the denial of a service to a transsexual person should only occur in exceptional circumstances*"[22]
>
> "*should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances*"

49. None of these prescriptive propositions is justified on a proper interpretation of the law. Specifically:-

    (i) In the relevant context (which, as the excerpts above make plain, relates to a service provider to whom Schedule 3 paragraph 28 applies, viz. **a**

[22] 'See also the EHRC Guidance: "Where the transsexual person is post-operative and visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should be treated in their acquired gender unless there are compelling reasons not to. See Items 8, 9 and 10 on list attached to PAP letter.

service provider who provides single- or separate sex services for women and men, or provides services differently to women and men), the effect of this statutory guidance is to introduce a presumption that any person who "*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*"[23] is **automatically** entitled to access separate sex or single-sex services provided for people of the opposite sex from their birth sex, and that automatic entitlement can only be denied if there are exceptional reasons in a particular case why this should not be permitted. This approach is not only an unjustifiable gloss on the statutory provision, but has the potential to discourage the proper consideration of both (i) risks to women and girls including those who are particularly vulnerable and (ii) of their rights, not only under the EA 2010 but also potentially under the Human Rights Act 1998 (Article 3 and Article 8 of the Convention).

(ii) This point is not answered by the Defendant's use of the words in the Guidance:-

> "*However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim".*

As set out above, Schedule 3 EA 2010 expressly permits (a) the provision of separate services for persons of each sex; (b) the provision of separate services differently for persons of each sex; and/or (c) the provision of a service only to persons of one sex, provided **only** that such provision is a proportionate means of achieving a legitimate aim and one of the conditions in Schedule 3 paragraphs 26-27 is met. There is no presumption or automatic entitlement for a TP to use all such services,

[23] During the committee stage of consideration of the Equality Bill (which became the EA 2010), the Solicitor General explained on behalf of the government that "proposing" may be manifested by a person "making their intention known" and that "Even if they do not take a single further step, they will be protected straight away". HC Deb (Public Bill Committee) 16 June 2009 c204

and the failure to the Statutory Code of Practice to make this plain (and indeed to imply the opposite) has led to an assortment of equally misleading guidance being issued by a number of different bodies to the detriment of female service users who themselves have rights of access to such services which should not be unlawfully or unnecessarily interfered with. Examples of such Guidance are set out in the witness statement of Ann Sinnott in support of the claim in particular at paragraphs 39 to 56 **[CB/ 59 – 67]** e.g. the Security Industry Authority Guidance, Guidance from ACAS, Guidance from the Metropolitan Police, Guidance from NHS Trusts etc.

(iii) TPs are protected from discrimination on the basis that (as a minimum) they have made known their intention to undergo a process of reassignment and therefore have the gender reassignment protected characteristic from that point onwards. That is protection from being discriminated against on the basis of **that characteristic** not an entitlement to be treated as if such a person was no longer of their birth sex. If a person (not yet reassigned as a matter of law) were denied access to a service available to persons of their birth sex on the basis of their protected characteristic, that would be unlawful; but

(iv) TPs <u>do not</u> have an automatic right to access separate sex or single-sex services such as toilets and changing rooms provided for people of the opposite sex from their birth sex, nor is it required by law to give them such access in the absence of some *exceptional circumstances* justifying their exclusion. That is not the effect of Schedule 3, paragraph 28 of the EA 2010.

(v) A TPNC who was born male and is excluded from a women's changing room because provision is single-sex would not be suffering discrimination on the basis of the protected characteristic of an intention to reassign. They would simply be treated in the same way as anyone else of the same legal sex (male) and excluded on that basis. To discriminate on the basis of a protected characteristic requires different

treatment because of that protected characteristic. When considering whether there has been discrimination against a TPNC who is born male, the relevant comparator is a male who does not have the gender reassignment characteristic, not a female.[24] Male to female TPs are not automatically entitled to the same treatment as women until they become in law, women[25], and even then such entitlement is subject to the statutory exceptions including Schedule 3, paragraph 28 of the EA 2010. Discrimination might arise on the basis of the gender reassignment protected characteristic if a TPNC born male but dressing as a woman was denied access to a mens' changing room on that basis. The fundamental error in EHRC Guidance is that it assumes that TPs (in particular TPNCs) are automatically entitled to access separate sex or single-sex services provided for people of the opposite sex from their birth sex. The Guidance has wrongly elided the requirement (i) not to discriminate against, for example, men who are transitioning because they are transitioning (TPNCs); with (ii) a requirement (subject to Schedule 3, paragraph 28) not to discriminate against women who were previously men but have become as a matter of law women because they have a GRC (TPCs).

(vi) Setting the bar in the Guidance at the level of "*exceptional circumstances*" is simply not a proper reflection of the law. There will be many circumstances, and not just exceptional ones, where the *Bank Mellat* test of justification for providing single-sex services which exclude (say) TPNCs from, e.g. female only changing rooms, will be satisfied and/or the policy (if a general policy) is deemed to be not manifestly without reasonable foundation. The most obvious example being that the provision of single-sex female changing rooms is considered to be a proportionate and reasonable response to the protection of the Article 8 and/or Article 3 rights of vulnerable women and children. Such a

[24] *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin) at [66]
[25] *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin) at [68]

general policy, if applied by a service provider is likely (in most cases) to be lawful on such grounds. This is the very reverse of the "exceptional circumstances" indicated in the Guidance.

(vii) Trans status is not one of the "suspect" grounds of discrimination in the jurisprudence (see *R (Carson) v Secretary of State for Work and Pensions*[26]) requiring particularly close scrutiny. Indeed there is no reported case where "*strict scrutiny*" has been applied where the difference in treatment is based on trans status (see for example, *PV v. Spain*[27] and the decision of the Court of Appeal in *Re. M (Children)*[28]). But even if "strict scrutiny" were applied to the question of justification, that is not the same thing as an "*exceptional circumstances*" threshold, which is plainly misleading and puts the matter altogether too high. The central question on justification is simply whether the impugned measure is proportionate and in pursuit of a legitimate aim, or alternatively, not manifestly without reasonable foundation.

50. In the absence of appropriate steps to remedy the consequences of this clear error in the guidance, a declaration by the Court that the guidance does not reflect the law (and is therefore *ultra vires*) is likely to be required. The Claimant also seeks a mandatory order requiring the dissemination of corrected guidance to a specified list of organisations. This is necessary to mitigate the effects, which are likely to be continuing, of the guidance being adopted by a variety of organisations and bodies who may not otherwise become aware of any rectification. In this regard the Claimant notes that the Defendant has acknowledged that if the Guidance contained fundamental errors which were being widely and erroneously relied upon leading to the commission of unlawful acts, it might be appropriate to take steps to draw the attention of relevant bodies to changes by making a public statement (paragraph 15 of the Defendant's PAP response).

[26] [2005] UKHL 37 at [55]
[27] (2011) ECHR 35159/09
[28] [2018] 4 WLR 60

Ground 2: Category 4 Guidance is unlawful

51. Category 4 Guidance is Guidance which includes words to the effect that the ability of a TP to access separate sex or single-sex services depends on whether they are "*visually and for all practical purposes indistinguishable from someone of their preferred gender*". The text from the Statutory Code of Practice is as follows:-

> *"Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary."*[29]

52. The formulation "*visually and for all practical purposes indistinguishable*" appears to be based on the House of Lords decision in *A v. Chief Constable of West Yorkshire Police and another*[30]. That case, which pre-dates the GRA and the EA 2010, considered section 54(9) of the Police and Criminal Evidence Act 1984 which requires a constable carrying out a search under that section to be of the same sex as the person searched. The House of Lords decided that:-

> *"effect can be given to the clear thrust of Community law only by reading "the same sex" in section 54(9) of the 1984 Act, and "woman", "man" and "men" in sections 1, 2, 6 and 7 of the [Sex Discrimination Act 1975], as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search."*

53. The question related to a post-operative TP. The legislative landscape has now changed, in that (i) TPs are able to obtain a GRC enabling them to be treated in law as a person of the opposite sex from the sex recorded on their original birth certificate, subject to some statutory exceptions; and (ii) the EA 2010 has introduced protection from discrimination on the basis of the gender reassignment protected characteristic, subject to the exceptions including that in Schedule 3, paragraph 28.

---

[29] EHRC Statutory Code of Practice: Services, public functions and associations, paragraph 13.59

[30] [2004] UKHL 21

54. The continued application of the test formulated by the House of Lords in 2004 prior to the enactment of the present statutory framework is therefore inconsistent with the terms of the new framework and misleading. The EA 2010 contains no requirement to treat a post-operative TP "*who is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender…according to their acquired gender, unless there are strong reasons to the contrary.*" As noted above, (and apparently accepted by EHRC) "*gender*" is not a protected characteristic under the EA 2010 in any event. What the EA 2010 requires is that TPs are not discriminated against on the basis of their gender reassignment protected characteristic unless one of the statutory exceptions applies. Guidance containing category 4 wording is therefore ultra vires and unlawful.

55. It is notable in this context that GEO's guidance, by contrast, refers to good practice being "*Try not to assume someone's gender simply by their appearance*". This is an implicit (and correct) acknowledgement that the "*visually indistinguishable*" test is fraught with practical difficulty, since it is far from clear who EHRC considers should assess whether a TP is "*visually indistinguishable*" from a non-TP of the relevant sex, how this is to be verified, and whether the view of the TP, the service provider or other service users should take precedence.

56. The Claimant seeks a declaration by the Court that this aspect of the Statutory Code of Practice does not reflect the law and is therefore *ultra vires*.

57. The Claimant also (because of the amount of related guidance which appears to be based on it) seeks a mandatory order requiring the dissemination by EHRC of corrected guidance to a specified list of organisations, a list of such organisations was provided with the PAP letter.

Costs Capping Order ("CCO")

58. For reasons set out in the statement of Ann Sinnott and in the grounds in support of a cost capping order a CCO is sought in terms that:
    - The Claimant shall not be liable for any adverse costs greater than a total sum of £5,000 (inclusive of VAT) arising from these proceedings;
    - The reciprocal cap on the Claimant's recoverable costs is £35,000 (inclusive of VAT).

59. For all these reasons the Claimant seeks an order that:
    (i) permission for judicial review be granted;
    (ii) a costs capping order be granted for the reasons set out in the attached application
    (iii) the EHRC Statutory Code of Practice be declared unlawful as claimed;
    (iv) further or alternatively, a quashing order of that part of the Statutory Code of Practice identified as unlawful and *ultra vires* by the Court;
    (v) further or alternatively a mandatory order be made requiring the Defendant formally to withdraw the Guidance identified by the Court as unlawful;
    (vi) further or alternatively, such other order as the Court considers just to give proper effect to the Judgement, including, if appropriate, a mandatory order in relation to the dissemination of corrected guidance as identified at paragraphs 50 and 57 herein.

JEREMY HYAM QC

9th November 2020

CO/4116/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

B E T W E E N:

AUTHENTIC EQUITY ALLIANCE C.I.C

Claimant

- and -

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE

References [PB/x/§y] are to the Claimant's permission bundle page x and paragraph y (where applicable). References [SG/§y] are to paragraphs in the Claimant's Statement of Facts and Grounds

INTRODUCTION AND SUMMARY OF DEFENDANT'S RESPONSE TO CLAIM

1. The following is the Summary Grounds of Resistance submitted by the Commission for Equality and Human Rights ("**EHRC**") in response to the judicial review brought by the Authentic Equality Alliance CIC ("**the AEA**"). For the reasons set out below, the EHRC submits the claim is unarguable. In addition, it has not been brought within three months of the grounds of challenge first arising. For both reasons the EHRC submits that permission should be refused.

2. The AEA is a community interest company set up in 2018. Its "*aim is to promote and further the personal and professional interests of natal women and girls*" **[PB/49/§9]** and its "*primary purpose is to benefit natal females*" **[PB/50/§10]**. The EHRC is a non-departmental public body. It has responsibility for the promotion and enforcement of equality and non-discrimination laws in England, Scotland and Wales. The AEA seeks to challenge passages in the Code of Practice on "*Services, Public Functions and Associations*" ("**the COP**") promulgated by the EHRC in 2011. Specifically, it seeks to challenge parts of 13.57-13.60 in a section headed "*Gender reassignment discrimination and separate and single-sex services*". The section provides guidance on paragraph 28 of Schedule 3 to the Equality Act 2010 ("**the EA 2010**").

3. The AEA contends that the impugned passages in the COP are "*underpinned by a fundamental misconception [of law]*" **[SG/§20]** and "*fundamentally mis-state… [the law]*" **[SG/§24]**. The "*misconception*" the AEA claims to have identified is that, on AEA's analysis, the EHRC has failed to appreciate that "*a [trans-woman without a gender recognition certificate] who was born male and is excluded from a women's changing room because provision is single-sex would not be suffering discrimination [under the EA 2010] on the basis of the protected characteristic of [gender reassignment]. They would simply be treated in the same way as anyone else of the same legal sex (male) and excluded on that basis.*" **[SG/§49(v)]**. On the basis of that analysis the AEA asserts that the EHRC has erred in suggesting in the COP that service providers should generally treat trans-persons (whether or not they have a Gender Recognition Certificate ("**GRC**")) according to their acquired gender identity in terms of access to single and separate sex services unless their exclusion can be justified as a proportionate means of achieving a legitimate aim. On the AEA's analysis that is correct for a trans-person with a GRC, but is wrong for a trans-person without a GRC, and the COP therefore fundamentally misstates the law the AEA asserts.

4. In short, and for the reasons set out further below, the claim is unarguable and the EHRC would invite the Court to refuse permission:

   (i) The AEA's claim is premised on a basic misunderstanding of applicable discrimination law. The AEA legal analysis, and its criticism of the COP, assumes the only relevant form of discrimination under the EA 2010 at issue is <u>direct</u> gender reassignment discrimination contrary to s 13. The AEA does not appear to appreciate that refusing to allow a trans-woman without a GRC access to a woman's facility is almost certainly *prima face* <u>indirect</u> discrimination in relation to the protected characteristic of gender reassignment within the meaning of EA 2010 s 19. It must therefore be justified as a "*proportionate means of achieving a legitimate aim*" if it is to be lawful (see EA 2010 s 19(2)(d) and Schedule 3 paragraph 28(1)). Such a justification for exclusion of the trans-person is thus required whether or not they have a GRC. That is reflected in the COP and the AEA's assertion that a justification is only required for exclusion of trans-persons from single and separate sex services of their acquired gender if they have a GRC is misconceived.

