sex matters
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Consultation response to Equality and Human Rights Commission

Code of practice for service providers, associations and public bodies

Sex Matters is a human-rights charity

promoting clarity about sex in law, policy and language

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Contents

Updated legal definition of sex

EHRC says:

We have updated the legal definition of sex throughout the code of practice. Our previous definition explained that:

'Legal sex is the sex that was recorded at your birth or the sex you have acquired by obtaining a Gender Recognition Certificate (GRC).'

Following the UK Supreme Court ruling in For Women Scotland, this definition is no longer accurate, because a GRC does not change your legal sex for the purposes of the Equality Act 2010. We have therefore updated this definition throughout the code to be:

'Legal sex is the sex that was recorded at your birth.'

The explanation of the updated legal definition of sex is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☑ **Disagree**
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

This definition (though it identifies the correct protected characteristic) is **overly complex** and suggests that there is a characteristic called "legal sex" that is different from sex and which depends on paperwork.

The protected characteristic is **sex:** man (male) and woman (female), as set out at s.11 EqA. This language should be used consistently throughout the guidance.

It is important to acknowledge that the previous guidance and position of the EHRC was wrong on this point. This is not an "**updated**" definition of sex but the **correct** definition.

It is not that "following the UK Supreme Court ruling in For Women Scotland, this definition is no longer accurate". This definition, and thinking and guidance based on the previous definition, were **ALWAYS** wrong.

As Hansard from the time that the protected characteristic of gender reassignment was first introduced in 2008 made clear:

> "The regulations simply outlaw a person being denied access to a shop or being subject to abuse by a sales person."

Having this protected characteristic does not change a person's sex, and was never intended to provide a right to access services provided exclusively for the opposite sex.

For Women Scotland v The Lord Advocate and *The Scottish Ministers [2022] CSIH 4* (FWS1) also confirmed this (and was ignored in the October 2024 version of the updated code).

As the Supreme Court emphasises: "The concept of sex is of foundational importance in the EA 2010. The words "sex" and "woman" appear across different parts of the Act and in many sections." At paragraph 239 it says: "Whereas the interests of biological women (or men) can be rationally considered and addressed, and likewise, the interests of trans people (who are vulnerable and often disadvantaged for different reasons), we do not understand how the interests of this heterogeneous group can begin to be considered and addressed."

It is crucial that the code of practice guides service providers to think rationally about the interests of women and men, and likewise the interests of women and men with the protected characteristic of gender reassignment, and does not get confused about the protected characteristics, either conceptually or linguistically.

Recommendations

Do not refer to "legal sex".

ADD: A clarification can be added for avoidance of doubt that a person's sex refers to the biological characteristic of being male or female. It is sometimes referred to as "sex recorded at birth".

FOOTNOTE THIS WITH: *For Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1), and The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16*.

EDIT: the examples in the October 2024 update of the code so that they do not create confusion between "man" and "woman" and the protected characteristic "gender reassignment", or suggest that individuals can change sex or that a gender-recognition certificate is relevant.

2.39 A woman who decides to live as in a transgender identity by adopting a male name and is considering taking male hormones has the protected characteristic of gender reassignment, as well as the protected characteristic of sex (female).

2.40 A man who has been living in a transgender identity by adopting a female name and wearing women's clothing has the protected characteristic of gender reassignment, as well as the protected characteristic of sex (male).

2.43 A man wears women's clothing and uses a woman's name on some days, and wears men's clothing and uses a man's name on other days. He tells the businesses with which he has a relationship that he is "gender fluid" and is undergoing a process of transition to live full-time in his transgender identity. The receptionist at the vet practice which treats his pets

begins to treat him unpleasantly, for example refusing to book appointments or return calls. This is likely to be direct gender-reassignment discrimination. The man is likely to be protected as he has adopted a "gender-fluid" identity as part of a process of gender reassignment.

ADD TO SECTION 2.41 of the January 2025 version (on minimum age for the protected characteristic of gender reassignment): "It is important to recognise that this does not mean that a child has changed sex, or that they will be able to in future."

FOOTNOTE THIS WITH: *Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1), *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* (FWS2) and *Green v Secretary of State for Justice [2013]*.

2.1: New content on Gender Recognition Certificates

CONSULTATION DRAFT

2.1.6 The Supreme Court in For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16 has ruled that a GRC does not change a person's legal sex for the purposes of the Equality Act 2010.

2.1.7 This means that, in relation to the Act, a person's sex remains their biological sex, whether they have a GRC or not. This is also referred to as 'sex at birth' or 'birth sex' in this code. For example, a trans man with a GRC is a woman and a trans woman with a GRC is a man, for the purposes of the Act.

2.1.8 A trans person will be protected from discrimination because of gender reassignment, whether they have a GRC or not.

2.1.9 A trans person will also be protected from sex discrimination whether they have a GRC or not. They will be protected from sex discrimination that is based on their birth sex. They will also be protected from sex discrimination related to their acquired gender where they suffer.

The explanation of the legal rights and responsibilities set out in the new content on Gender Recognition Certificates is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☑ **Strongly Disagree**
- ☐ Do not know

Commentary

The scope of this code of practice is to provide a detailed, practical explanation of the Equality Act 2010, incorporating case law.

This guidance on the Gender Recognition Act is confusing and irrelevant and undermines clarity about the Equality Act. It introduces concepts that are not in the Equality Act to the guidance, such as **"birth sex", "trans man"**, "**trans woman"** and **"acquired gender"**. This is confusing and irrelevant to understanding the legal concepts of the protected characteristics in the Equality Act.

The language "sex at birth" and "birth sex" should be removed. The Equality Act refers to the protected characteristic "sex".

Recommendations

REMOVE THIS WHOLE SECTION as it does not concern the Equality Act 2010, and replace it with footnotes in context.

The Equality Act interacts with many other laws, but they do not need to be referenced with dedicated sections. The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025]* confirmed that the GRA does not change the interpretation of the words male, female, man or woman, or the concept of sex, same-sex, opposite-sex or sexual orientation, in the Equality Act.

This point can be made with two notes/ footnotes linked to relevant case law in the sections on the protected characteristics of sex or gender reassignment.

ADD TO Section 2.35 in the January 2025 version (on the protected characteristic of gender reassignment): "Although the Equality Act uses the phrase 'reassigning sex', having the protected characteristic of gender reassignment does not change a person's sex for the purposes of the Equality Act 2010, whether or not the person has a gender recognition certificate."

FOOTNOTE THIS WITH: *Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4 (FWS1), For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16 (FWS2)* and *Green v Secretary of State for Justice [2013].*

EDIT Section 2.38 of the January 2025 version, replacing: "It also does not matter whether a trans person has applied for, or obtained, a Gender Recognition Certificate (GRC), which is the document that confirms the change of a person's legal sex" with: "In relation to the Act, a person's sex remains their biological sex, whether or not they have a gender recognition certificate, a birth certificate or other paperwork that appears to record them as the opposite sex."

FOOTNOTE THIS WITH: *Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4 (FWS1), For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16 (FWS2)* and *Green v Secretary of State for Justice [2013].*

ADD TO section 2.83 in the January 2025 version: "In relation to the Act, a person's sex remains their biological sex, whether or not they have a gender recognition certificate, a birth certificate or other paperwork that appears to record them as the opposite sex."