(ii) Once it is appreciated that refusing to allow a trans-woman without a GRC access to women's facilities generally constitutes *prima facie* indirect discrimination pursuant to the EA 2010 (and that justification for the exclusion is therefore required), it is clear that there are no underpinning legal errors reflected in the COP. To the contrary, the COP states the law correctly. Any remaining complaints made by the AEA in relation to specific sentences in the COP are no more than disagreements with the EHRC as to how best to communicate the relevant legal requirements in a way that is practical and understandable. How best to phrase the COP is a matter within the particular expertise of the EHRC and it is not arguable that the EHRC's judgment in that regard was unlawful.

5. Permission should also be refused, it is submitted, as the claim is out of time. The AEA raised concerns with the EHRC about its alleged errors of law in this area on 17 February 2020. The AEA has known since 23 March 2020 the EHRC's position in relation to the issues it now seeks to challenge, indeed it expressly criticised the EHRC for maintaining the position at the time. Proceedings were not issued until 17 November 2020. That is more than three months after the alleged grounds for the challenge first arose even on the most generous interpretation of limitation. No good reason has been provided to extend time.

FACTUAL BACKGROUND

Promulgation of COP

6. The EHRC's power to promulgate Codes of Practice is contained in the Equality Act 2006 s 14. A Code should contain provisions designed to "*ensure or facilitate compliance*" with the EA 2010 and "*promote equality of opportunity*" (Equality Act 2006 s 14(2)). That is what the EHRC sought to achieve in the COP at issue in this case which was promulgated in 2011. In this regard it is important to bear mind that the purpose of the COP is to facilitate understanding of and compliance with the law. It is not a statute and it is not a legal treatise. The COP is intended to help service providers and service users to understand their rights and obligations under the EA 2010 by providing an accessible

and practical explanation of the law, and guidance on how best they can comply with it.[1]

7. There was a detailed process prior to the COP's promulgation to ensure it properly reflected the law and was helpful for those using it. Prior to the promulgation of the COP an extensive process was followed to consult with and secure the views of the widest group of interested persons as possible.[2] The Draft Code was approved by the Secretary of State and laid before Parliament on 12 October 2010. It came into force on 6 April 2011.

Debates around access by trans-persons to single sex services

8. The question of when a trans-person can be lawfully excluded from a separate or single-sex service of their acquired gender has been the subject of considerable controversy over the past few years. There has been a heated, and often fractious, debate between some of those who suggest a trans-inclusive approach (treating trans-persons in their acquired gender in terms of access to single-sex organisations, institutions and services), and those who claim to represent "*natal women and girls*" who campaign for the exclusion of trans-persons, and in particular trans-women, from such organisations, institutions and services. The AEA advocate an approach that aligns with the latter camp in the debate.

9. The EHRC's position has consistently been that there are competing rights and interests at stake. The EHRC recognises that trans-persons have rights and interests in being able to access services of their acquired gender. The EHRC also recognises the importance of separate and single-sex service provision, and the potential detriment to some of their users if trans-persons are allowed to access the service of their acquired gender. That is expressly recognised in the COP at 13.60 which states "*Service providers will need to balance the need of the transsexual person for the [same or separate sex] service [of their acquired gender] and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users…*"

[1] See witness statement of Melanie Field at paragraph 5
[2] See paragraphs 7 to 13 of the witness statement of Melanie Field

10. The position that a balance is required is also reflected in the views expressed publicly by the EHRC. In 2019, the EHRC's former Chair stated **[PB/169]**: "*One only has to look at the debate about transgender rights to see how polarized this discourse has become. It's a good example of complicated issues and competing rights. We must reach a sensible accommodation to ensure that the rights of both women and the transgender community are protected.*". He stated in 2020 "*we have to acknowledge there are lots of difficult issues in relation to women-only spaces, but shouting at each other doesn't help anybody. We need to move beyond that toxic debate so talking to each other, engaging in respectful listening even if you disagree, that's the way forward*". It is not accepted that the EHRC has taken a *"partisan"* approach as the AEA asserts **[PB/184].** It has consistently stressed the difficult balance at issue and the competing rights and interests and has sought to reflect that in the COP. The fact that some, such as the AEA, may disagree with the EHRC as to how the balance should be struck does not justify its accusation that the EHRC is biased or that it is guilty of "*misconduct*" **[PB/184].**

Background to issuing of current claim

11. On 17 February 2020, AEA wrote to the EHRC **[PB/165]**. It complained about the EHRC's position on access of trans-persons to single and separate-sex services (see letter **[PB/165-169]** and annex **[PB/171-176]**). The AEA complained, *inter alia*, about the issues raised in the present case (namely the apparently "*prescriptive … language*" used by the EHRC, the reference to "*exceptional circumstances*" in which trans-persons could be excluded from single or separate sex services **[PB/168]).** The letter further accused the EHRC of being partisan, and it was noted that the EHRC is a, "*Stonewall Diversity Champion further highlights that partisanship*" **[PB/168]**. The letter concluded by asking that the EHRC's guidance be amended, as in AEA's words, there is a "*pressing need to scale-back the fervour generated by unlawful and misleading guidance, and subsequent dissemination thereof.*" **[PB/169]**

12. On 19 February 2020, Ms Sinnott, Director of the AEA, wrote again to the EHRC **[PB/177]**:

> *I would like to make clear that, despite flagging up illegalities, my sole aim is to get the guidance changed. Incorrect guidance has been displayed on EHRC website for about six years which, to my mind at least, is wholly unacceptable.*

> *I was aware that the EHRC guidance complained about in 2018 - indeed I instigated Nic Williams'/Fair Play For Women complaint about the business guidance - and knew it had been rectified. When I began to look again at the guidance, it was solely to gather material for training purposes. I was surprised when I encountered the first example of incorrect guidance and devastated when I discovered how widespread.*

13. On 23 March 2020 the EHRC replied to the AEA **[PB/178]**. The EHRC accepted that some terminology it used in its guidance was outdated **[PB/180]** and that some references to gender ought to have been references to sex. EHRC's reply stated this would be altered **[PB/181]**. As to the issues that arise in the present case, the EHRC made clear its position. Quoting from its "*Core Guidance for Business*", the EHRC stated **[PB/179]**:

> *Generally, a business which is providing separate services or single-sex services should treat a transsexual person according to the sex in which the transsexual person presents (as opposed to the sex recorded at birth), as it is unlawful to discriminate against someone because of gender reassignment. Although a business can exclude a transsexual person or provide them with a different service, this is only if it can objectively justify doing so.*
>
> *A business may have a policy about providing its service to transsexual users, but this policy must still be applied on a case-by-case basis. It is necessary to balance the needs of the transsexual person for the service, and the disadvantage to them if they are refused access to it, against the needs of other users, and any disadvantage to them, if the transsexual person is allowed access. To do this may require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice.*
>
> *Where a trans person is visually and for all practical purposes indistinguishable from someone of their preferred gender, they should normally be treated according to their acquired gender unless there are strong reasons not to do so.*

14. The AEA responded on 26 March 2020 **[PB/182]**. It specifically took issue with the quotation from the Guidance for Business and repeated the criticism of the EHRC's guidance it raises in this case (referring to the EHRC's "*overly prescriptive language*", and criticised its suggestion that while a service-provider could have a policy it should be prepared to consider matters on a "*case-by-case basis*".)

15. On 7 April 2020, AEA wrote again **[PB/184]**. The letter repeated the suggestion that the guidance promulgated by the EHRC was wrong and accused the EHRC of being "*partisan*" and engaging in "*misconduct*".

16. On 3 July 2020, the EHRC replied **[PB/186]** outlining a timetable for amendments to guidance which it had agreed to make in March. The EHRC rejected the suggestion it had acted unlawfully and reaffirmed the commitment to protecting both the rights of women and of the trans community. The EHRC again repeated its underlying analysis which is reflected in the COP **[PB/187-188]**:

> *Your query with regard to our guidance that policies [on access to single-sex services] should be applied on a 'case-by-case' basis reflects the requirement for a trans user policy for a single or separate sex service (SSS) to be a 'proportionate means of achieving a legitimate aim' (often known as the 'objective justification' test). A business should apply a policy with sufficient flexibility. This is to ensure that it is objectively justified in relation to the circumstances of a particular trans person who wishes to use their service, balancing the extent of the disadvantage they will face if excluded against the justification for the policy, taking into account all relevant facts. A blanket application of a policy is unlikely to be objectively justified in all cases. Factors such as how the service is provided may be relevant.*
>
> *Our guidance that where a trans person is visually and for all practical purposes indistinguishable' from someone of their acquired gender, they 'should' normally be treated according to their acquired gender unless there are 'strong reasons' not to do so reflects the Commission's view that in such circumstances it will be difficult to objectively justify excluding the trans person from a SSS.*

17. On 26 August 2020 the AEA sent a letter before claim to the EHRC and to the Government Equalities Office **[PB/204]**. It raised the claims made in this judicial review, and which had been previously made in correspondence, as well as other complaints that are not now pursued. The EHRC responded to the letter before claim on 23 September 2020 **[PB/262]**.

RELEVANT STATUTORY PROVISIONS

18. The relevant sections of the EA 2010 and the Gender Recognition Act 2004 are set out in the attached annex.

EXTRACT FROM THE COP

19. The following is the extract from the COP with which the AEA takes issue. The four impugned sentences are underlined, but as set out further below the EHRC submits that it is important to read the relevant sections as a whole:

> *13.57 <u>If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present.</u> However, the Act does permit*

the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate.

13.58 The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex which are otherwise provided only to people of that sex. For example, a transsexual man may need access to breast screening or gynaecological services. In order to protect the privacy of all users, it is recommended that the service provider should discuss with any transsexual service users the best way to enable them to have access to the service.

Example: *A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles.*

13.59 Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.

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

EHRC'S SUMMARY RESPONSE TO CLAIM

20. The EHRC deals below with (i) the claim that the COP is underpinned by a "*fundamental misconception*" of law and (ii) the specific sentences in the COP with which the AEA takes issues.

(i) Claim that the COP is underpinned by a fundamental error of law

21. The following is the relevant legal framework the EHRC submits:

(i) Prior to the enactment of the GRA 2004 the courts considered that "*sex*", and being "*male*" or "*female*", was biologically determined and "*fixed at birth*" by reference to

chromosomal, gonadal and genital tests (see Corbett v Corbett [1971] PR 83, 104-D-E and 106B-F and Bellinger v Bellinger [2003] AC 467 §6-49, 56-8, 62-65, 71, 77, 80-83). As commentators have suggested, such a concept of "*sex*" has been criticised, but it is the one that was reflected in the Sex Discrimination Act 1975 and now appears in the EA 2010. Subject to a person obtaining a GRC, the EA 2010 thus treats sex as "*immutable and … biologically determined*" at birth (see Monaghan on Equality Law (2nd edn 2013) §5.136-5.137). The position was recently confirmed in AP v JP [2019] EWHC 3105

(ii) A person's legal sex can be changed if they obtain a GRC pursuant to the GRA 2004 section 4. If a person obtains a full GRC they are entitled to be treated in law as being a person of their acquired gender save where a statutory provisions states to the contrary (see GRA 2004 s 9). A person's legal sex will thus be their sex as "*fixed at birth*" or their acquired gender if they have obtained a full GRC.

(iii) A trans-person without a full GRC has the "protected characteristic" of "gender reassignment" pursuant to the EA 2010 ss 4 and 7. The same is true of a trans-person with a GRC. The "*sex*" of a trans-person without a GRC, within the meaning of EA 2010 s 11, will, however, be the legal sex assigned to them at birth, while the "*sex*" of a trans-person with a GRC will be their "*acquired gender*".

(iv) Subject to any statutory defence, trans-persons (both with and without a GRC) are entitled not to be subject to discrimination in relation to the protected characteristic of "*gender reassignment*". The relevant forms of discrimination are listed in EA 2010 Part 2 Chapter 2 and include "*direct discrimination*" (EA 2010 s 13) and "*indirect discrimination*" (EA 2020 s 19). A trans-person is entitled (subject to any statutory defence) not to be treated "*less favourably … because of [their] protected characteristic*" of gender re-assignment (see s 13). They are also entitled (subject to any statutory defence) not to be subjected to a "*provision, criterion or practice*" which places them and others with the protected characteristic of gender reassignment at a "*particular disadvantage when compared to those without [the protected characteristic]*" (see s 19). That is so unless the provision, criterion or practice can be shown to be "*a proportionate means of achieving a legitimate aim*" (s 19(1)(d)).

(v) EA 2010 Schedule 3 paragraph 28 contains a statutory defence to discrimination related to gender re-assignment in relation to the provision separate or single sex services, and the impugned section of the COP gives guidance on that paragraph. Paragraph 28 states that a service provider will not be guilty of "*gender reassignment discrimination*" in relation to "*anything done*" by a person in the provision of "*separate services to people of each sex*", "*separate services differently for persons of each sex*" or "*service only to a person of one sex*" provided the "*conduct in question is a proportionate means of achieving a legitimate aim.*" The statutory defence in EA 2010 Schedule 3 paragraph 28 is separate to and distinct from the statutory defences contained in paragraphs 26 and 27. The latter permits what would otherwise be "*sex discrimination*", as opposed to "*gender reassignment discrimination*". Both defences are needed and each performs a different function. Refusing to allow a male who is non-trans tto use facilities intended for women, would be unlawful sex discrimination unless the service-provider comes within a defence in paragraphs 26 and 27. If a trans-person is refused access to the service because they are trans, or pursuant to a provision, criterion or practice that disadvantages trans-people, it is the defence in paragraph 28 to a gender reassignment discrimination claim that is potentially relevant. What has to be justified in each case will hus be different. In the former, it will be necessary for the service-provider to show that it is justified generally to exclude men from a women's facility. For the latter it will be the detriment suffered by those who have the protected characteristic of gender reassignment that must be justified.

22. The AEA's analysis sets out what is said to be the error of law underpinning the COP. It is as follows:

(i) The AEA recognise that if a trans-person with a GRC is excluded from the separate or single-sex service of their acquired gender that will constitute direct gender reassignment discrimination pursuant to EA 2010 s 13. The legally recognised sex of a transwoman with a GRC is "female". If she, unlike other females, is excluded from a women's service or facility because she is trans, that is less favourable treatment on the grounds of her gender reassignment which is a protected characteristic. Such treatment can, however, be justified pursuant to

EA 2010 Schedule 3 paragraphs 28 if it is "*a proportionate means of achieving a legitimate aim.*" The EHRC agrees with that analysis.

(ii) The AEA's position is that the exclusion of a trans-person without a GRC from a separate or single-sex service of their acquired gender is not capable of being gender reassignment discrimination under the EA 2010. The EHRC's failure to appreciate that is said by the AEA to be the fundamental error that underpins the COP. It is that argument that is misconceived, the EHRC submits.

(iii) The AEA asserts that "*if a separate or single-sex service can be justified in accordance with Schedule 3, paragraphs 26-27 EA 2010 [i.e. it is justified sex discrimination], then all those who are in law of the opposite sex can lawfully be excluded*" **[SG/§22]** (emphasis in original). The AEA thus asserts that, if it is not unlawful sex discrimination to exclude men generally from the women's toilet facilities, it cannot be gender-reassignment discrimination to exclude a trans-woman without a GRC. According to the AEA, the trans-woman without a GRC barred from using the women's toilets "*would not be suffering discrimination on the basis of the protected characteristic of [gender reassignment]. They would simply be treated in the same way as anyone else of the same legal sex (male) and excluded on that basis*" **[SG/§49(v)]**.[3] The only form of gender reassignment discrimination that arises in this context, according to the AEA, would be "*if a [trans-person without a GRC] born male but dressing as a woman was denied access to a men's changing room on that basis*" **[SG/§49(v)]**. If, however, she is refused access to the women's changing room there is no gender reassignment discrimination according to the AEA.

(iv) On the basis of the above analysis, the AEA assert that the EHRC's understanding, reflected in the COP, that excluding a trans-person without a GRC from single or separate-sex services of their acquired gender is unlawful

[3] The AEA suggests subjecting a trans-person without a GRC to less favourable treatment because they are trans may breach the prohibition on discrimination contained in Article 14 of the European Convention of Human Rights ("**the ECHR**"). The AEA considers, however, that a service provider would only need to show that the decision to subject the trans person to the less favourable treatment was not "*manifestly without reasonable foundation*", or would fail some similar generous test under a "*conventional proportionality test, giving appropriate weight and respect to the judgment of the decision-maker*", for it to be lawful **[SG/§41** and discussion **§35-41**]. It is not clear what the ECHR adds to the analysis given that ECHR Art 14 will only be of relevance if the service-provider is a public authority, and the COP is aimed at all service-provider many of which will be private parties. If the service-providers is not a public authority, the AEA's position appears to be that refusing a trans-person without a GRC access to services of their acquired gender is under no circumstances unlawful, irrespective of whether the refusal is justified.

unless it is a "*proportionate means of achieving a legitimate aim*", is based on a "*fundamental misconception*" of the law **[SG/§20]**. Specifically, it is said, the EHRC has failed to appreciate the distinction between those with and without a GRC and wrongly elides the two **[SG/§49(v)]**. It is said that the EHRC has failed to appreciate that while a trans-person with a GRC is entitled to access services of their acquired gender unless the exclusion can be justified, a trans-person without a GRC will not be the victim of discrimination on grounds of gender reassignment pursuant to the EA 2010 if they are excluded and that is irrespective of whether the exclusion is unjustified.

23. The AEA's argument is misconceived and is based on a misapplication of the EA 2010. It erroneously assumes that the only form of relevant discrimination if a trans-person is excluded from facilities of their acquired gender is <u>direct</u> gender reassignment discrimination. The error is clear form **[SGR/49(v)]** where the AEA assert that excluding a trans-person without a GRC from services of their acquired gender cannot be gender reassignment discrimination because "*To discriminate on the basis of a protected characteristic requires different treatment <u>because of that</u> protected characteristic*" (emphasis added). That is a description of <u>direct</u> discrimination. It does not appear that the AEA has appreciated that excluding a trans-person without a GRC from services of their acquired gender is almost certain to be *prima facie* <u>indirect</u> gender reassignment discrimination. It thus requires justification if it is to be lawful.

24. The EHRC sets out what it submits is the correct legal analysis below. The analysis is illustrated by a scenario in which a service station has separate toilets for men and women and requires people to use the toilets of their sex as legally recognised. In the analysis below "X" is a transwoman with a GRC; "Y" is a transwoman without a GRC; "Z" is someone legally male who is not trans. The analysis below would, however, apply equally to a trans-man seeking to access the men's toilets.

25. The EHRC submits that the correct analysis is as follows:

    (i) If Z (or anyone else regarded by the law as "male") is refused access to the women's toilets that will, in principle, be direct discrimination on grounds of sex. Z has been refused access "*because of*" his sex. The exclusion will, however, very

likely be justified "*sex discrimination*" pursuant to EA 2010 Schedule 3 paragraph 26(1).

(ii) If X is refused access to the women's toilets because she is trans, that is direct gender reassignment discrimination pursuant to EA 2010 s 13. X is legally female and she has been treated less favourably than others who are legally female "*because of*" her protected characteristic of gender reassignment. The exclusion will be lawful, but only if it is a "*proportionate means of achieving a legitimate aim*" (see EA 2010 Schedule 3 paragraph 28).

(iii) If Y is refused access to the women's toilets solely because she is regarded as being legally male, that is not direct gender reassignment discrimination. Y was refused access not "*because of*" her protected characteristic of gender reassignment but because the service provider refuses anyone it considers "*male*" access to the women's toilets.

(iv) Y's exclusion from the women's toilets, however, is almost certain to be *prima facie* indirect gender reassignment discrimination and will thus be unlawful unless the exclusion can be shown to be "*proportionate means of achieving a legitimate aim*". That is so for the following reasons:

a. A decision by a service-station to insist that customers use the toilets of their legal sex is a "*provision, criterion or practice*" ("**PCP")** within the meaning of EA 2010 s 19(1) and 19(2).

b. The PCP is applied to all customers. EA 2010 s 19(2)(a) is thus satisfied.

c. The PCP is almost certainly one which places those with the protected characteristic of gender reassignment at a "*particular disadvantage*" within the meaning of EA 2010 s 19(2)(b)). If one considers the "*pool*" of those affected by the PCP, it will be those whose legal sex is male who will all be refused access to the women's toilets. However, it is very unlikely those whose legal sex is male, but who are not trans, will have any legitimate concerns, or be adversely affected, by a requirement that they use the men's toilets. By

contrast many transwomen, if required to use the men's toilets, are likely to be significantly adversely affected. For example, a transwoman, even if she does not have a GRC, but who lives and operates socially as a woman, and who many others may believe is a woman, may well find it distressing and humiliating to be forced at a service station to use the men's toilets. There will be no similar, or indeed any, disadvantage suffered by those whose legal sex is male but who do not have the protected characteristic of gender reassignment. The PCP is therefore *prima facie* indirectly discriminatory as it places those with the protected characteristic of gender reassignment at a particular disadvantage.

d. The PCP may still be lawful. The owner of the service station would, however, need to show that the PCP is a "*proportionate means of achieving a legitimate aim*" within the meaning of EA 2010 s 19(2)(d). In addition, if the policy is a "*proportionate means of achieving at legitimate aim*", the owner will have a defence pursuant to EA 2010 Schedule 3 paragraph 28 which will operate in essentially the same way as s 19(2)(d). If, as in the example used in the COP at paragraph 13.58, "*the privacy and decency of all users can be assured by the provision of separate cubicles*", and without it being necessary to exclude transwomen from the women's toilets, the harm caused to those who are trans of requiring everyone to use the toilets of their sex as legally ascribed at birth may not be justified. Or it may be that in other cases, or for some different facility, that exclusion of trans-persons is justified. Ultimately, and as set out in the COP paragraph 13.60, that is a question of balancing the "*needs*" and potential "*detriment*" of the different service-users in any particular case.

26. Contrary to AEA's claim, the COP is thus correct in stating that excluding a trans-person from the service provided for their acquired gender will almost certainly be unlawful unless the service provider can show the exclusion is a "*proportionate means of achieving a legitimate aim*" (see COP paragraph 13.57). That is correct whether or not the trans-person has a GRC. Once that is appreciated it is unarguable that the COP s premised on a "*fundamental misconception*".

(ii) Challenge to the detail of the COP

27. If the above analysis is correct, the AEA's primary case challenging the COP fails. The remaining criticism of paragraphs 13.57-13.60 of the COP is to the manner in which the EHRC has chosen to word particular sentences in the Code and for the reasons set out below there is no arguable error of law in that wording.

Applicable principles

28. In respect of this aspect of the AEA's challenge the EHRC submits that the following principles apply:

(i) The staring point is that the EHRC's power to promulgate Codes of Practice is contained in the Equality Act 2006 s 14 and a Code should contain provisions designed to "*ensure or facilitate compliance*" with the EA 2010 and "*promote equality of opportunity*" (Equality Act 2006 s 14(2)). The statutory purpose of the COP challenged in this case was to meet those ends by providing practical guidance to service-providers, members of the public, public bodies and others who need to apply the law to understand what the law requires and how they can ensure compliance with it, as well as assisting lawyers and the courts interpreting the EA 2010. The COP should be read in that light and not as if it is a statute.[4]

(ii) If a Code of Practice misstates the law, it can, of course, be corrected by the Courts. Applicable sections of a Code of Practice should, however, be read as a whole (in this case that is paragraphs 13.57-13.60). In particular, it would be wrong to read, and forensically analyse, individual sentences of the COP in isolation and out of context.

(iii) In promulgating the COP the EHRC considered comments from a variety of expert stakeholders from the public sector and voluntary sector.[5] It then took a view how best to succinctly and accurately summarise the legal regime in a way that would be practical and comprehensible to those using the Code. Prior to

[4] See *Lawson, Mottram and Hopton, Re (appointment of personal welfare deputies)* (Rev 1) [2019] EWCOP 22 §16 in which it was stated by the Court of Protection in respect of the Mental Capacity Act Code of Practice that "*It is axiomatic that the Code of Practice is not a statute. It is an aid to the interpretation of the law, not a primary source of law.*" It is submitted that applies equally to the Codes promulgated by the EHRC.

[5] See witness statement of Melanie Field at paragraph 9 - 11

promulgating the COP, the EHRC submitted a draft to the Secretary of State for approval. The Secretary of State approved the draft and laid a copy before Parliament. Both Houses had an opportunity to scrutinise the Code before it came into force. The EHRC respectfully submits that in the light of that process, and the particular expertise of the EHRC in this area, the Court should be slow to interfere with the EHRC's assessment of how best to communicate practical advice to those who use the COP.

Relevant sections of the COP

Paragraph 13.57

29. The AEA objects to the first sentence of COP paragraph 13.57 which states: "*If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present*" **[SG/§49(i)]**. The next two sentences of the COP state: "*However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim*."

30. The AEA's objection to the first sentence appears to be premised on its misunderstanding of the law dealt with above (see **SG/§49(i)-(v)**). If, for the reasons set out above, the AEA's analysis of the law is erroneous, it is not clear what objection can properly be taken to COP paragraph 13.57. It should not be contentious that service providers should respect the gender identity of a trans-person, for example by using their preferred pronouns, in the context of service provision. The second and third sentences of paragraph 13.57 make it clear, however, that while service providers should respect a trans-person's gender identity, the EA 2010 permits service providers to offer a different service or to exclude a trans-person from the service of their acquired gender if this can be objectively justified. That is the start of the section to which AEA objects. It sets out the law correctly and makes clear to anyone reading the COP what is the applicable legal test. On no proper basis can it be said that the paragraph, taken alone or with the rest of the section, misstates the law.

Paragraph 13.58 and example

31. The AEA has no apparent objection to paragraph 13.58 which explains the circumstances in which a trans-person may need to access services of their "birth sex" (for example gynecological services). Nor does it object to the example which follows and states: "*A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles*."

32. Indeed, it is clear from the example, as well as the rest of the relevant section of the COP, that much of the AEA's criticism of the Code is simply misplaced. The AEA repeatedly asserts that the COP states that a trans-person is "*automatically*" entitled to access a single-sex or separate sex service **[see §SG/49(i), (ii), (iv)]**. That is a statement made nowhere in the COP and is obviously inconsistent with it. Instead, as paragraph 13.57 and 13.60, and the example in paragraph 13.58 make clear, a trans-person can be excluded from single-sex or separate sex services if that is "*a proportionate means of achieving a legitimate aim*". As the example illustrates, the exclusion is unlikely to be satisfied if inclusion is possible while the "*privacy and decency of all users*" is respected, but may be justified in other cases. That is an entirely accurate description of the law.

Paragraph 13.59

33. COP paragraph 13.59 states that "*Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary*." The AEA objects to that sentence **[SG/§51-54]**.

34. The context, as set out above, is the statement at paragraph 13.57 that a trans-person can be excluded from a single-sex service if that is a proportionate means of achieving a legitimate aim. The EHRC considers that where someone is "*indistinguishable from a non-transsexual person of that gender*" they should "*normally*" be treated according to their acquired gender, and that, in order to establish it is proportionate to exclude them from a service, "*strong reasons*" will be required. Returning to the example of the toilet facilities in a service station, the EHRC does consider that "*strong reasons*" would be required for insisting that a trans-woman who is "*for all practical purposes*

indistinguishable from a non-transsexual person of that gender" use the men's toilets. The EHRC consider it is helpful to service users and service providers to know that is the EHRC's view. The fact that reference to those "*indistinguishable from a non-transsexual person of that gender*" was made in a case in the House of Lords in a different context prior to the enactment of the EA 2010 is nothing to the point **[SG/§52]**. It is unarguable that the view expressed by the EHRC as to what is "*normally"* required where a trans-person is "*indistinguishable from a non-transsexual person of that gender*" is erroneous. Including that view in the COP is plainly not "*ultra vires and unlawful"* **[SG/§54]**.