FOOTNOTE THIS WITH: *Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4 (FWS1), For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16 (FWS2)* and *Green v Secretary of State for Justice [2013].*

2.2: New content on asking about sex at birth

CONSULTATION DRAFT

2.2.1 It is important to be aware that some people, including some trans or gender non-conforming people, may find it distressing to be asked about their birth sex. Therefore, any necessary request about birth sex should be made sensitively, taking this into account.

2.2.2 Where obtaining information on birth sex is not necessary and proportionate, asking a trans person about their birth sex may risk unjustifiably interfering with their human rights under Article 8 of the European Convention on Human Rights (ECHR), which is respect for private and family life. Therefore, care should be taken, particularly by public authorities, that this is only done where necessary and justified.

2.2.3 Requests about birth sex are more likely to be justified where it is necessary and proportionate for a service provider, those exercising public functions or an association to know an individual's birth sex to be able to discharge their legal obligations under the Equality Act 2010 (the Act). Any request that is made should be done in a sensitive way which does not cause discrimination or harassment.

2.2.4 Discrimination or harassment could occur if, for example, individuals are asked about their birth sex in a way which may require them to disclose this information in public, or if the language or manner of a request is rude, combative or offensive.

2.2.5 Indirect discrimination could occur if a policy on how or when to ask for such information places some protected characteristic groups at a particular disadvantage and is not justified. However, where practical, it is likely to be best to adopt the same approach with everyone, rather than only asking some people for information, because this approach is less likely to be discriminatory against any one group.

2.2.6 If it is necessary to ask a person's birth sex, consideration should be given to whether it is reasonable and necessary to ask for evidence of birth sex. In many cases, it will be sufficient to simply ask an individual to confirm their birth sex. A service provider may make a rule that if someone is asked their birth sex and chooses to answer objectively falsely it will be grounds for exclusion from the service.

Example 2.2.7 A trans woman goes to the office of a local support group and makes enquiries with the receptionist about the group counselling sessions they offer. Based on the needs of its service users, the group provides different sessions that are single-sex or mixed-sex. The receptionist reasonably thinks that the trans woman is a biological male and, as there are some other people waiting in the office, asks her to come into a side room to get more details about the support she is looking for. When they are in private, the receptionist explains the different group sessions that are offered and asks the trans woman what her birth sex is. When she confirms her birth sex, the receptionist provides her with the details of the mixed-sex groups she could attend.

2.2.8 If there is genuine concern about the accuracy of the response to a question about birth sex, then a birth certificate could be requested. For the vast majority of individuals, this will be an accurate statement of their birth sex. However, it should be noted that a birth certificate may not be a definitive indication of birth sex. If a person has a Gender Recognition Certificate (GRC) they may have obtained an amended birth certificate in their acquired gender. In the unlikely event that it is decided that further enquiries are needed, such as confirmation as to whether a person has a GRC, then any additional requests should be made in a proportionate way which is discreet and sensitive.

2.2.9 It is important to be aware of legal provisions protecting privacy in the context of making such enquiries. If, in the course of these enquiries or otherwise, a service provider, those exercising public functions or an association acquires information that someone has a GRC or has applied for a GRC, onward disclosure of either that information or their biological sex without consent may be a criminal offence in some circumstances (read section 22 of the Gender Recognition Act 2004).

2.2.10 Read also the Data Protection Act 2018 and UK General Data Protection Regulations, which deal with processing personal data.

The explanation of the legal rights and responsibilities set out in the new content on asking about sex at birth is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☑ **Strongly Disagree**
- ☐ Do not know

Commentary

This section does not align with the Equality Act or the Data Protection Act. It is misguided and unworkable. There is no particular provision in the Equality Act against recording sex data (following ordinary data-protection rules). This section should be removed.

Its placement in the numbering scheme suggests that it comes before the protected characteristic of sex rather than after it. This is irrational. It suggests that asking about "birth sex" is different to asking about "sex". This is not supported by the Equality Act or by case law.

Consider this section: "It is important to be aware that some people, including some trans or gender non-conforming people, may find it distressing to be asked about their birth sex." This does not come from the Equality Act. It is impractical and not in line with data protection. In order to consider that someone might be sensitive about their sex being recorded, you would need to know that they are transgender. This means recording MORE sensitive data about them, not LESS.

In many situations, it is **routine to collect and record data on sex**, along with other information such as name, date of birth and address. This is often done online, via a form or via referral to existing records or from another organisation, and once the information is collected it is included in a database. Normal principles of data protection apply. As with any personal data, collecting, recording or sharing it engages Article 8 and must be done as a **proportionate means to a legitimate aim, and in line with data protection**.

The emphasis on asking the question sensitively is misplaced. Of course all personal data collected should be in line with data-protection principles, and in general people should not be asked for personal information in a way that is combative or rude.

A person who feels sensitive about sharing any particular piece of information may be able to respond "prefer not to say", or to skip a question if the data field is not mandatory.

The practical difficulty and legal position of trying to keep a person's sex data private by marking it as sensitive are explored in *R (on the application of C) (Appellant) v Secretary of State for Work and Pensions (Respondent) [2017] UKSC 72* and in *Croft v Royal Mail.[2003] UKCA.* Both find it is not a breach of Article 8 or anti-discrimination law to ask for and record people's sex or previous names wherever that information is generally needed. *Pemberton v Inwood [2018] EWCA Civ 564* concludes in general: "If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive."

It is not a cause for offence for an organisation to ask for and record sex.

This section also uses the concepts of discrimination, indirect discrimination and harassment before they are introduced in the guidance. This is not helpful to readers.

While equality monitoring is not the only or primary reason for recording sex, the Supreme Court made clear (at paragraph 239) that the PSED requires data collection on women and men, not on the incoherent groups of "women including transgender women" and "men including transgender men".

The advice on birth certificates is inaccurate. There are currently no reliable official sources of data on sex, as passports, driving licences and NHS data have not been kept accurate. Birth certificates are not forms of identification and (because of the GRA) are not accurate about sex.

For now, therefore, organisations have to rely on honest answers and their own knowledge.

The example of a "trans woman" going to the office of a local support group and being taken into a side room by the receptionist is particularly bad and illustrates the problem with the approach.

It suggests that rather than collect accurate information using a form that is compliant with data-protection principles, the receptionist should adopt an ad-hoc workaround that involves making assumptions based on appearances, leaving the reception unattended with people in the waiting area, and going into a side room with someone she can see is a man, and who may well respond badly to being asked to confirm that he is a man. The risks of doing this are obscured by referring to the man as "she" in the example.

The entire thinking behind this example is wrong. The service provider offers single-sex services for vulnerable people. It should make this clear in all communications about its services – online, in leaflets and in person. Clients all know what sex they are, and should not try to attend services which are not intended for them. **The risk that people (such as the potential client in the example) will try to access services illegitimately should be assessed when developing the service, and the service should have protocols that mitigate these risks**.

Recommendation

THIS WHOLE SECTION SHOULD BE REMOVED.

2.3: New content on defining sex at birth

CONSULTATION DRAFT

2.3.1 Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and / or boys, or women and / or girls (s.11(a) and (b) and s.212(1)).

2.3.2 The Supreme Court in For Women Scotland ruled that 'sex', 'woman' and 'man' in the Act mean biological sex, biological woman and biological man. This is the sex of a person at birth.

2.3.3 A Gender Recognition Certificate (GRC) does not change a person's sex for the purposes of the Act. Read paragraphs 2.1.1 to 2.1.9 for more information on GRCs. Read paragraphs 2.2.1 to 2.2.10 for more information about when and how it may be appropriate to request information or evidence of birth sex.

2.3.4 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (read paragraphs 2.1.6 to 2.1.9) or sexual orientation (read paragraphs 2.4.1 to 2.4.6).

2.3.5 There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity, or because she is breastfeeding (s.13(6)(a) and s.13(7)).

The explanation of the legal rights and responsibilities set out in the new content on defining sex at birth is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☑ **Disagree**
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

This section introduces the concept of "sex at birth", suggesting that there is a different kind of sex. It refers to the section on requesting information on "sex at birth" (which we recommend removing or rewriting).

It also treats the Supreme Court's judgement in FWS differently from other case law in the guidance.

Recommendations

REMOVE 2.3.2 and 2.3.3.

ADD after 2.3.5: "In relation to the Act, a person who has the protected characteristic of gender reassignment remains a man or woman based on their biological sex, whether they have a gender recognition certificate, a birth certificate or other paperwork that appears to record them as the opposite sex."

FOOTNOTE THIS WITH: *For Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1), *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* (FWS2) and *Green v Secretary of State for Justice [2013].*

2.4: Updated description of the protected characteristic of sexual orientation

CONSULTATION DRAFT

2.4.1 Sexual orientation is a protected characteristic (s.12(1)). It means a person's sexual orientation towards:

- persons of the same sex (the person is a lesbian woman or a gay man)
- persons of the opposite sex (the person is heterosexual)
- persons of either sex (the person is bisexual)

2.4.2 Sexual orientation relates to how people feel as well as their actions.

2.4.3 Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. These may include someone's appearance, the places they visit or the people they associate with.

2.4.5 When the Act refers to the protected characteristic of sexual orientation (s.12(2)), it means the following:

- a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation
- a reference to people who share a protected characteristic is a reference to people who are of the same sexual orientation

2.4.6 Gender reassignment is a separate protected characteristic and unrelated to sexual orientation, despite often being grouped together (for example under the acronym 'LGBTQ+ people').

The explanation of the legal rights and responsibilities set out in the updated description of the protected characteristic of sexual orientation is clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Recommendations

EDIT 2.4.6 to say: "Gender reassignment is a separate protected characteristic and unrelated to sexual orientation, despite SOMETIMES being grouped together (for example under the acronym 'LGBTQ+ people')."

ADD: "While some individuals and groups describe themselves as 'LGBTQ+', duty bearers under the Act should not treat this as a group that shares a protected characteristic, as it combines groups whose experience and interests are different."

FOOTNOTE THIS WITH: *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* (FWS2).

Change 4.1: New example on sex discrimination by perception

CONSULTATION DRAFT

4.1.1 It is direct discrimination if service providers, those exercising public functions or associations treat an individual less favourably because the service providers, those exercising public functions or associations perceive that the individual has a protected characteristic even if they do not. However, this does not apply to the protected characteristic of pregnancy and maternity.

Example 4.1.3 A trans woman is a member of an association and applies to become treasurer, but her application is rejected. She is told by the Chairman that this is because they want a man to take the role on as they do not think a woman could do the job as well. This is less favourable treatment because of sex. The trans woman would have a claim for direct discrimination because of her perceived sex as a woman. The fact that she is not a woman under the Equality Act 2010 would not prevent her bringing this claim of sex discrimination.

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination by perception are clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

The situation itself is a good example, but it should be explained more clearly in terms of the protected characteristics and avoiding pronouns that are likely to confuse readers. It would also be good to make clear that the association in the scenario is not sex-based.

Recommendation

EDIT 4.1.3 to: "A male transsexual who uses a female name and title is a member of a heritage railway association and applies to become treasurer, but is rejected. The Chairman

says this is because they want a man to take on the role as they do not think a woman could do the job as well. This is less favourable treatment because of sex. The transsexual individual could have a claim for direct discrimination because of being discriminated against as a woman. The fact of being male would not undermine the claim of sex discrimination."

Change 4.2: Removed reference to superseded case law – organisations

- ☑ **Strongly Agree**
- ☐ Agree
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

5.1: New example on sex discrimination – same disadvantage

CONSULTATION DRAFT

5.1.1 Indirect discrimination may also occur when an individual without the relevant protected characteristic experiences disadvantage alongside persons with the relevant protected characteristic. Provided that a discriminatory provision, criterion or practice puts, or would put, them at substantively the same disadvantage as people who share the relevant protected characteristic, such an individual may bring a claim for 'same disadvantage' indirect discrimination (s.19A). Objective justification applies to same disadvantage indirect discrimination.

5.1.2 Although this type of indirect discrimination is sometimes referred to as 'associative indirect discrimination', it is not necessary for there to be any relationship or association between the group with the relevant protected characteristic and the individual who does not share it. Rather, the individual without the relevant protected characteristic must be able to show that the disadvantage they experience is essentially the same as that experienced by the group sharing the protected characteristic and it arises from the same provision, criteria or practice.

Example 5.1.3 A local council holds its public consultation meetings on a weekday evening in an area regarded as unsafe for women. It discovers that fewer women than men attend. A woman complains that this is because many women cannot come because of safety concerns, including herself. This kind of disadvantage is more likely to

apply to women as a group and will amount to indirect discrimination against women, unless the council can justify its policy.

People who do not share the same protected characteristic but who may also feel unsafe for similar reasons could experience disadvantage that is essentially the same. For example, a trans woman who feels unsafe in the area where the consultation meetings are held because they present as a woman would also have a claim for indirect discrimination, if the council is unable to justify its policy.

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination – same disadvantage is clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

The situation is a good example of discrimination by association (that is, "same disadvantage"), but it should be explained more clearly in terms of the protected characteristic and the disadvantage, which is not about "presenting as a woman" but about facing the same discrimination.

Recommendation

EDIT 5.1.3 to: "A local council holds its public consultation meetings on a weekday evening in an area regarded as unsafe for women. It discovers that fewer women than men attend. A woman complains that this is because many women cannot come because of safety concerns about the location and because of lack of childcare at that time. These disadvantages are more likely to apply to women as a group and will amount to indirect discrimination against women, unless the council can justify its policy.

"People who do not share the same protected characteristic but who may also feel unable to attend for similar reasons could experience disadvantages that are essentially the same. For example, a man with the protected characteristic of gender reassignment who feels unsafe in the area where the consultation meetings are held would also have a claim for indirect discrimination, as would a man with similar childcare constraints to women, if the council is unable to justify its policy."

Change 8.1: Updated example on harassment related to sex

CONSULTATION DRAFT

'Related to'

8.1.1 Unwanted conduct 'related to' a relevant protected characteristic has a broad meaning. It can include many situations, such as those described in paragraphs 8.1.2 to 8.1.6.

8.1.2 Harassment can be related to an individual's own protected characteristic.

Example 8.1.3 A woman using the gym equipment in her local leisure centre is regularly subjected to comments from male staff members such as 'watch what you say in front of her, it's her time of the month again'. This could amount to harassment related to sex.