Paragraph 13.60

35. It is notable that the AEA does not discuss the second half of paragraph 13.60. It states: "*Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users…"* That is plainly a correct assessment of the law and entirely unobjectionable. It also makes clear, contrary to the AEA's repeated claim, that at no stage is it suggested in the COP that a trans-person has an "*automatic"* right to access facilities of their acquired gender. As the COP states, the test is whether their "*exclusion is a proportionate means of achieving a legitimate aim*" and that is a question of "*balance[ing]*" the "*needs*" and "*detriment*" not only of trans-persons but other service-users who may be affected.

36. The AEA objects to the first part of the first sentence of paragraph 13.60 which states "*As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible …*" **[SG/§48]**. Read in the context of this section of the COP, and indeed the COP as a whole, that clearly reflects the law. The principle of equal treatment requires any exceptions to the prohibition of discrimination within the Equality Act 2010 to be construed as narrowly as possible. The first sentence of paragraph 13.60 simply reflects this principle and any suggestion that it is unlawful is unarguable.

37. The AEA also objects to the second part of the first sentence of paragraph 13.60 which states "*the denial of a service to a transsexual person should only occur in exceptional circumstances*." **[SG/§48, 49(i), (iv), (vi), (vii)]**. As set out above, the start of the relevant

section makes clear that a trans person can be excluded from a single-sex service if it is a proportionate means of achieving a legitimate aim. That is the legal test. The EHRC considers that the test is generally likely to be met only in "*exceptional circumstances*". That is often the case where otherwise discriminatory conduct must be justified and the EHRC consider that exceptions in the Act permitting discrimination are likely to be construed narrowly by the courts. The EHRC also considers that, generally speaking, service providers will be able to operate services which do not bar trans-persons from the services of their acquired gender while still catering for the needs, and respecting the rights, of others. There may, of course, be cases where that is not possible, but the EHRC consider it helpful to indicate that such instances are likely to be the "*exception*" rather than the rule. It is unarguable that in reaching that view, or expressing it in the COP, the EHRC has acted *ultra vires*.

38. Finally, the AEA object to the second sentence of paragraph 13.60 which states " *A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances*" **[SG/§48]**. Again, the EHRC submits that is a helpful summary of the legal position. The EHRC consider that the advice on having a "*policy*" applicable to transsexual users but considering "*individual circumstances*" as and when they arise, best ensures that service-providers act in a way that is lawful. The EHRC also consider that to be an accurate way to explain, in lay terms, how a court is likely to approach cases. For example, suppose a women's refuge has a general policy that it will provide services to transwomen, but will not allow transwomen (including those with a GRC) to stay overnight in the refuge because of concerns about the impact on other service users. As the COP makes clear service-providers can have such policies in this area. However, if a transwoman comes in the middle of the night with young children fleeing from a violent male partner (and, for example, she is known to the staff and there are no safety concerns about her, or it may be the refuge is empty that night), it is the EHRC's view that the refuge should at least consider whether it is appropriate to refuse to allow her and her children to stay the night. The EHRC is entitled to reach that conclusion and it does not come close to being *ultra vires* that the EHRC has chosen to include the impugned sentence, or frame it in the way it has, in the COP.

TIME BAR

39. Claims for judicial review must be brought "*promptly and in any event not later than 3 months after the grounds to make the claim first arose*" (CPR rule 54.5(1)). AEA asserts in its Claim Form that the date of the decision under the challenge is "*23 September 2020*", when the EHRC responded to the AEA's letter before claim, and it is also stated that the refusal to amend the COP is a "*continuing breach of the law*" **[PB/8]**. Neither statement is correct.

40. In relation to secondary legislation which is made on a particular date, but continues to be applied, the Courts have made clear that the legislation should not be regarded as a "*continuing act*" that can be challenged whenever a claimant chooses. There is no reason to treat a challenge to a COP any differently (and indeed in this case the COP was laid before Parliament before it came into force much like secondary legislation). In relation to subordinate legislation there are two possible dates for calculating limitation which depend on the nature of the challenge. If the challenge is a "*person specific*" challenge (i.e. one brought by a person who claims they were adversely affected by the application of the legislation) a claim should be brought within three months of the person in question being affected (see *R (Badmus) and others v Secretary of State for the Home Department* [2020] EWCA Civ 657 §63 and discussion §59-87). If the challenge is brought in the "*abstract*" (i.e. by an NGO or other body that is not itself directly affected by legislation), the claim should be brought within three months of the legislation being made (ibid).

41. There is an argument that the present case is an "*abstract*" challenge to the COP, and the claim should have been brought within three months of the Code being made. The EHRC does not, however, wish to discourage those who consider that parts of a COP are unlawful to enter correspondence with the Commission. It would therefore invite the Court to take a more generous approach to limitation. It cannot, however, be correct that those who wish to challenge a Code can bring a claim at any time of their choosing. The EHRC submits that, at the latest, once a person becomes aware of what they consider to be an unlawful provision in a Code they should draw it to the EHRC's attention without delay and once it is apparent that the EHRC is not intending to amend the Code as requested, they should issue proceedings within three months.

42. As set out above, the AEA claim to have identified the EHRC's misinterpretation of the law sometime prior to it writing to the EHRC on 17 February 2020. On 23 March 2020 the EHRC wrote to AEA making clear its position on the matters now raised (see above paragraph 13). The AEA wrote back immediately on 26 March 2020 noting that it disagreed with the EHRC (see above paragraph 14). The EHRC's position was again repeated in the letter of 3 July 2020 (see above paragraph 16). The fact that the EHRC repeated its position for a third time in the response to the letter before claim of 23 September 2020, does not make that the date the grounds of challenge first arose. The grounds to make the present claim first arose on 23 March 2020 when the EHRC made its position clear, and proceedings should have been issued by 22 June 2020 at the latest. No good reason is put forward for the failure to do so.

COSTS CAPPING

43. For the reasons set out above, the EHRC submits that permission should be refused. If that is accepted the issue of cost-capping does not arise. If, however, permission is granted, the EHRC does not, in principle, object to a cost-capping order. The caps suggested by the AEA are, however, plainly inappropriate. As of 9 November 2020 the AEA had raised £60,075 towards the present legal challenge **[PB/42]**. As of 8 December 2020 the figure is £65,465. No doubt more could be raised if permission were granted. AEA nevertheless suggest that, if its claim fails, its costs liability should be capped at £5,000 **[PB/39]**. That is plainly not a fair or just order.

44. The EHRC no doubt has greater resources than the AEA. Its budget is, however, finite and has been subject to significant cuts since the EHRC was established. The budget is provided from public funds to meet a range of statutory duties under sections 3 and 8 to 12 of the Equality Act 2006. The EHRC's broad mandate includes promoting equality of opportunity, working towards the elimination of unlawful discrimination for all nine protected characteristics and promoting protection of and compliance with the European Convention on Human Rights. As the United Kingdom's National Human Rights Institution (as recognised under the Paris Principles, UN Resolution 48/134), the Commission is also required to promote and seek to ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a signatory. The work the EHRC undertakes to achieve its statutory objects includes research and inquiries into equality and human rights

issues, Parliamentary work, investigations, regulatory compliance work, enforcement, litigation, and the production of guidance.

45. The AEA is entitled as part of its wider political campaigning in relation to the issues raised in this case, if it is arguable, to pursue a claim against the EHRC. There is, however, no reason why that claim should be subsidised from public funds, and to the detriment of the EHRC performing its other public functions, to the extent proposed by the AEA. It is not an appropriate order that, despite AEA having raised over £65,000 to date for this litigation (and no doubt with the ability to continue to raise funds), that the EHRC should be able to claim only £5,000 towards its legal costs if AEA's claim turns out to be a bad one. The EHRC suggest that an appropriate order would be for both sides costs to be capped at £25,000 for the purpose of any adverse costs order. Such an order would ensure that AEA's potential costs liability is limited, but would ensure that a reasonable proportion of the over £65,000 AEA has already raised for this litigation will be available to cover the EHRC's costs if AEA's claim is ultimately rejected. The same costs cap should be applicable to the EHRC should its case be rejected.

CONCLUSION

46. For the reasons identified above, it is respectfully submitted that permission should be refused. The EHRC seeks its costs in preparing its response to the claim, as set out in the Costs Schedule accompanying these Summary Grounds of Resistance.

DAN SQUIRES Q.C.
Matrix Chambers

IAN P BROWNHILL
39 Essex Chambers

9 December 2020

CLAIM NO: CO/ 4116 /2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

AUTHENTIC EQUITY ALLIANCE C.I.C.

Claimant

-and-

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

REPLY TO DEFENDANT'S SUMMARY GROUNDS

Introduction: Claim plainly arguable

1. For the reasons set out in the Claimant's Statement of Facts and Grounds (SFG) and below: (i) the Claimant's claim is plainly arguable on all grounds; and (ii) it raises an issue of general public importance. Permission should be granted for both these reasons, and a CCO should be made in the terms as requested.

Defendant's Summary Grounds deliver no knockout blow

2. The Defendant has filed with its Acknowledgement of Service Summary Grounds of Resistance ("DSG") running to some 33 pages with Appendix. Despite their length, a proper reading of those grounds only serves to underline why this claim is both (i) plainly arguable and (ii) of general public importance, such that permission should be granted and a CCO made in favour of the Claimant.

3. The Defendant's response to the claim is marked by its mischaracterisation of the claim as one based on "*a basic misunderstanding of applicable discrimination law*". Indeed the Defendant asserts (without any evidential basis for so saying other than a

proposed "scenario") that exclusion of a transsexual person without a Gender Recognition Certificate ('GRC') from a female-only toilet or changing facility, is "*almost certain*" to result in "*prima facie*" indirect discrimination – see §4(i)-(ii) and more generally §4; §§23-26 This is simply not the case for the reasons set out shortly below.

Point 1: ***supposed misunderstanding re. indirect discrimination is no error at all***

4. The Defendant seeks to argue – see §4; and §23-§26 of the DSG that the Claimant's argument is "*misconceived*", based upon a "*misapplication*" of the EA 2010 and upon a failure to appreciate that "*excluding a trans-person without a GRC from services of their acquired gender is <u>almost certain</u> to be <u>prima facie</u> indirect gender reassignment discrimination*" (emphasis added).

5. Rather than undermining the Claimant's claim this flawed and specious argument underlines the strong arguability of the claim.

6. The Defendant's argument appears to be that exclusion of a transsexual person without a GRC from any "*female only*" facility will necessarily place transsexual persons (presumably the EHRC means male-to-female transsexual persons without a GRC) at a particular disadvantage because while a non-transsexual man would not suffer any discomfort or prejudice being required to use all-male facilities, a male-to-female transsexual person at any stage of their gender reassignment process, short of obtaining a GRC, would necessarily be so prejudiced or be caused discomfort or distress. This does not follow.

7. First, the Defendant's argument wrongly assumes that the entire pool of persons sharing the protected characteristic (i.e. transsexual persons) would suffer detriment irrespective of their individual circumstances. But that is by no means the case. It cannot simply be assumed that a male-to-female transsexual person without a GRC would objectively be distressed or caused discomfort by their use of a male-only toilet or changing facility - a use to which no other person could object.

8. Second, the Defendant's argument proceeds on the false assumption that the choice of facilities at any particular location (the example given in the proposed scenario is a service station) is, or is likely to be, limited to the binary choice between a male-only and a female-only facility. In fact the choice is rarely binary. As is explained in the recent Government open consultation Call for Evidence summary[1]:-

"*In recent years, there has been a trend towards the removal of well-established male-only/female-only spaces when premises are built or refurbished, and they have often been replaced with gender-neutral toilets. This places women at a significant disadvantage. While men can then use both cubicles and urinals, women can only use the former, and women also need safe spaces given their particular health and sanitary needs (for example, women who are menstruating, pregnant or at menopause, may need to use the toilet more often).*
Women are also likely to feel less comfortable using mixed sex facilities, and require more space.
….
The government wants to ensure dignity and respect for all. The Equality Act provides that sex, age, disability and gender reassignment are protected characteristics. This does not mean that gender-specific toilets should be replaced with gender-neutral toilets. But there should be balanced consideration of how the needs of all those with protected characteristics should be considered, based on the mix of the population and customer demand.

9. Two short points follow from this:-

(i) there is in fact already widespread provision of both disabled (accessible) and mixed-sex facilities across the private and public sector which frequently exist alongside, and not in substitution for, exclusively male and exclusively female facilities.

(ii) it does not follow from the fact that a transsexual person is lawfully excluded from a women-only space that they are "forced to" or "required to" or "must use" male-only facilities. It is not a question of compulsion at all, only whether the exclusion, if *prima facie* discriminatory, is justified by reference to a legitimate aim.

[1] https://www.gov.uk/government/consultations/toilet-provision-for-men-and-women-call-for-evidence/toilet-provision-for-men-and-women-call-for-evidence 31 October 2020

10. It is therefore quite wrong (and misleading) of EHRC to argue that, what is likely to be entirely lawful and proportionate protection of women-only spaces under the Act (and in accordance with the Government's approach above), is "*almost certain*" to be "*prima facie"* indirect discrimination against transsexual persons on the erroneous basis that a male-to-female transsexual person without a GRC would thereby be "forced" to use the men's toilets (§25(iv)c of the DSG). Indeed if this false assumption (that the usual choice is binary between either all-male or all-female provision[2]) is what has informed the guidance in the Code which the EHRC seeks to defend, then it is yet a further reason to consider that the Guidance is flawed and should be quashed/ declared unlawful.

11. The Claimant would further observe that there is no evidence at all that the Defendant's rationale for promulgating the Code in 2011 in the terms it did was to avoid indirect discrimination against transsexual persons who did not have a GRC and who were "forced" to use facilities designated for their birth sex. The argument and scenario put forward is nothing more than an (unsuccessful) attempt at *ex post facto* rationalisation.