8.1.6 An individual does not have to possess the relevant protected characteristic themselves for protection from harassment to arise. This can happen in several different situations.

b. An individual may be wrongly perceived as having a particular protected characteristic.

Example A trans woman using the gym equipment in her local leisure centre is regularly subjected to comments from male staff members such as 'watch what you say in front of her, it's her time of the month again'. As with the example at 8.1.3, this could amount to harassment. However, in this example, the harassment would be related to the trans woman's perceived sex.

The explanation of the legal rights and responsibilities set out in the updated example on harassment related to sex is clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

The situation is a good example for explaining the concept of harassment related to a protected characteristic, but it should be explained more clearly in terms of the protected characteristic and the concept of being related to it.

The code should also make clear that trying to use opposite-sex facilities (or failing to adequately explain or enforce rules) is **likely to result to result in harassment related to sex (and risk of sexual harassment).**

The code should also address the misconception that "misgendering" is harassment related to sex or gender reassignment, since the Supreme Court has clarified that, in terms of the

Equality Act and other laws where sex matters, "trans women" are men and "trans men" are women. This means that **politely referring to someone's sex in the course of explaining or enforcing a lawful rule that relates to sex cannot be harassment.**

Recommendations

EDIT example at 8.1.6: "A member of a gym, who is male, is regularly subjected to comments from male staff members that are typically directed at women, such as 'watch what you say in front of her, it's her time of the month again.' As with the example at 8.1.3, this could amount to harassment related to the protected characteristic of sex."

Under "meaning of unwanted conduct" (8.14 in the January 2025 version), it would be helpful to provide a clear example related to single-sex spaces. This could return to the spa example given at Section 4.5 of the 2010 Code of Practice.

ADD EXAMPLE: "A group of women using a health spa are alarmed and uncomfortable to encounter a trans-identifying man in the women's changing room. When they complain that there is a man in the women's changing room the manager refuses to address the issue and tells them to get over their prejudice. This is likely to be harassment related to sex as allowing a man into a female changing room is unwanted conduct which has the effect of creating an intimidating environment for women who are undressing in a space they have been told is for women only."

ADD: "It is not harassment to explain or enforce a lawful rule, even if the person finds this to be 'unwanted conduct'. Service providers may need to ask, record or refer to a person's sex. People who identify as transgender may feel disappointed and upset that they are not permitted to use services provided for members of the opposite sex, and may perceive this as 'misgendering'. However it is necessary and proportionate to use clear language to explain a rule, and implies no violation of dignity. It is not cause for reasonable offence."

FOOTNOTE THIS WITH: *Pemberton v Inwood [2018] EWCA Civ 564.*

Change 12.1: New example on women-only associations

CONSULTATION DRAFT

Example 12.1.3 A trans woman applies to join a women-only association and her application is refused. This would be lawful because membership is based on sex and restricted to women and, under the Act, she does not share that protected characteristic

The explanation of the legal rights and responsibilities set out in the new example on women-only associations is clear.

☐ Strongly Agree

- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

This example is a reasonable situation, but it should be explained more clearly in terms of the protected characteristics.

An explanation could be added on how groups may be set up related to more than one characteristic and how they may combine.

Recommendations

EDIT 12.1.3: "Someone who identifies as a 'trans woman' (i.e. a man with the protected characteristic of gender reassignment under the Act) applies to join a women-only association and is refused. This is the operation of a lawful membership criterion. Men who identify as women do not share the protected characteristic of sex with women (read about this in the changes to chapter 2, paragraphs 2.3.1 to 2.3.5)."

ADD after 12.1.17:
"12.1.18 Associations can set membership restrictions based on more than one shared protected characteristic. For example, a Young Men's Christian Association is an association whose membership is restricted to people who share the protected characteristics of age, sex and religion.

"12.1.19 A formal legal association whose membership is restricted based on protected characteristics that are not shared will not benefit from the exception against discrimination. For example, an association whose members must be *either* over 60 *or* Christian is unlawfully discriminatory, and will be vulnerable to claims of discrimination from those who are explicitly excluded, as well as from those included if there are different terms of membership for the two groups. However, two separate associations, each with membership criteria based on a protected characteristic, can associate together by agreement.

"For example: A group of women and 'trans women' (that is, men with the protected characteristic of gender reassignment) want to collaborate together to promote a particular view of feminism. They want the association to exclude men who identify as men. They consider the risk of unlawful discrimination and decide to form two separate associations. One restricts membership to those who have the protected characteristic of sex (female) and the other restricts membership to those who share both the protected characteristics of sex (male) and of gender reassignment. The two associations collaborate together by holding joint events and activities."

Change 13.1: Updated section on competitive sport

CONSULTATION DRAFT

13.1.1 The Act includes four types of exceptions that may apply in relation to the participation of a competitor in a sport, game or other activity of a competitive nature (s.195). These relate to sex, gender reassignment, nationality or birthplace, and age.

Competitive sport – sex

13.1.2 It is not a breach of the Act for a person to organise single-sex or separate-sex events for male and female competitors in a sport, game or other activity of a competitive nature in specific circumstances (s.195(1) and (3)). These circumstances are where an average person of one sex would be at a disadvantage as a competitor against an average person of the other sex due to their physical strength, stamina or physique (referred to in the Act as a 'gender-affected activity'). Where there is no disadvantage due to these factors, organising single-sex or separate-sex events may be unlawful sex discrimination.

Example: 13.1.3 The organisers of a 5-a-side football event decide that it is necessary to hold separate competitions for men and women. This is likely to be permitted under the Act. Physical strength, stamina and physique are all significant factors in 5-a-side football match. An average man has an advantage compared to an average woman because men are on average taller and stronger and have more overall muscle mass than women.

13.1.4 This exception also applies to children's sport (s.195(4)). However, organisers must consider whether there are significant differences in physical strength, stamina or physique at the age and stage of development of the children competing in the activity.

13.1.5 A primary school only has a boys' under-7 football team as there are not enough girls for a full team. A girl requests to join the team. It may be unlawful to decline this request unless the school can demonstrate that there are differences in physical strength, stamina or physique between boys and girls under 7 years old that would disadvantage girls taking part in football. Examples of disadvantage could be unfair competition or risks to health and safety.

Competitive sport – gender reassignment

13.1.6 In the context of a gender-affected activity (read paragraph 13.1.2), the Act allows trans people to be excluded from an event or treated differently, which would otherwise constitute unlawful gender reassignment discrimination, when necessary for reasons of safety or fair competition. If it is not necessary for these reasons, it is likely to be unlawful to exclude trans people.

13.1.7 Consequently, if a person is organising single-sex or separate-sex events for men and women in a gender-affected activity, they should consider their approach to trans competitors' access to the service (s.19 and s.195(2)).

13.1.8 Direct gender reassignment discrimination can occur if a policy or decision to restrict participation of trans people is made on the grounds of gender reassignment.

13.1.9 This would be the case, for example, if a trans man, who is a woman under the Act, is excluded from a women's event because of his gender reassignment characteristic. Read our changes to chapter 2 for more information on the meaning of gender reassignment.

13.1.10 Indirect gender reassignment discrimination can occur if a provision, criterion or practice puts trans people (including the individual trans person concerned) at a particular disadvantage compared to people who are not trans and it cannot be justified.

13.1.11 However, in the context of a gender-affected activity, the Act provides an exception to a claim of gender reassignment discrimination if a person restricts participation of a trans person in a gender-affected activity and can show it is necessary to do so for reasons of fair competition or the safety of competitors (s.195(2)).

13.1.12 This means that organisers can prevent trans people from participating in a gender-affected sporting activity if it is necessary to do so because their participation would create a competitive advantage or disadvantage, or would potentially endanger their own safety or that of other participants.

Example. 13.1.13 A boxing gym runs a boxing competition for men. A trans man wishes to compete. The gym declines his request because they are concerned about the safety of trans men taking part in the full-contact sparring with men due to physiological differences. This is likely to be lawful if the gym can demonstrate that there would be a genuine health and safety risk if trans men were allowed to join the competition.

13.1.14 In some circumstances, limiting, modifying or excluding the participation of trans people for the reasons of fair competition or safety may be necessary to avoid discrimination against other competitors. Section 195(1) provides organisers of separate sporting events for men and women with an exception for sex discrimination when providing separate men's and women's events. The law on the interpretation of this provision is not settled and there is therefore uncertainty as to how this provision applies.

13.1.15 Section 195(1) is likely to only apply where a person has decided to organise the gender-affected activity as a single-sex or separate-sex event. A claim of direct or indirect sex discrimination cannot be brought about the participation of a person in an event which has been organised as a single-sex or separate-sex event.

13.1.16 Where an organiser chooses to offer a mixed-sex gender-affected activity, then this activity is not protected by the exception in section 195(1) and participants may bring claims of direct and indirect sex discrimination about it.

Example 13.1.17 An athletics club chooses to organise an athletics event that includes women and trans women. The trans women who participate are significantly faster and have a physical advantage. A woman may be able to bring a claim for indirect sex discrimination due to the provider's decision not to limit or modify the participation of trans women placing her at a particular disadvantage.

13.1.18 Given the physiological differences between men and women, it will often be necessary for organisations to develop general policies to guide and inform their decision making in this area. Policies should be supported by a clear rationale and evidence base, and will often wish to draw upon guidance from sporting authorities. Relevant factors may include:

- whether an activity is primarily competitive, or competitive but with a significant social and recreational purpose, and whether it is a mass participation event
- whether there are safety risk factors such as those arising from physical contact between men and women
- the extent to which there are competitive advantages arising from sex-based physiological factors such as physical strength, stamina or physique
- whether such competitive advantage can be sufficiently reduced through medical intervention, such as drugs to reduce levels of testosterone, to make the competition fair.

The explanation of the legal rights and responsibilities set out in the updated section on competitive sport is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☑ **Strongly Disagree**
- ☐ Do not know

Commentary

This guidance says at 13.1.14 that "**the law on the interpretation of s.195(1) is not settled and there is therefore uncertainty as to how this provision applies.**" This is baseless. In fact s.195(1) is quite clear. It says: "A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity."

The section appears to be based on the EHRC's previous wrong interpretation of the Equality Act, according to which men with gender-recognition certificates are women, or its earlier wrong interpretation (in the 2010 Code) that under the Act a man who self-identifies as a woman (a "transsexual woman") can be excluded by a women's sport provider only "if they are satisfied that to do so is necessary to uphold fair competition or to ensure the safety of other competitors".

A clear reading of s.195 following the Supreme Court's ruling in FWS2 (as well as the previous court ruling in FWS1) is that **these interpretations are and always were wrong**. This is not uncertain. It is made explicit at paragraphs 234–236 of the judgment, which say that the provisions on sport are **plainly predicated on biological sex**, and may be unworkable if a certificated sex interpretation is required.

The code should be rewritten based on a clear understanding of the protected characteristic of sex, which aligns with the physical characteristics of the bodies which play sport. All men are male (including those who identify as trans women) and all women are female (including those who identify as trans men), and these are biological (physiological) characteristics.

Because there has been so much previous confusion and misinformation on this, including from the EHRC, the point from the Supreme Court judgment that the gateway conditions for the sport exceptions are predicated on biological sex should be made explicitly.

The guidance must make clear that it is straightforward to run a single-sex sporting event. It must also recognise that this applies too to the application of sex-based rules in mixed sports, such as mixed doubles in racquet sports and mixed pairs in figure skating; to mixed-sex team sports that have rules requiring a minimum number of women on the team/pitch; and to sex-based record-keeping in parallel sports such as fell running.

It is not consequent on s.195 (2) that a person organising single-sex or separate-sex events for men and women "should consider their approach to trans competitors' access to the service". As the Supreme Court said at paragraph 236: "a women's boxing competition organiser could refuse to admit all men, including trans women regardless of their GRC status. This would be covered by the sex discrimination exception in section 195(1)."

If the organiser excludes a biological female who has taken testosterone from the female division, this would be permitted by s.195(2). As the Supreme Court says: "It is here that the gender reassignment exception would be available to ensure that the exclusion is not unlawful, whether as direct or indirect gender reassignment discrimination."

The sections in the guidance following this are misguided, and overly complex for a topic that the Supreme Court's clarification of the Equality Act has rendered quite simple. Someone organising a female-only sport competition is not "making a decision" to restrict the participation of males who are trans on the grounds of gender reassignment: they are simply organising a sports competition which has a qualifying condition that does not include males.

Sections 13.1.15 and 13.1.16 are incorrect and should be deleted. Many gender-affected activities are organised as mixed (but not "open") events rather than single-sex or separate-sex events. One example is mixed doubles. There is no basis for saying that an organiser of a mixed-sex gender-affected activity is not protected by the exception in s.195(1) in relation to sex-based rules about participation.

Example 13.1.17 is confusing and refers to a category that does not exist in the Equality Act. An athletics event that "includes women and trans women" is an athletics event for women and men. It is a mixed event.

The guidance goes on to say, at 13.1.18: "Given the physiological differences between men and women, it will often be necessary for organisations to develop general policies to guide and inform their decision making in this area." This disregards the Supreme Court's conclusion that it is the physiological differences between men and women that make them men and women, and which in turn create the gateway conditions for establishing sex-based rules in so-called "gender-affected sports".

As the Supreme Court notes, there is not necessarily any physiological difference between "trans women" and other men.

The starting point for any policy related to trans individuals in sport must therefore be that they can compete only in the sex category in which they are entitled to compete.

Neither the Equality Act nor the previous guidance mention testosterone suppression by medical or surgical means as a gateway condition for sport.

These are interventions with serious health consequences, up to and including sterilisation. While s.195 of the Equality Act provides an exception from gender-reassignment discrimination, any organisation drawing up criteria requiring men to take hormone-suppressing treatment in order to compete in a sporting category would need to very carefully consider the human-rights implications. **This recommendation is outside the scope of the Equality Act and should be removed.**

As the Supreme Court noted, Parliament has decided that the criteria for having the protected characteristic of gender reassignment do not include hormone treatment or surgery. The ECtHR in the case of *AP Garcon and Nicot v France* concluded that a law requiring treatment that amounted to sterilisation in order to obtain administrative gender recognition had been a violation of Article 8 (right to respect for private life). Requiring treatment that is likely to impair sexual function and fertility, and which might lead to sterilisation, in order to compete in a sport competition is unlikely to be proportionate. Furthermore there is already a sport competition (the male – or open – category) in which these men are qualified to compete, and where the Equality Act provides them with protection against discrimination. They are not excluded from sport.