Point 2: Proportionate means of achieving a legitimate aim

12. In any event, even if the choice at any particular location was binary: i.e. male-only or female-only (which by reason of the existence of the requirement to make reasonable adjustments to allow disabled persons to access facilities it almost never is) the Claimant's case is that a proper interpretation and application of the Equality Act 2010 will have the consequence that a service provider will <u>almost always</u> be able to justify as lawful (a proportionate means of achieving a legitimate aim) the exclusion of a male-to-female transsexual person from a female-only toilet or changing room on grounds of the protection of the rights (dignity, privacy and safety) of women.

[2] If nothing else the choice is not binary because of the obligation on service providers to provide accessible mixed sex disabled facilities. But in fact service providers such as those at service stations frequently provide both mixed sex and single sex facilities. Where there is limited space (e.g. in a non-motorway service station) the usual default is a mixed sex/disabled facility.

13. The claim of "*prima facie*" indirect discrimination against transsexual persons (if such indirect discrimination exists at all) is not a trump card. It yields to a proper balancing exercise between competing rights. When such an exercise is carried out, a decision-maker is entitled to conclude that the exclusion of a male-to-female transsexual person without a GRC from a female-only facility is a proportionate means of achieving a legitimate aim (the protection of rights of women) provided proper consideration has been given to the availability of the range of other facilities (male, disabled and mixed-sex) to which the male-to-female transsexual without a GRC, may have access. That balancing exercise will necessarily balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users (in particular women) and any detriment that may affect them if the transsexual person has access to the service. That balance between likely detriment to women who wish to be able to use women-only facilities, may well, in the majority of cases, outweigh any detriment to any individual transsexual person without a GRC who is denied access to such facilities, not least because of the usual availability of alternative facilities of some description (e.g. mixed-sex facilities) and the fact that a greater number of women will be adversely affected if the exclusion is maintained, than the relatively small number of transsexual persons.

14. The DSG actually reinforce and repeat the flawed approach encapsulated in the Code. The Claimant's case is that such arguments when presented as part of a Statutory Code are tantamount to an effective fetter on the discretion of decision-makers who are obliged to have regard to it, because the impugned paragraphs of the Code imply that the law requires a particular approach when it does not. In particular it would simply be erroneous for a decision-maker to proceed on the basis that the exclusion of a transsexual person without a GRC would "*almost certainly*" amount to "*prima facie*" direct or indirect discrimination, when this is simply not the case.

15. Thus the impugned Guidance, such as:-

"If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, ***they should treat transsexual people according to the gender role in which they present****."*[3]*;*

is entirely inapposite and not a proper reflection of the law.

16. Although the Defendant's skeleton appears to concede that "*Ultimately the issue is of balancing the "needs" and potential "detriment" of the different service users in any particular case*," the Guidance in the Code does not reflect this balance nor the fact that it is entirely lawful to adopt a policy of general application (e.g. single-sex provision of toilet facilities) without requiring individualised case-by-case assessment.

17. Put shortly, the Guidance in the Code is unlawful because it implies quite wrongly, that denial of access to female facilities of transsexual persons requires exceptional justification, and/or requires the service provider to become engaged in (a time consuming and costly) case-by-case assessment of each individual case, when in fact a general policy (properly arrived at by balancing the competing rights, detriments and harms) will usually be entirely lawful and in accordance with Schedule 3 paragraph 28 of the Equality Act viz.

"(1) A person does not contravene s.29, so far as relating to gender reassignment discrimination only because of anything done in relation to a matter within subparagraph 2[4] ***if the conduct in question is a proportionate means of achieving a legitimate aim****"*

18. The extracts from the Guidance in the Code already summarised in the SFG illustrate this lack of balance/ misrepresentation of the legal position in the Guidance but in particular the following extracts are repeated:-

- ***13.57 [Service Users] should treat transsexual people according to the gender role in which they present.***

[3] EHRC Statutory Code of Practice: Services, public functions and associations, paragraph 13.57 -13.60

[4] e.g. the provision of a service only to persons of one sex

- ***13.59 [transsexual persons] should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.***
- ***13.60 any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.***
- ***13.60 [any policy should be applied] on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances***

Point 3: Arguable error of law in how the Guidance in the Code is expressed

19. The Defendant seeks to argue (see §27 DSG) that "*if the above analysis is correct* [which the Claimant for reasons above says it is not] *the AEA's primary case challenging the COP fails. The remaining criticism of paragraphs 13.57-13.60 of the COP* [discloses] *no arguable error of law*". The point being made appears to be that matters of emphasis in the wording of the Guidance in the Code are not the proper subject matter of judicial review. But the Claimant's case is not about different shades of meaning or subtle differences in interpretation. Rather it is a challenge to the lawfulness of particular paragraphs of the Guidance in the Code which frankly misrepresent the law and will encourage (and have encouraged) an incorrect and unlawful approach to service provision which is likely to be significantly to the disadvantage of women and their protected rights.

Point 4: Delay not a bar to the claim

20. The Defendant seeks to argue at §5 DSG that the claim is out of time even though:-

    (i) the Guidance remains current and has not been amended (and therefore there is a continuing breach of the law);

    (ii) the Claimant has properly sought through correspondence to persuade the Defendant to withdraw its guidance but was only met with unequivocal refusal when the Defendant made the decision under challenge, namely 23rd September 2020 in its pre-action response. That is the decision under challenge and is in time.

    (iii) insofar as the Defendant contends (see §42 DSG) that proceedings should have been issued by 22nd June 2020 at the latest (i.e. three months after

EHRC's letter of 23rd March 2020) then the Claimant seeks an extension of time from 22nd June 2020 to the date of issue on the grounds that:-

(a) the Claimant has brought what it considers to be unlawful provisions in the Code to the EHRC's attention as soon as possible;

(b) the Claimant has engaged in entirely appropriate pre-action correspondence (having regard to the risks and costs of litigation) to seek to persuade the EHRC of the manifest error of law contained in its guidance;

(c) the letter of 23rd March 2020 was not a reasoned response to the challenge but merely a recitation of the EHRC's guidance at https://www.equalityhumanrights.com/en/advice-and-guidance/core-guidance-businesses. It did not answer or even properly engage with the complaints made as the Claimant's subsequent letters of 26th March, 7th April and 23rd April make clear.

(d) the first time that the Defendant made it unequivocally clear that it would not amend the Guidance in the Code despite having the error(s) brought clearly to its attention was on 23rd September 2020.

(e) in all the circumstances it would be just to extend time. There is no detriment or delay to good public administration caused by allowing the claim to proceed or in granting the declaratory relief sought, neither is there any legal uncertainty created by granting the relief sought. On the contrary, it would give clarity to the law in this complex field and enhance the standing of the Code.

Point 5: Costs Capping Order

21. The Defendant at §43 of the DSG does not in principle object to a CCO if permission is granted (as the Claimant says it should be). It may properly be inferred that the EHRC accepts that the matters raised by the claim are matters of general public importance since they go directly to the protection of rights of both women and transsexual persons from unlawful discrimination.

22. The Defendant wrongly argues that the caps suggested by the AEA are "*plainly inappropriate*". In fact:-

    (i) they mirror the standard CCOs that are made in judicial review cases governed by the CPR where the Aarhus convention applies – see CPR 45.43;

    (ii) the Defendant acknowledges that "*The EHRC no doubt has greater resources than the AEA*"; and

    (iii) the Defendant has chosen to instruct not only a leading silk in public law, but also a junior.

23. There is a stark inequality of financial resources which is properly redressed through the cost-capping mechanism. It is both unfair and unreasonable for the Defendant to expect the Claimant's lawyers to conduct this litigation of general public importance at a significant financial loss or to expose the Claimant itself to a significant cost liability. The proper order to make in all the circumstances is either that initially sought (a costs cap of £5,000), or taking into account the funds raised for the litigation by crowdfunding, an order that the Claimant shall not be exposed to an adverse costs liability of more than £10,000. Thus an order is sought in the following terms:-

    (i) the Claimant shall not be liable for any adverse costs greater than a total sum of £5,000 [alternatively £10,000] inclusive of VAT.

    (ii) the reciprocal cap on the Claimant's recoverable costs is £35,000.

24. For reasons given above permission should be granted as should a CCO in the above terms.

JEREMY HYAM QC

8th January 2021

CLAIM NO: CO/ 4116 /2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

AUTHENTIC EQUITY ALLIANCE C.I.C.
Claimant

-and-

COMMISSION FOR EQUALITY AND HUMAN RIGHTS
Defendant

CLAIMANT'S SHORT REPLY TO DEFENDANT'S SUMMARY GROUNDS

JEREMY HYAM QC

1 Crown Office Row

London

Russell-Cooke Solicitors
2 Putney Hill
London
SW15 6AB

Ref: 12/MTS/180107.1

Michael Stacey

CLAIM NO: CO/ /2020

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:-

THE QUEEN
(ON THE APPLICATION OF
AUTHENTIC EQUITY ALLIANCE C.I.C)

Claimant

AND

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

WITNESS STATEMENT OF
ANN MARIE SINNOTT

I, **ANN MARIE SINNOTT** of Kemp House, 152-160 City Rd, London, EC1V 2NX WILL SAY AS FOLLOWS:

Introduction

1. I am the founder of Authentic Equity Alliance C.I.C. ("AEA") which is a community interest company ("CIC") registered in England and Wales with company number 11596085. I am currently the sole director of AEA. I have full knowledge of the way in which AEA operates and the purposes for which it was set up.

2. I make this statement in support of AEA's application for permission to apply for judicial review and in support of its application for a costs capping order in respect of the proceedings.

3. I am authorised by AEA to make this statement, the contents of which are derived from my own knowledge, save where the contrary is expressed, in which case I identify the source of my knowledge. The facts and matters to which I refer in this statement are true to the best of my knowledge, information and belief.

4. In this statement I refer to an accompanying exhibit of documents, being true copies of documents to which I shall refer in this witness statement. Numbers in square brackets below are references to pages in that exhibit. The page numbers are those in the electronic bundle filed with the Claim Form.

5. The structure of this witness statement is as follows:

- Part 1: Background to AEA
- Part 2: Background to this application for permission to apply for judicial review
- Part 3: Examples of public, private and voluntary sector organisations adopting EHRC's unlawful guidance
- Part 4: AEA's application for a costs capping order

PART 1: BACKGROUND TO AEA AND ITS APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

Background to AEA

6. Prior to founding AEA, I served as a Cambridge City Councillor for more than four years. I was a member of several committees, including Chair of Community Services and Vice Chair of Strategy & Resources. I was also Lead Councillor on Domestic Abuse and Sexual Violence and I was instrumental in the Council's adoption of tackling domestic violence/abuse as a strategic priority. I founded the Cambridge Community Forum on Domestic Abuse & Sexual Violence, as well as the Mawson Road Mosque Neighbourhood Forum based in the ward that I represented.

7. In May 2018, I was re-elected as Cambridge City Councillor for a further four-year term. Five weeks later, I learned that Cambridge City Council's equality policy breached the Equality Act 2010 ("EA 2010"). I repeatedly called on the Council to rescind and rewrite its policy to bring it into compliance with the law but, unfortunately, the Council refused. I resigned and made an official complaint to the Equality and Human Rights Commission as a result of which Cambridge City Council subsequently amended its equality policy to make it compliant with the EA 2010.

8. As set out in further detail below, I have learned from my own research that EHRC guidance has been widely accessed by and further disseminated to a range of other organisations in the public, private and voluntary sectors and is reflected in the policies of many organisations. It is apparent from these policies that there is widespread misunderstanding of equality legislation in relation to the single-sex exception, to the potential detriment of natal females. The confusion concerning the application of the single-sex exception was acknowledged by the House of Commons Women and Equalities Committee in its report "Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission" (HC 1470). I exhibit at **[76 – 84]** an extract from that report, section 7 entitled "Balancing rights in single-sex services". I also exhibit at **[94 – 124]** a transcript of the oral evidence before the Women and Equalities Committee meeting on 31 October 2018. In particular, Questions 5 **[98]** and 52 - 54 (and the corresponding answers) **[120]** are illustrative of the widespread confusion regarding the clarity of the law and the scope of the single-sex exception. They demonstrate the need for clarification, particularly since some service providers are afraid to invoke the single-sex exception given that they lack clarity in relation to it.

9. I founded AEA in September 2018. As a community interest company, AEA's designated community is natal women and girls. AEA's aim is to promote and further the personal and professional interests of natal women and girls. Endeavouring to ensure that existing legislation is applied correctly, is a means to protect the interests of AEA's designated community.

AEA's purposes and activities

10. AEA's primary purpose is to benefit natal females. Its aim is not to produce a return for shareholders. It was for that reason that the legal structure of an asset-locked CIC limited by guarantee was chosen. AEA does not have shareholders. AEA was incorporated on 28 September 2018, began incurring costs in February 2019 and was publicly launched in October 2019.

11. AEA does not have employees as yet but it does have a team of volunteers to assist with administrative tasks, mailshots, research and also with the staging of AEA's trial equality legislation training workshops and talks held during AEA's pre-launch period.

12. AEA's community interest statement (**[125]**) defines its community as "female members of particular disadvantaged groups as identified by the Equalities Act 2010 (EA2010) Protected Characteristics". AEA carries on its activities to provide benefit to females in the EA 2010 protected characteristics of 'Age', 'Disability', 'Pregnancy and maternity', 'Race', 'Sex' and 'Sexual orientation'. I should clarify that AEA also carries on activities to provide benefit to females in the protected characteristic of religion and belief but this is not currently detailed in AEA's community interest statement as it was omitted in error. AEA is in the process of correcting the position with Companies House.

13. AEA has three strands of activity to benefit its designated community:

- Strand 1: the provision of equality legislation training;
- Strand 2: the provision of conferences and workshops; and,
- Strand 3: the publication of books or other material relevant to or of interest to AEA's designated community.

Currently, only Strand 1 is active. Although a provisional date of March 2021 was displayed on AEA's website for the launch of conferences under Strand 2, as a result of the coronavirus pandemic that has been postponed until March 2022. Strand 3, AEA's publishing arm, was always a future aim. However, a range of research reports on issues relevant to AEA's designated community are provided on AEA's website.