Recommendations

Significantly cut and simplify this section to reflect the Equality Act.

EDIT: 13.1.2 to include mixed-sex sports with sex-based rules.

SUGGESTED TEXT: "It is not a breach of the Act for a person to organise single-sex or separate-sex events, OR TO ORGANISE A MIXED-SEX EVENT WITH SEX-BASED RULES OR RESULTS, in a sport, game or other activity of a competitive nature in specific circumstances (s.195(1) and (3)). These circumstances are where an average person of one sex would be at a disadvantage as a competitor against an average person of the other sex due to their physical strength, stamina or physique (referred to in the Act as a 'gender-affected activity')."

DELETE: "Where there is no disadvantage due to these factors, organising single-sex or separate-sex events may be unlawful sex discrimination."

This is unnecessary and suggests that it is particularly difficult to meet this criterion. It is a general observation that unless an exception applies anywhere in the Act, discrimination will be unlawful. Sport is almost universally organised by sex, relying on being gender-affected to be lawful. This is established and accepted, and following the FWS judgment there is no need for further consideration of people of the other sex based on their cross-sex identification.

EDIT: Example 13.1.3 to make clearer this is straightforward and not at all uncertain.

SUGGESTED TEXT: "A 5-a-side football tournament includes separate competitions for men's and women's teams. This is permitted under the Act because football is a gender-affected activity where physical strength, stamina and physique put women at a disadvantage compared to men on average."

ADD an example on mixed-sex sport with sex-based rules:
"A volleyball tournament has male, female and mixed divisions. It has the following rules. In Women's Divisions, only females may play. Females are permitted to play in the Men's competition. In Mixed Divisions there must be at least three women on court at all times."

ADD an example of a parallel sport:
"A regular recreational 5k running event is held in which times are collected and people are recognised as 'fastest finisher', 1st, 2nd, 3rd, 'top 10' and so on. Both men and women participate and times are published by sex.

"These rules are lawful and reflect the greater average strength, power and height of male players."

EDIT 13.1.4 to reflect the wording in the Act: "it is appropriate" to consider age and stage.

SUGGESTED TEXT: "This exception also applies to children's sport (s.195(4)). It is appropriate to take account of the age and stage of development of children who are likely

to be competitors in considering whether the activity needs to be sex-separated. Sex differences are present from birth, so it is likely to be lawful to operate separate sex sports even before puberty, if deemed necessary."

EDIT 13.1.5 to make clear this is about categories and rules:

SUGGESTED TEXT: "A community football league only has mixed teams for under-8s. For over-8s it also has a girls' division. This is lawful because football is a gender-affected activity at this level. However girls are allowed to play in teams with boys in the general youth division up to age 18. From age 18 the teams are male and female. This progression reflects the increasing divergence between boys' and girls' speed, strength and force as they grow up."

REMOVE THE HEADING Competitive sport – gender reassignment

EDIT 13.1.6 as it wrongly suggests there is some legal difficulty in excluding men who identify as transgender from female sports and vice versa. Use the text from the notes section of the legislation.

SUGGESTED TEXT: "As with the meaning of the words men and women throughout the Act, the provisions on sport are plainly predicated on biological sex. This means that a sporting competition or event with a qualifying condition that competitors are women will exclude all men, including those who identify as 'trans women'. This is not gender reassignment discrimination."

FOOTNOTE THIS WITH: *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* (FWS2).

ADD an example.

SUGGESTED TEXT: "A boxing club organises men's and women's competitions. One of the male boxers transitions, adopting a female name, asking to be called 'she' and taking female hormones in order to grow breasts. The boxer asks to compete in women's tournaments. The club says that is not permitted as the competitions are organised by sex. This is not gender reassignment discrimination."

EDIT 13.1.16 and make it simpler and clearer, to use the text from the notes to the legislation and to bring it in line with the Supreme Court.

SUGGESTED TEXT: "Section 195(2) makes it lawful to restrict participation of trans people in sporting competitions if this is necessary to uphold fair or safe competition, but not otherwise."

Then give examples that make clear that this is a question about transgender people being excluded from sports FOR THEIR OWN SEX:

SUGGESTED TEXT: "If the male boxer who identifies as a woman was excluded from men's boxing, this could be unlawful gender reassignment discrimination unless there was a reason based on safety or fair competition.

"A female boxer transitions to identify as a "trans man" and takes testosterone. The individual is excluded from female competition. This is not unlawful gender reassignment discrimination if it is necessary for reasons of safety or fair competition."

FOOTNOTE THIS WITH paragraph 236 of *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* (FWS2).

Change 13.2: Updated section on separate and single-sex services for men and women

CONSULTATION DRAFT

13.2.1 The Equality Act 2010 (the Act) contains specific exceptions (discussed in this section) which allow service providers and, in certain cases, those exercising public functions (s.31(3)), to provide services:

- separately and / or differently for women and men
- exclusively for women
- exclusively for men
- to people of a particular age group (in certain circumstances)

13.2.2 If a service is generally provided only for persons who share a protected characteristic, a person who normally provides that service can (Sch 3 paragraph 30):

- insist on providing it in a way they normally provide it
- refuse to provide the service to people who do not share that protected characteristic, if they reasonably think it is impracticable to provide it

Separate services for women and men

13.2.3 The Act (Sch 3 paragraph 26(1)) does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions (s.31(3)) offers separate services for men and women in specific circumstances. It is lawful to provide separate-sex services if:

1. a joint service for women and men would be less effective, and
2. providing the service separately to women and men is a proportionate means of achieving a legitimate aim

13.2.4 If these conditions do not apply, the provision of separate-sex services is likely to be unlawful sex discrimination.

13.2.5 The Act (Sch 3 paragraph 26(2)) also does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) provides separate services for each sex in a different way, if:

- a joint service for persons of both sexes would be less effective, or
- the extent to which the service is required by one sex makes it not reasonably practicable to provide the service other than separately and differently for each sex, and
- the limited provision of the service is a proportionate means of achieving a legitimate aim

Example 13.2.6 A domestic violence support unit is set up by a local authority for women and men separately as they are aware that service users feel safer and more comfortable attending a single-sex group. There is less demand for the men's group, which meets less frequently.

13.2.7 The Act (Sch 3 paragraph 26(3)) also does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) does anything in relation to the provision of separate services, or services provided differently for women and men, for the reasons set out in paragraph 13.2.5.

Example 13.2.8 A local authority allocates funding for a primary care trust to contract with a voluntary sector organisation to provide counselling for women who have had a mastectomy.

13.2.9 Read paragraphs 13.3.1 to 13.3.20 for the considerations relevant to whether a separate-sex service, or anything done in relation to it, is a proportionate means of achieving a legitimate aim.

Single-sex services

13.2.10 The Act (Sch 3 paragraph 27) does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) provides a service exclusively to one sex, if doing so is a proportionate means of achieving a legitimate aim and at least one of the conditions in paragraphs 13.99 to 13.109 applies.

13.2.11 Condition 1: Only people of that sex need the service.

13.2.12 Condition 2: A service that is provided jointly for both sexes is not sufficiently effective without providing an additional service exclusively for one sex.

Example 13.2.13 A gym provides weightlifting classes to all its customers, but few women join the class, so it also provides an additional single-sex weightlifting class for women to encourage women to use the service.

13.2.14 Condition 3: A service provided for men and women jointly would not be as effective, and the demand for the services makes it not reasonably practicable to provide separate services for each sex.

Example 13.2.15 A support unit for women who have experienced domestic or sexual violence can be established, even if there is no men's unit established because there is insufficient demand to make it reasonably practical to provide a separate service for men.

13.2.16 Condition 4: The service is provided at a hospital or other place where users need special care, supervision or attention.

Example 13.2.17 A hospital chooses to provide a single-sex hospital ward for women patients to protect their safety, privacy and dignity. The hospital supports this decision by noting that the ward in question does not fit its criteria for the small number of circumstances where mixed-sex accommodation may be acceptable.

13.2.18 Condition 5: The service is for, or is likely to be used by, more than one person at the same time and a woman might reasonably object to the presence of a man, or vice versa.

It is likely to be reasonable for a woman to object to the presence of a man if she will be getting undressed or in a vulnerable situation when she is using the service.

Example 13.2.19 Women-only communal changing rooms in a sports facility.

13.2.20 Condition 6: The service is likely to involve physical contact between the service user and another person and that other person might reasonably object if the service user is of the opposite sex.

In this condition, limited and non-intimate physical contact is unlikely to justify single-sex provision. For instance, the fact that in first aid training there may be some physical contact between participants in the classes is unlikely to warrant the provision of single-sex sessions.

Example 13.2.21 A female carer only provides intimate personal care to female clients as she is uncomfortable providing this type of care to men in a domestic environment.

13.2.22 Where a service provider (including a person providing a service in the exercise of public functions) does anything in relation to the provision of single-sex services, this will be lawful provided that one of conditions 1 to 6 is met, and that providing the service on a single-sex basis is a proportionate means of achieving a legitimate aim.

13.2.23 Read paragraphs 13.3.1 to 13.3.20 for the considerations relevant to whether a single-sex service, or anything done in relation to it, is a proportionate means of achieving a legitimate aim.

The explanation of the legal rights and responsibilities set out in the updated section on separate and single-sex services for men and women is clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

The wording at "The Act does not prohibit sex discrimination" is correct but difficult to parse in this negative construction.

The fundamental point from the Supreme Court judgment is that the gateway conditions for single-sex and separate-sex services are based on biological sex, and that therefore "men" includes "men who identify as transwomen" and "women" includes "women who identify as transmen" in relation to these conditions. This should be addressed up front in this section, not left to the end of the following section (currently proposed to be at 13.3.19).

As the Supreme Court says at paragraph 213: "it is likely to be difficult (if not impossible) to establish the conditions necessary for separate services for each sex when each group includes persons of both biological sexes." And at 216: "The gateway conditions in paragraph 27(2) to (7) cannot be coherently applied if sex does not carry its biological meaning."

If users of the Code of Practice become confused and do not understand that the gateway conditions relate to the ordinary meaning of biological sex, and not the idea of gender identity, they may be unable to apply them coherently and rationally.

Recommendations

ADD after 13.2.1: "These exceptions set out a series of 'gateway conditions' that provide the justification for single and separate sex-services to operate lawfully under the Act. These conditions relate to biological sex. When considering the needs of men and women (and boys and girls), and whether to provide separate-sex services, service providers should be clear that these two groups relate to biological sex, not gender reassignment.

"If a service provider does not apply rules and policies based on biological sex, it is very likely to amount to unlawful direct or indirect sex discrimination."

FOOTNOTE THIS WITH: *For Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1), and The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16 (FWS2)*.

ADD: "Public authorities must, in the exercise of their functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act (s.149 (1)). This includes public authorities, both as direct providers of services and as funders or regulators of services provided by others.

"They should therefore be clear that where they consider and develop policies and rules concerning providing services to men and women (and boys and girls), this is based on consideration of biological sex."

FOOTNOTE THIS WITH: The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16 (FWS2)*.

EDIT 13.2.3, 13.2.7 and 12.2.10 to change from negative to positive statements.

13.2.3 SUGGESTED TEXT: "It is lawful for a service provider (including a person providing a service in the exercise of public functions) to offer separate services for men and women if a joint service for women and men would be less effective, and the provision is a proportionate means of achieving a legitimate aim (Sch 3 paragraph 26(1))."

13.2.7 SUGGESTED TEXT: "It is also lawful for a service provider (including a person providing a service in the exercise of public functions) to offer separate services differently for men and women if…."

13.2.10 SUGGESTED TEXT: "It is lawful for a service provider (including a person providing a service in the exercise of public functions) to offer a service only for women or only for men if it meets one of of the following conditions and doing so is a proportionate means of achieving a legitimate aim (Sch 3 paragraph 27)."

13.2.11 ADD AN EXAMPLE for condition 1: Only people of that sex need the service.

SUGGESTED TEXT: "An NHS hospital trust provides breastfeeding support groups in the community. This is a service that is needed only by women."

13.2.6 ADD AN EXAMPLE of an everyday separate-sex service, for example toilets.

SUGGESTED TEXT: "A company operating train stations adopts a policy of providing separate-sex WCs for women and men, as well as a unisex option, as it believes this is most effective. It determines the number of units needed based on demographics at different stations, recognising that women need twice as many facilities as men per capita to achieve equal waiting time."

NB: This is Network Rail's policy.

EDIT 13.2.17: The hospital policy is oddly phrased in the negative construction. It could be improved.

SUGGESTED TEXT: "A hospital has a policy of providing single-sex accommodation to protect the privacy, dignity and safety of patients. The policy also allows for mixed-sex accommodation in situations such as critical care units."

EDIT 13.2.19 The changing-room example does not need "communal".

SUGGESTED TEXT: "Women-only changing rooms in a sports facility."

Change 13.3: New section on justification for separate and single-sex services

CONSULTATION DRAFT

13.3.1 When providing a separate or single-sex service, a service provider (including a person providing a service in the exercise of public functions) must be able to demonstrate that doing so is a proportionate means of achieving a legitimate aim.

13.3.2 An example of a legitimate aim for providing a separate or single-sex service could be ensuring the safety of women or the privacy and dignity of women and / or men. The service provider (including a person providing a service in the exercise of public functions) must show that providing the service only to one sex or separately to both sexes is a proportionate way to achieve the aim.

13.3.3 When considering whether providing a separate or single-sex service is proportionate, the service provider (including a person providing a service in the exercise of public functions) should consider all potential service users and whether there is a fair balance between:

- the benefits of offering the service as a separate or single-sex service, and
- the needs of those who are accessing it, and
- the impact on those who are excluded from accessing it

13.3.4 When considering the benefits of offering a separate or single-sex service, the service provider (including a person providing a service in the exercise of public functions) should think about whether women's safety, privacy and / or dignity would be at risk in the service if it was shared with men.

Taking the example of offering a single-sex service for women, the service provider should consider factors such as:

- whether women are likely to be in a state of undress

- whether there will be limited ability for women to leave or to choose an alternative service
- whether the service is provided a result of, or connected with, male violence against women
- whether the physical differences between men and women are relevant to the experience of the service and put women at a particular disadvantage

Where factors like these are present, the benefits of offering a separate or single-sex service will be likely to outweigh other considerations in the balancing exercise.