Training on equality legislation

14. Strand 1 of AEA's activities is the provision of in-house training for commercial and voluntary organisations and also the hosting of training workshops. AEA's training has a particular focus on the protected characteristic of sex and the application of the single-sex exception, as detailed in the EA 2010 in Schedule 3, paragraphs 26, 27 and 28. The single-sex exception is crucial to enable service providers to lawfully provide single-sex services and single-sex facilities, such as toilets and changing facilities, provided the provision is a proportionate means to achieve a legitimate aim. AEA's training also includes the interplay between the Gender Recognition Act 2004 ("GRA 2004") and the EA 2010, as well as relevant Articles of the European Convention on Human Rights.

15. AEA's training workshops are designed to provide attendees with: (i) an understanding of the law in relation to the single-sex exception and where/when the single-sex exception can be applied; (ii) an understanding of the complex interplay between protected characteristics and an enhanced ability to fairly balance competing interests; and, (iii) an understanding of how to navigate conflicts of interest and thereby be more equipped to mitigate discord and promote inclusion. Natal females are AEA's designated community but AEA's training is open to all and, with the current law as its bedrock, is impartial. Provision of training to those outside of AEA's designated community benefits AEA's community because attendees acquire an increased knowledge and understanding of the needs of AEA's designated community.

16. Prior to the Covid-19 pandemic and lockdown, AEA had secured a contract to deliver training to a major national retailer, with a March 2020 date agreed. However, this pre-paid contract was, by mutual consent between AEA and the client, postponed indefinitely as a result of the government's coronavirus restrictions. AEA and this client are currently in process of agreeing a date for online training.

17. AEA's online training is in development and will be launched in November 2020.

Conferences

18. AEA's conferences are for natal females only, invoking the single-sex exception. Attendees will be required to pay to attend these events, although there will be a pre-designated number of low-cost and free places for women on low incomes. AEA's conferences will focus on topics of everyday concern or of interest to females, e.g. pregnancy, birth and motherhood; returning to work; understanding sexism and misogyny; health and well-being; dealing with the realities of rape and sexual assault; and the pay gap. Motivational speakers will inspire, increase self-confidence in attendees and raise aspirations. AEA's conferences will also create opportunities for the formation of supportive local networks.

PART 2: BACKGROUND TO THIS APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

Why single-sex services matter to women

19. The EA 2010 is a beneficial piece of legislation for AEA's designated community provided it is correctly applied. Unfortunately, the provisions of the EA 2010, in particular the provisions in relation to single-sex services, have been misapplied by numerous organisations, examples of which are given below. When the EA 2010 came into force, organisations across all sectors, as well as management consultancies and training agencies, were reliant on guidance produced by EHRC, the statutory body with responsibility for promoting awareness and understanding of rights under EA 2010, and which also has a statutory power to enforce the EA 2010.

20. However, I discovered that EHRC's guidance was confusing, disordered and beyond the law. By way of example (and as outlined in more detail in AEA's letter to the Defendant dated 17 February 2020 at **[164]** and the list enclosed with that letter at **[170]**):

- Some guidance documents contained incorrect and unlawful content.

- Some guidance documents, whilst not themselves containing unlawful or inaccurate content, linked to other guidance documents that did.

- Some guidance documents contradicted other guidance documents aimed at the same sector – to give just one example, guidance aimed at business service providers contradicted guidance aimed at business service users.

- Multiple versions of similar guidance were available, some containing Category 1 wording and some not.

I have kept a record of at least 18 pieces of EHRC guidance which at some point in time contained the unlawful Category 1 phrase. These have now either been removed from EHRC's website or the Category 1 phrase which they contained has been removed. There are still numerous items of EHRC guidance, including The EHRC Services, public functions and associations Statutory Code of Practice ("the Code of Practice"), which contain unlawful guidance or overly-prescriptive language concerning the application of the single-sex exception which goes beyond the terms of the EA 2010. Moreover, the EHRC guidance misrepresents the single-sex exception, as explained in further detail below and in the Statement of Facts and Grounds, to the detriment of AEA's designated community.

21. Detriment may arise where the admission of transwomen to women-only spaces undermines the purposes which the statutory conditions for separate-sex and single-sex services are designed to fulfil. These include:

    a. Protecting women from physical and sexual violence: I am aware of a number of media reports of attacks on women by transwomen in single-sex facilities which illustrate the risks to women if all transwomen are automatically permitted in women-only spaces. I exhibit examples at **[130 – 135]** of media reports of (i) a sexual assault on a ten year old girl by a transwoman in a Morrisons toilet **[130]**; and, (ii) an alleged assault by a transwoman on a female prisoner **[134]**. However, it is male violence generally that women fear. The definition of gender reassignment is broadly drawn, such that any male could identify themselves into the category. If the single-sex exception is not applied, particularly in situations in which women are in states of undress, women are at risk. The provision of mixed-sex services, where single-sex services are required to protect women, may also put women at risk. I exhibit at **[136 - 139]** an article which reports hundreds of vulnerable patients being sexually assaulted in mixed-sex NHS mental health wards. The past experiences that women have suffered may make the provision of mixed-sex

services wholly unsuitable for them. For example, a 2019 research report by the Women's Budget Group on homelessness "*A home of her own: Housing and women*"[1] (see **[141]**) included:

> *"Shared mixed-sex temporary accommodation is also unsuitable for women who have experienced trauma and abuse at the hands of men. Frontline staff in our interviews reported women being re-traumatised, their mental health worsening and their recovery journeys unravelling as a result of being placed in a hostel or B&B with violent or otherwise problematic homeless men.*

b. Preserving women's privacy: This is particularly important given the increased prevalence of voyeurism including "upskirting" and hidden cameras, which led to the creation of new voyeurism offences in the Voyeurism (Offences) Act 2019. I am aware of a large number of media reports of men secretly filming women in changing rooms (see, for example, four articles at **[142 – 157]**).

c. Protecting women's dignity: When attending to intimate female biological processes many women would find it distressing and traumatic to be in close proximity to transwomen. For some women, menstrual cycles can be painful, unpredictable and blood flows can be heavy, necessitating frequent changes of sanitary wear and also, at times, underwear. Menopausal women taking hormone replacement therapy can experience frequent and unpredictable floods of menstrual blood, which usually necessitates the washing of underwear. Women also suffer miscarriages in public toilets. The charity, Tommys, estimates that 1 in 4 of all pregnancies ends in miscarriage and whilst there has not been specific research so as to provide a statistic on the number, many miscarriages take place in public toilets. I exhibit at **[158 - 164]** an article from the Huffington Post where Ruth Bender-Atik from The Miscarriage Association talks about the challenges women face when miscarrying away from home or a hospital, including in public toilets.

[1] https://wbg.org.uk/wp-content/uploads/2019/07/WBG19-Housing-Report-full-digital.pdf

d. Avoiding women feeling disturbed and threatened: Many women (including women who have suffered male violence and/or abuse) experience an involuntary sense of threat and disturbance at the presence of men in situations when women are in states of undress, such as women's toilets and changing rooms. This can be described similarly to the way in which many women would experience a sense of threat and uneasiness when walking alone at night in darkened streets and an unknown man is seen approaching.

22. EHRC's incorrect guidance, along with third party dissemination thereof, is a direct cause of such detriment and risk to women. Providers of separate-sex and single-sex services relied on it and formed an erroneous belief that they have no option but to allow anyone with the gender reassignment protected characteristic to access facilities of their own choosing, unless there is some exceptional reason why this should not be permitted.

AEA's interest and pre-action correspondence

23. AEA, as an equality legislation training provider with a thorough working knowledge of the EA 2010 and the single-sex exception, is an appropriate body to represent the interests of its community and the public interest generally in these proceedings. On behalf of its designated community, AEA has an interest in ensuring that official guidance reflects the law and is not unlawful, and that the law is not misapplied to the detriment of members of its community.

24. With the knowledge that many organisations in the public and private sector have been misled by unlawful official guidance on equality legislation, AEA is not only bringing this claim for the benefit of its community but also in the wider public interest, to ensure that unlawful guidance is corrected, that organisations are made aware of and receive correct guidance on the topic and that the law is upheld.

25. Having analysed the relevant sections of the Code of Practice and various sectoral guidance in respect of the single-sex exception in considerable detail, it is clear that EHRC guidance documents reflect the Code of Practice, which was also drawn up by EHRC. Though the Code does not contain the Category 1 wording, as set out in the Statement of Facts and Grounds, it contains a number of statements which are clearly inconsistent with the law, and which are replicated in numerous other pieces

of EHRC guidance documents, permutations of which appear in guidance of third party organisations such that they are now widespread.

26. I exhibit AEA's substantive correspondence with EHRC in respect of this issue since February 2020 at **[165 – 282]** which includes our pre-action protocol letter at **[204]** and EHRC's response at **[262].**

27. On 17 February 2020, I wrote to EHRC and the Government Equalities Office ("GEO") (EHRC's funder and sponsor) on behalf of AEA (**[165]**) outlining that incorrect guidance, incorrect terminology and overly-prescriptive language was included in an extensive range of EHRC guidance, which had been accessed by and then further disseminated to multiple other organisations. I enclosed a list of the guidance in question and requested that this be rectified so as to be consistent with the EA 2010. I followed up with an email on 19 February (**[177]**) highlighting AEA's aim of getting the guidance amended and that the amendments be widely publicised.

28. After chasing EHRC, I received a substantive response on 23 March (**[178]**). EHRC indicated that a review was underway and stated its intention to make the appropriate amendments before its new website was created. EHRC stated that its position was as per its guidance document '*Core guidance: Businesses*'. However, I pointed out in an email on 26 March (**[182]**) that '*Core guidance: Businesses*' was one of a number of documents which used overly prescriptive language beyond the terms of the EA 2010. I made clear that rectification of guidance would not be enough and that EHRC should issue a public statement listing the rectifications and, at the least, should inform key individual organisations of the rectifications. I criticised EHRC's handling of the matter up to that point and logged a complaint with their sponsor and funder, GEO, via email that same day.

29. I chased EHRC for a response on 5 April and wrote to EHRC again on 7 April **[184]** restating the issues previously raised and the need for those to be addressed in a timely manner. EHRC provided a substantive response on 3 July (**[186]**). It outlined some amendments which it intended to make to its guidance which included the removal of the phrase Category 1 phrase: "*Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes and therefore should not be excluded from single-sex services*". EHRC also agreed it would make amendments so that its guidance would refer consistently to "*sex*" rather than "*gender*". EHRC said it intended to make the amendments by the end of July

2020. It denied that EHRC had breached the EA 2010 and said that as part of updating its guidance it would ensure that it does not go beyond the EA 2010.

30. After further correspondence from AEA seeking confirmation that the promised changes had been made, on 14 August 2020 EHRC provided AEA with a list of amendments it had made to its guidance and deletions which it had made to EHRC's web pages (**[190]**). I reviewed this and on analysis, a total of 20 guidance documents were listed. 16 of the guidance documents listed had simply been removed from EHRC's website. Only four of the guidance documents listed had been amended, of which three contained "Category 1" wording. The fourth guidance document that was amended was "Equality Law – Hotels, restaurants, cafes and pubs"[2] which previously stated:

> *"A pub…should not give a transsexual person a worse standard of service, for example by all allowing other customers to make hostile remarks or refusing them access to the toilets appropriate to the sex in which they present."*

31. This was amended (according to EHRC's website, on 13 July 2020) to read:

> "*A pub cannot refuse to serve a customer because they are a transsexual person or with a transsexual person. Nor should the transsexual person be given a worse standard of service, for example by insisting they sit in a particular part of a pub.*"

32. On 26 August 2020, AEA sent a pre-action protocol letter with accompanying appendices to EHRC (**[204 - 261]**) challenging four categories of guidance as being ultra vires and unlawful. The categories of unlawful guidance which AEA challenges are set out in paragraphs 10 to 17 of AEA's Statement of Facts and Grounds for Judicial Review filed with this witness statement.

33. If AEA's claim for judicial review succeeds, AEA's designated community will benefit significantly from the promulgation of guidance which reflects the law.

34. These judicial review proceedings raise significant issues of public importance as they relate to fundamental questions of widespread significance, application and concern. In September 2020, Government ministers announced that they have ruled out changes to the GRA 2004 that would have made it easier for transgender people in England and Wales to have their gender legally identified. Ministers rejected calls

[2] https://www.equalityhumanrights.com/en/advice-and-guidance/equality-law-hotels-restaurants-caf%C3%A9s-and-pubs

to bypass the current medical and verification processes and, instead, to instate a simple self-identification process.

35. Though a self-identification process as a matter of law has been ruled out, it is clear that many public and private sector bodies have, in practice, already adopted and implemented a self-identification process by adopting 'inclusive' policies in respect of transgender people, with or without reference to a gender recognition certificate. A problem with this, as mentioned previously, is that the definition of gender reassignment in the EA 2010 is broadly drawn so as to include "proposing to undergo… a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex", such that any male could identify themselves into the category. Moreover, any individuals and/or organisations who question, or are seen to question, such policies are increasingly characterised as hateful and/or transphobic and, in many cases, are thereby silenced. Changes to services and facilities - across all sectors, as well as in workplaces - are instated without consultation with those who are affected by such change.

36. In light of the Government's announcement in September 2020, it is ever more important that the application of the single-sex exception is clarified and that guidance on the issue is corrected and promulgated, so that organisations understand lawful limits. In such a controversial area, it is essential that EHRC's Code of Practice and guidance adhere strictly and accurately to the law. It is imperative that clarification is provided. These proceedings are an appropriate means of seeking to resolve confusion in relation to the issue and the very real detriment to natal women and girls which results.

37. For the avoidance of doubt, AEA supports the protection of transsexual persons' rights. What is at issue is the appropriate balancing of the rights of women and of transsexual persons, where those rights conflict. AEA's primary concern is that guidance issued by EHRC and other organisations reflects the law.

PART 3: EXAMPLES OF PUBLIC, PRIVATE AND VOLUNTARY SECTOR ORGANISATIONS ADOPTING EHRC'S UNLAWFUL GUIDANCE

38. I have identified numerous examples of organisations in the public, private and voluntary sectors that have adopted EHRC's unlawful guidance (including that which has now been amended following AEA's letter of 17 February 2020 to which I refer above) and reflected it in their own policies and guidance. I provide some examples below.

Public sector organisations

39. The Security Industry Authority guidance "Trans customers: A guide for door supervisors" (**[283 – 286]**) includes:

> *"**Toilets***
>
> *If a trans person says that a particular toilet is appropriate for them, then that is the appropriate toilet for them.*
>
> *It is not a trans person's fault if other people object to them using the toilet they feel is appropriate for them.*
>
> *A trans person is more likely to be a victim of violence or sexual assault. They are particularly vulnerable to attack and victimisation in toilets.*
>
> *Trans people can be nervous about using a toilet if they feel other people will have issues with them being there. They may sometimes not go to places if they feel other people will complain about them using the toilet.*
>
> *Don't require a trans person to use an accessible (disabled) toilet if people complain about them using a male or female toilet. However, let a trans person use the accessible toilet if this is what they are comfortable with and want to do."*
>
> and

*"**Equality Act 2010***

It is unlawful to refuse a service, or provide a worse standard of service, because a person is intending to undergo, are undergoing, or have undergone gender reassignment. For example, this means that stopping a trans person from using the toilet they feel is appropriate to them may create a risk of legal action being taken against the pub, club or venue you work at."

40. Guidance issued by ACAS, a public body, "*Gender reassignment discrimination: key points for the workplace*" (**[287 – 319]**) includes:

"***Use of toilet, changing and shower facilities:*** *Assume the employee or job applicant knows how to choose the facilities that match their gender identity. An employer should make clear to all staff that it agrees an employee, once living and working in their gender identity, can use the facilities they feel best match that identity. Some organisations may have some gender-neutral facilities, and a trans employee or job applicant may feel more comfortable using these, but generally should not be told they have to. Neither should they be told to use a toilet for the disabled. Provision of some facilities with private cubicles are likely to be appreciated by all the staff*." (**[307]**).

41. The Metropolitan Police's Transgender policy (**[320 – 332]**) included:

"***What facilities can a non-binary person use?***
If someone (whether binary or non-binary) presents as, say, female then they use the female toilet and vice versa. There is no law or policy prohibiting anyone from using whichever toilet matches their gender identity, and a trans individual cannot be ordered to use a toilet that they feel uncomfortable using. A trans* person does not need to "prove" their right to use the toilet in anyway, including producing a Gender Recognition Certificate."* (**[325]**).

and under the heading "Transitioning Q&As" includes:

*"**Which toilets and changing room am I able to use?***
You will use the facilities that are appropriate to your assumed gender. However, in the early stages you may prefer to use private facilities if they are available. Your line manager should discuss this with you." (**[328]**).

I understand that the Metropolitan Police's Transgender policy is currently under review and subject to change.

42. The Cambridgeshire and Peterborough NHS Foundation Trust "*Transgender guidance for Trust staff and service users*" (**[333 – 324]**) includes at **[340]**:

> *"**7. Standards and practice (supporting our staff)***
> *…*
> *7.3. The staff member should be treated as their preferred gender in the transition period. This will include wearing the appropriate uniform / clothes and using the preferred gender's facilities - i.e. toilets and changing areas."*

Commercial organisations

43. Aviva's published "*Transitioning at Work Employee Guidelines*" (**[343 – 352]**) includes:

> *"The toilets question. You can use whichever toilets you wish to at any point in your transition. Every transition is unique and therefore there is no right or wrong time. We recommend you discuss with your leader the point in your transition that you will begin to use the toilets and other facilities of the gender in which you identify. Gender neutral toilets are provided at various sites for all employees to use. You may wish to the use the gender-neutral toilets, however, there is no requirement for you to do so."* (**[349]**).

44. hr-24, a website offering "Employer Focused HR Advice & Guidance" publishes a page "*Transgender Employees Experiences and a Guide for Employers*" (**[353 – 362]**) which includes:

> *"**Toilets and changing rooms***
>
> *Managers must ensure that the employee can use facilities appropriate to their expressed gender identity. It may be appropriate to set a date when this will happen – the social transition date – and ensure that it is communicated so that relevant colleagues are not surprised. A transgender employee must be able to use the toilet or changing room of their expressed gender identity*

without fear of harassment. People should not be made to use unisex disabled toilets, unless they choose to do so, which may be a preference as a temporary measure during the transition period." (**[361]**).

Not-for-profit organisations

45. Swim England, a charity which is the governing body for swimming in England, included in its "Guide to engaging trans people in swimming" (**[363 – 377]**):

> "*1. The most appropriate changing and shower facilities are gender neutral village style changing rooms so that everyone can enter together without fear, with individual changing and shower cubicles also provided to enable a closed, private space to change and shower before and/or after exercise.*
> …
> *3. If your facility is not able to cater for this and you have a more traditional gender assigned toilet/shower allocation, then you should enable trans people to use the facilities which they feel to be most appropriate. As outlined in the Equality Act section earlier in this toolkit, you have a responsibility to support somebody who is undergoing or who has undergone a gender transition as much as possible."* (**[373]**).

46. Swim England has since removed this guidance from its website and states on its website that the guidance is "under review".[3] However, this guidance is still published elsewhere, including on the website of Bournemouth University.[4]

47. The Citizens Advice publication "Single-sex and separate services for men and women" (**[378 – 380]**) includes:

> *"Transgender people mustn't be excluded from separate or single sex services provided to people of their acquired gender, unless there's a good enough reason. This can be the case whether or not they have a gender recognition certificate. A gender recognition certificate is a document which allows you to be legally recognised in your acquired gender.*

[3] https://www.swimming.org/swimengland/engaging-trans-people-facility-operators/
[4] https://www.bournemouth.ac.uk/sites/default/files/asset/document/LSR327%20Swim%20England%20-%20Guide%20to%20Engaging%20Trans%20People%20in%20Swimming.pdf

Services that are provided to both men and women should be provided according to your acquired gender." (**[379 – 380]**)

48. The Law Society has produced a "Transition and change to gender expression template" for use by law firms (**[381 – 392]**), which includes:

"*There are two key pieces of legislation in the UK which provide protection and recognition for trans people, namely the Equality Act 2010 and the Gender Recognition Act 2004. Whilst these statutes were revolutionary when first enacted, it is recognised that they fall short in protecting and assisting the trans and non-binary community.*

[NAME] intends to exceed the requirements of these statutes and celebrate all gender identities and expressions." (**[381]**).

and

*"**Toilets and changing facilities***
Please use the facilities that make you feel most comfortable. This may change over time, in which case you should continue to use the facilities you prefer." (**[383]**).

49. The Youth Hostel Association's "Transgender Guest Equality Policy (2019)" (**[393 – 397]**) includes:

4. Our Services

While we recognise our guests' right not to disclose private information, customers are welcome to contact a member of the Hostel Team to discuss how we may make them feel more comfortable during their stay, including discussion with them on where they would be most suitably accommodated. Any discussions which customers have with one of our Team will remain strictly confidential.

Many YHA properties have unisex toilet and shower facilities which are available for the use of all of our guests, regardless of their gender. In

properties where there are no unisex toilets and showers, Transgender guests are welcome to use the facilities that reflect their identified gender.

YHA provides both single gender dormitories and private rooms for our guests; both male and female dormitories are available. Transgender guests are welcome to stay in the dormitory which corresponds to the gender with which they identify, as per the requirements later in this policy.

Private rooms of a variety of sizes are also available for families, individuals and groups where there are female and male guests in a party." (**[396]**).

50. Stonewall, a charity which campaigns for LGBT rights, publishes a range of guidance. By way of example, its guidance "*An Introduction To Supporting LGBT Children And Young People: A guide for schools, colleges and settings*" (**[398 – 434]**) includes:

"TOILETS AND CHANGING ROOMS

It is important to ask a trans child or young person which facilities they would feel most comfortable using.

Schools, colleges and settings should ensure that a trans child or young person is supported to use the toilets and changing rooms they feel most comfortable with, including the facilities matching their gender.

Under the Equality Act a trans child or young person can use the toilets and changing rooms that match their gender.

Under the Act, a school can only prevent a trans child or young person from using the facilities matching their gender if they can demonstrate that doing so is a 'proportionate means of achieving a legitimate aim', which is a high legal bar to clear.

Schools, colleges and settings should also support trans children and young people to use gender-neutral facilities or a private space, if that is what they prefer. The most important thing is to talk to the child or young person rather

than making assumptions about the facilities they would like to use." (**[420 – 421]**).

51. In addition, Stonewall's guidance entitled "Delivering LGBT-Inclusive Higher Education. Academic provision, accommodation, catering, facilities, induction, recruitment, registry, societies, sports and student services" (**[435 – 443]**) includes:

> "*KEY ACTIONS FOR YOUR ORGANISATION (Cont.)*
>
> *…*
>
> *Students should be able to access facilities that align with their gender or that they feel most comfortable using. This should be stated in publicly available policies.*
>
> *Staff and students should be reminded to never challenge a student's choice of facilities."* (**[441]**).

52. The Gender Identity Research and Education Society (GIRES) is an organisation that describes itself on its website as "a volunteer operated membership charity that, in collaboration with the other groups in its field, hears, helps, empowers and gives a voice to trans and gender non-conforming individuals, including those who are non-binary and non-gender, as well as their families". Its "Equality and Diversity Transgender Policy Guide for Employers 2015" (**[444 – 473]**) includes:

> *"**5i Use of single-sex facilities***
>
> *Facilities such as toilets and changing rooms should be accessed according to the fulltime presentation of the employee in the new gender role. It is never appropriate to insist that a person who has transitioned, use only the toilets that are meant for disabled people, or unisex toilets, unless these are the only facilities available, or they are preferred by the trans person. If others do not wish to share the 'ladies' or 'gents' facilities with a trans person, then it is they, not the trans person, who must use alternative facilities.*
>
> *Sufficient cubicles, designed for maximum privacy by having partitions and doors that extend from floor to ceiling, should be provided. Unisex toilets may be provided as an alternative for any person, whether trans or not, who does not wish to share with others. This may be especially important for some trans*

individuals (non-binary, genderqueer for instance), who do not identify either as men or as women, and would be uncomfortable entering facilities designated: 'ladies' or 'gents'.

Also, all other users of all facilities should have awareness training, and be properly prepared to welcome any trans person who is starting to use the appropriate facilities.

The question about whether or not a person has a Gender Recognition Certificate is irrelevant, and must never be asked." (**[464]**).

53. Gendered Intelligence is organisation that delivers trans awareness training to professionals and individuals. It describes on its website that it delivers "training, consultation and policy development as part of wider educational support packages for schools, colleges, universities and other educational settings". An extract from its policy, "Trans Inclusive Residentials, A Free Resource for Youth Workers, Schools and Organisations" (**[474 – 497]**) includes:

"***1b. Toilets, Showers and Changing***

What does the law say?

The Equality Act 2010 supports the idea that anyone who identifies as trans and who is transitioning or intends to transition is protected by law and should be able to use the changing facilities and toilets best fitting with their gender identity." (**[479]**).

54. In November 2015, GEO released guidance entitled "Providing services for transgender customers", co-produced with Gendered Intelligence (**[498 – 518]**). AEA has complained to GEO concerning this guidance in its letter of 17 February 2020 (**[165]**) and in the PAP letter (**[204]**). An extract from this guidance reads:

"*Good Practice 4: Assume everyone selects the facilities appropriate to their gender*

A trans person should be free to select the facilities (such as toilets or changing rooms) appropriate to the gender in which they present. For example, when a trans person starts to live in their acquired gender on a full-time basis they should be afforded the right to use the facilities appropriate to their acquired gender. Service providers must avoid discriminating against anyone with the protected characteristic of 'gender reassignment'."

Example:

A pub serves their transgender customers and those customers who are with trans customers just as they would any other customer. The trans person is not given a worse standard of service. The staff serving in the pub do not allow other customers to make hostile remarks without intervening. The pub allows all trans customers access to the toilets appropriate to the sex in which they present. 1" (**[505]**).

55. The example given above is an obvious permutation of the extract from the EHRC guidance document "Equality Law – Hotels, restaurants, cafes and pubs" referred to at paragraphs 30 and 31 of this witness statement. At the end of the example above, a footnote with a link to EHRC's guidance publication "What equality law means for your business" is included. At page 19 of the GEO/Gendered Intelligence guidance documents, links to further EHRC resources are included, including to EHRC's Code of Practice. This is a relevant example of an organisation promulgating EHRC's guidance and provides an illustration as to how EHRC's incorrect guidance has become woven into the guidance documents of even more organisations including that of government departments. Organisations wishing to draft and improve their own policies look to third party organisations for guidance. Some may look to charities like Gendered Intelligence that pride themselves on "trans awareness training" and organisations will likely consider the guidance of a public body like EHRC to be authoritative and correct in law.

56. It is worth noting that all of the guidance documents from which I have included quotes in this witness statement were produced after EHRC's Code of Practice came into force (in January 2011) and after initial versions of the majority EHRC's other

guidance documents were published. The language within the third party organisations' guidance documents typically reflects that found within EHRC guidance documents. Of particular influence seems to have been the emboldened part of the phrase: "*service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they* ***should normally be treated according to their acquired gender, unless there are strong reasons to the contrary***", permutations of which can be seen in many of the quotes I have provided in part 3 of this witness statement.

57. I have also identified examples of inaccurate media reporting which reflects a misunderstanding of the law consistent with the incorrect position set out in EHRC's guidance. In April 2020, the Independent Press Standards Organisation (IPSO)'s Complaints Committee upheld a complaint (**[519 - 522]**) concerning an article which included the quote "*It is illegal for anyone to tell or suggest to any individual which facilities they can or cannot use in any establishment. It is discrimination, period. Transgender people have protected characteristics under the Equality Act 2010.*" In its ruling, the Committee stated:

> *"9. It was accepted by the publication that it had inaccurately reported the requirements of the Equality Act, and its application to transsexual people in circumstances where separate services are provided for women and men. The article had failed to acknowledge that the Act recognises that providing a service to only one sex will not amount to sex discrimination if any of the conditions set out in the Act is satisfied and is a proportionate means of achieving a legitimate aim. This represented a failure to take care not to publish inaccurate information in breach of Clause 1(i). In the context of an article about the legality of excluding a transgender person from using a single sex bathroom, incorrectly stating the legal position represented a significant inaccuracy which required correction under the terms of Clause 1(ii)."*

PART 4: AEA'S APPLICATION FOR A COSTS CAPPING ORDER

58. I make this part of my witness statement in support of AEA's application for a costs capping order to limit the liability of AEA to pay the costs of EHRC in the proceedings

if relief is not granted to AEA. AEA understands that the costs capping order must also limit the liability of EHRC to pay AEA's costs if relief is granted to AEA.

59. In terms of AEA's financial resources, whilst AEA was incorporated on 28 September 2018, it only began incurring costs in February 2019 and it did not commence trading until mid-October 2019. AEA is a relatively new organisation. Because of unavoidable delays, AEA did not meet its planned public launch target of June 2019 and launched instead in Oct 2019 but, with the close proximity to Christmas, this was not optimum timing. By February 2020, it was clear that a coronavirus lockdown was imminent. Accordingly, AEA postponed in-person training indefinitely. Owing to these combined events, AEA is effectively still a new start-up and has been, along with all other businesses, stymied by coronavirus. On that basis, AEA applied for a small Bounce Back Loan of £2,000 under the government scheme, which was granted. AEA does not yet have employees, premises or assets and has very low overheads. Its only asset is a bank account containing a balance of £2,095 as at 6 November 2020.

60. As a CIC, AEA is required to prepare and deliver accounts, a community interest company report and a confirmation statement to the Registrar of Companies on an annual basis. I exhibit a copy of AEA's 2018/19 accounts and community interest company report at **[523 – 531]**.

61. AEA is raising money to fund these judicial review proceedings using crowd funding through Crowd Justice. As at 6 November 2020, AEA has raised £60,075, predominantly from women of all ages, through its crowd funding platform. This serves to demonstrate the public backing of these proceedings and their importance to AEA's community.

62. AEA has a privately funded legal team consisting of solicitors from Russell-Cooke LLP and Counsel, Jeremy Hyam QC, of 1 Crown Office Row. So far, AEA has raised enough funds through crowd funding to cover its legal team's costs in relation to the pre-action stage of judicial review. AEA has settled its legal team's invoices in respect of pre-action costs.

63. I consider that this is a case where it would be appropriate for the Court to make a costs capping order given the public interest involved. It would be unreasonable to expect AEA to use all of the donations it has received through crowd funding to meet

EHRC's costs in the event that relief is not granted to AEA, especially given that EHRC has far greater resources than AEA. AEA should be entitled to meet its own legal costs.

64. Without a costs capping order, AEA would be forced to withdraw its application for permission to apply for judicial review because of the adverse cost risk. A costs capping order is therefore essential to enable AEA to pursue the proceedings and obtain a remedy for its designated community, and in the public interest, on what is a controversial and current issue in need of resolution.

Statement of Truth

I believe that the facts stated in this Witness Statement are true. I am duly authorised by the Claimant to make and sign this statement.

Date: 9 November 2020

Signature: 

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
CO/4116/2020

THE QUEEN ON THE APPLICATION OF AUTHENTIC EQUITY ALLIANCE

Claimant

v

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

WITNESS STATEMENT OF MELANIE FIELD

I, **Melanie Field,** of the Commission for Equality and Human Rights, Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8AE, will say as follows:

A. Introduction

1. I am the Executive Director, Strategy, Policy and Wales at the Commission for Equality and Human Rights ("the Commission"). I am a member of the senior leadership team, with specific oversight of teams responsible for strategy, policy, evidence, human rights monitoring and the Commission's work in Wales. I am authorised to make this statement on behalf of the Commission. I joined the Commission in January 2014.

2. I make this statement in support of the Commission's defence of this application for permission to apply for judicial review. References in bold and in brackets **[xx]** are to the exhibits to this statement.

B. The purposes of Codes of Practice

3. The Commission's powers are derived from the Equality Act 2006 ("EA06"). Section 14 of the EA06 provides that the Commission may issue a Code of Practice in connection with any matter addressed by the Equality Act 2010 ("EA10"), and requires that Codes of Practice shall contain provision designed to ensure or facilitate compliance with the EA10, or to promote equality of opportunity.

4. At present the Commission has three Codes of Practice relating to equal pay, employment, and services, public functions and associations. It is the latter ("the services Code") which is the focus of these proceedings.

5. The main purpose of the services Code is set out at paragraph 1.13 of the Code itself: to provide a detailed explanation of every provision in the relevant parts of the EA10 in order to help advisers and others who need to apply the law and understand its technical detail as well as assist courts when interpreting the law, and to help lawyers. The Code does this by drawing upon legislation and case law, and by setting out practical examples which bring the statute to life by applying legal concepts to everyday situations and providing an accessible explanation of what the law requires and guidance on how to comply with it.

6. The Code is not a binding statement of the law and does not impose legal obligations, although courts and tribunals are obliged to take the Code into account in their decision-making.

C. How the services Code was produced

7. The Commission followed a rigorous process prior to publishing the services Code. I will set out the main steps in that process here.

8. First, the Commission undertook pre-consultation activity. As part of that process, it established a virtual reference group to support the development of the Codes of Practice (all 3 Codes were in development at the same time). The group comprised around 400 UK-wide organisations representing the public, private and voluntary sectors. During September 2009, the group was asked – among other things - to feed back on suggested priorities for detailed interpretation in the Codes, and suggestions for practical examples that relate to specific contexts in which discrimination actually happens, and which relate to the real practice of service providers. Suggestions were then incorporated where appropriate.

9. The next key stage in the process was formal public consultation which allowed the Commission to take on board comments, concerns and recommendations of a diverse groups of expert and specialist stakeholders. The following steps were taken:

    a. A draft of the Code was published and notifications were sent to stakeholders via a range of media **[MF1]**. The Commission also advertised the consultation on its website **[MF2]**, in e-bulletins and at stakeholder events and through membership networks in order to maximise reach of the consultation.

    b. In order to minimise the burden on consultees, the Commission provided them with the opportunity to complete a questionnaire in response to the consultation **[MF3]**. The questionnaire asked specific questions in relation to the chapter of the Code dealing with statutory exceptions.

    c. Consultees were also encouraged to engage informally through the consultation period so that their queries and concerns could be addressed as they drafted their submissions **[MF4]**.

    d. The consultation process ran for 12 weeks, from Monday 11 January 2010, to 2 April 2010. The post-consultation report recorded that over 100 submissions were received from expert stakeholders in relation to this Code and the other two Codes..

    e. The Commission also hosted round-table review meetings with key stakeholders for each of the protected characteristics and for key sectors. It also hosted 10 regional events with attendees drawn from the public sector, business organisations and the voluntary sector, giving a further opportunity for comments on the draft Codes.

    f. In May 2010 the Commission held two meetings with an expert reference group to look at general issues where there were fundamental differences of opinion between stakeholders. The expert reference group consisted of 10 legal experts from across sectors. Issues covered included use of language, length and ease of navigation, and legal issues such as how the Codes should explain comparators and objective justification.

    After the closure of the consultation process, the Commission reflected on feedback and made revisions to the Code.

10. The Commission then ‘road-tested’ the Codes with a selection of key users to determine utility and accessibility. Participants included Judges, discrimination lawyers, and trade union

representatives. Participants were provided with a practical exercise to answer based on the Codes. Six participants responded in relation to the services Code and on the whole the content was felt to be clear and the language and tone appropriate.

11. In accordance with the EA06, the Commission then submitted a draft of the services Code to the Secretary of State. The Code was approved by Theresa May, the then relevant Secretary of State, and the Code was then laid before Parliament on 12 October 2010. Both Houses had the opportunity to consider the Code and neither House passed a resolution disapproving the Code.

12. In accordance with the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011, the services Code came into force on 6 April 2011.

13. There have been no revisions to the services Code since its publication. The EA06 does allow for this, but requires the Commission to replicate the process above by consulting on the revised Code, obtaining approval from the Secretary of State, and then laying the Code before Parliament once again. It is simply not within the Commission's gift to make revisions to the Code of its own accord. Although the Commission is able to publish supplements to its Codes, these do not form part of the Statutory Codes of Practice and would therefore not enjoy the same status in law.

D. What the Commission is seeking to communicate through the contested paragraphs of the services Code of Practice

14. The Commission carefully considers the wording used in the Code of Practice and has revisited this following communication with the Claimant in this case.

15. I will seek to provide some additional information as to why the Commission considers those paragraphs to be an appropriate form of wording. As a general point, I would re-iterate that the disputed guidance at paragraphs 13.57 to 13.60 of the Codes should be read together and in the context of the whole of Chapter 13 of the services Code, which deals with statutory exceptions to discrimination. This includes more detailed guidance for service providers on justifying the use of an exception as a 'proportionate means of achieving a legitimate aim' at paragraphs 13.3 to 13.8 of the Code.

16. Underpinning the Code guidance at paragraphs 13.57 to 13.60 is the Commission's view that the sex of a person for the purpose of the protected characteristic of sex is determined by their legal sex. Legal sex is generally assigned on the basis of physical sex characteristics at birth, but may be changed by obtaining a Gender Recognition Certificate under the Gender Recognition Act 2004. Whether a trans person has a GRC will determine the form of gender reassignment discrimination that may arise if they are excluded from a separate or single-sex service of their gender identity:

    a. If a trans person has a GRC, it will be **direct** gender reassignment discrimination if they are excluded from a separate or single-sex service of their legal sex *because* they have the protected characteristic of gender reassignment;
    b. If a trans person does not have a GRC, then **indirect** discrimination in relation to the protected characteristic gender reassignment may arise. Trans-persons are very likely to be placed at a particular disadvantage by a policy or decision that they must use the service that matches their legal sex when compared to non-trans service users who do not share their protected characteristic of gender reassignment and are unlikely to suffer any disadvantage at all.
    c. For example, a trans woman without a GRC who is denied access to a women's changing facility at a swimming baths and is required to use the men's changing facilities instead, may be placed in a vulnerable, humiliating and potentially dangerous position, putting her at a particular disadvantage. No such disadvantage will be experienced by those who are legally male but not trans. The disadvantage may be justified, but our view is that the EA 2010 requires such justification must be established. It is that view that is reflected in the Code.

17. The Claimant objects to the fact that the disputed section of the Code makes no reference to GRCs. That is because, firstly, gender reassignment discrimination is not predicated on whether a trans-person has or does not have a GRC. Secondly, both direct and indirect gender reassignment discrimination in relation to separate and single-sex services may be justified under the Schedule 3, paragraph 28 exception as a proportionate means to achieve a legitimate aim and both forms of discrimination are likely to be suffered by the exclusions of trans-persons from services of their acquired gender (as set out above). Whether or not a trans-person has a GRC therefore does not determine whether their exclusion from services of their acquired gender requires justification. In the Commission's view, the way it has

explained the law is the best way to enable people to understand their rights and obligations in a way that is clear and comprehensible.

E. Balancing rights

18. The Claimant asserts that the Commission's guidance undermines the single-sex exemption in favour of trans-persons. It accuses the EHRC of being "partisan", and states that the Commission's status as a Stonewall Diversity Champion evidences such partisanship. I will set out more below in relation to why the Commission denies that it is partisan and is taking an appropriate 'balance of rights' approach in this context, but first wanted to deal with the Claimant's reference to the Commission's status as a Stonewall Diversity Champion.

19. The Stonewall Diversity Champion programme is an 'employers' programme for ensuring all LGBT staff are accepted without exception in the workplace' **[MF5]**. The Commission's membership relates exclusively to its internal affairs and is wholly separate to external guidance issued to the public. As such it is completely irrelevant to this claim.

20. The Commission also takes issue with the Claimant's use of the term 'partisan'. What is in effect being alleged by the Claimant in this claim is that the Commission has got the balance wrong between the rights of trans users and those of others service users. That is a matter on which people can disagree. It is a quite different thing to assert that the Commission is "partisan", which means showing prejudice and/or bias.

21. The Commission's statutory remit – to work towards the elimination of all forms of unlawful discrimination - means that it is often required to navigate the complex path of rights of different groups. The Commission has explicitly recognised the need for a 'balance of rights' approach in the Code which is under challenge in this claim, which at paragraph 13.60 says:

    'service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service'

    Far from taking a partisan approach, the Code, and the law it seeks to explain, explicitly requires balance and careful weighing of competing rights.

22. The fact that the Claimant considers the Commission's approach to be partisan, rather than appreciating the complexity of competing rights, perhaps reflects the increasingly polarised

nature of public discourse surrounding trans rights and women's rights. There has been a marked polarisation in the debate with regard to the conflict of rights between trans and non-trans women since the government announced its consultation on potential reform of the Gender Recognition Act 2004 in 2018. People on different sides of the debate have been subject to online harassment as a result of their beliefs. It appears that the Claimant is trying to situate the Commission within that divisive arena simply because it does not agree with its exact interpretation of the law and believes it is biased and accuses it of "misconduct". Those are not fair criticisms.

23. The Commission's former Chair stated earlier this year the Commission's position that: *'we have to acknowledge there are lots of difficult issues in relation to women-only spaces, but shouting at each other doesn't help anybody. We need to move beyond that toxic debate so talking to each other, engaging in respectful listening even if you disagree, that's the way forward'* **[MF6]**.

24. It appears that until now, there has been general satisfaction with the balanced approach that the Commission has taken in the services Code. The Commission is unaware of any case law in relation to these aspects of the Code before now in which the Code has been challenged or it has been suggested that a service-user acted unlawfully in reliance on the Code. Instead it appears that the Code has enabled service providers to negotiate the difficult balance of rights in practice. The Claimant refers to hypothetical problems that might be encountered as a result of the services Code, but the reality does not seem to reflect these concerns.

Statement of Truth

I believe that the facts stated in this Witness Statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed…….

Date: 9 December 2020