13.3.5 The needs of potential service users include the specific needs of people with different protected characteristics, such as older people, disabled people and those who observe particular religious practices. For example, Muslim people may have a particular need for separate-sex services to observe the requirements of their faith.

Example 13.3.6 A swimming class provider runs classes at a swimming centre that caters to the local community, including Muslim people. The swimming class provider operates a mix of services with some separate-sex classes, which are used predominantly by Muslim women and men, as well as mixed-sex classes which are open to everybody. The swimming class provider has considered the impact of the mix of its services across different protected characteristics and determined that its balanced mix of services is proportionate. The provision made is therefore likely to be lawful.

13.3.7 The impact on those who will be excluded from the service includes both the impact on people of the opposite biological sex generally and the particular impact on trans people of the opposite biological sex. In separate or single-sex services, a trans man will be excluded from the men-only service because his biological sex is female, and a trans woman will be excluded from the women-only service because her biological sex is male. Trans people are likely to be disadvantaged by this, by comparison to people who are not trans.

13.3.8 The service provider (or person providing a service in the exercise of public functions) should consider whether the disadvantage to trans people, and any other people who may be disadvantaged, outweighs the benefits of achieving the legitimate aim. They should also consider whether there is a less intrusive option than excluding trans people which would be proportionate (read 13.4.4 to 13.4.8).

13.3.9 Having carried out this balancing exercise, the service provider (including a person providing a service in the exercise of public functions) may conclude that arrangements or adaptations can be made to meet the needs of all service users, or that it remains proportionate to maintain only a separate or single-sex service.

13.3.10 In many cases, it will be proportionate to take a holistic approach to service provision by providing a mix of services which may include both separate or single-sex

services and mixed-sex services. The mix of services in terms of the size of the separate or single-sex services and of the mixed-sex services should reflect the needs and relative numbers of service users with different needs.

Example: 13.3.11 A service provider operates a shopping centre and decides to renovate the centre. It initially intends to only provide separate-sex toilets to improve the safety and comfort of users. This disadvantages trans people because it means that a trans person cannot access a toilet catered towards their acquired gender. The service provider therefore decides to also provide toilets in individual lockable rooms which can be used by people of either sex.

Example: 13.3.12 A community group is opening a small advice centre. It decides to provide separate-sex toilets for women and men, and it repurposes the accessible toilet to be used as a mixed-sex toilet for anybody who does not wish to use the toilet for their biological sex. This is likely to be proportionate given the size and resources of the centre and takes into account the needs of all the potential service users.

Example: 13.3.13 A local gym organises weightlifting induction classes designed to teach users of the gym proper techniques and safety measures. The classes are in high demand and are well attended. A small number of women request women-only classes, as they feel uncomfortable in the mixed-sex service. The gym amends its schedule to offer one class a fortnight to cater to this request, which it considers to be proportionate to the needs of service users and the relative demand. This is likely to be lawful because it has balanced the needs of different service users and provided a proportionate mix of services.

13.3.14 However, it may be that offering alternative arrangements is not reasonably possible for the service provider (including a person providing a service in the exercise of public functions) or that doing so would undermine the service that is being provided. This may be because of the type of service being provided, the needs of the service users, the physical constraints of any building, or because of the disproportionate financial costs associated with making those arrangements.

Example: 13.3.15 In the example in paragraph 13.3.13, the women who have requested women-only classes also ask for single-sex changing rooms. The gym is in a small, shared studio space which provides mixed changing facilities with private cubicles for changing. The cubicles have floor to ceiling lockable doors and there have been no complaints about inappropriate conduct in the changing rooms. The service provider determines that providing single-sex changing rooms is impractical because of space constraints and the disproportionate cost. Since the existing changing rooms enable users to change in privacy, the current arrangement is likely to be proportionate and lawful.

Example: 13.3.16 A women's centre provides a gym predominantly used by Jewish women who have religious objections to sharing a gym with men. The gym considers

whether to open the gym to men on certain days, or to open the gym on a mixed-sex basis on certain days.

13.3.17 However, the centre decides to offer the gym only to women because the overwhelming demand for the service is from Jewish women and there are numerous other gyms in the area that cater to men and trans people. This service would exclude men and trans women, but it is likely to be proportionate and lawful.

13.3.18 It is good practice to record the reasons why a decision has been taken to provide or not to provide a separate or single-sex service, along with any supporting evidence.

13.3.19 If a service provider (or a person providing a service in the exercise of public functions) admits trans people to a service intended for the opposite biological sex, then it can no longer rely on the exceptions set out at paragraphs 13.2.3 to 13.2.22. This means that if a service is provided only to women and trans women or only to men and trans men, it is not a separate-sex or single-sex service under the Equality Act 2010. A service like this is very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it. A service which is provided to women and trans women could also be unlawful sex discrimination or lead to unlawful harassment against women who use the service. Similar considerations would apply to a service provided for men and trans men.

13.3.20 Similarly, if a service provider (including a person providing a service in the exercise of public functions) decides only to provide a service on a mixed-sex basis, without any separate or single-sex option, this could be direct or indirect sex discrimination against women who use the service or lead to unlawful harassment against them. This is most likely in contexts like those referred to in paragraph 13.3.4.

The explanation of the legal rights and responsibilities set out in the new section on justification for separate and single-sex services is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☑ **Disagree**
- ☐ Strongly Disagree
- ☐ Do not know

Commentary

This section is too long and overcomplicated. It should be much shorter and simpler.

Together with Section 2 on recording sex (which we recommend should be removed entirely), this section introduces extraneous material that goes beyond the Equality Act.

These are the two areas that are most vulnerable to pressure, confusion and misunderstanding by those pushing for service providers to allow people to use opposite-sex services, or to make it difficult or daunting to provide lawful single-sex services.

Sex Matters has published guidance that addresses this section in detail.

The aim of this section should be to make completely clear that single and separate-sex services are often justified, are straightforward to implement and defend legally, MUST operate on the basis of biological sex, and do not require detailed up-front justification, individualised case-by-case assessment or complex legal expertise.

Guidance published by groups such as Gendered Intelligence seeks to make operating single and separate-sex services appear difficult and complex, and to encourage trans-identifying people to continue to attempt to access opposite-sex services.

The statutory guidance should counter the pressure and misinformation that organisations providing services to the public face, for example the misrepresentation that:

- proportionate means to a legitimate aim is a test that needs to be applied to individuals on a case-by-case basis
- it is possible to provide a gender-identity-based service for "women", entirely bypassing the issue of sex discrimination, simply by not calling it a single-sex service.

The guidance should be simple, clear and practical, and should recognise that legal tests which might be undertaken by a court in relation to objective justification are not the same as service providers' practical considerations when designing their services and buildings. The wide range of options for different configurations of joint, separate or single-sex services provided by paragraphs 26 and 27 (and the wide range seen in practice) should make it obvious that service providers deciding whether to offer a service to both sexes (together or separately) or to only one sex, or some mixture of these options, are not operating on a legal knife-edge. In many everyday situations there will be a variety of lawful ways to provide facilities and services.

It will only be unlawful discrimination (as in *OFSTED v Al Hijarah School[[2017] EWCA Civ 1426]* and *Coll, R. (on the application of) v Secretary of State for Justice [2017] UKSC 40 (24 May 2017)*) if does not meet one of the gateway conditions or is not a proportionate means to that legitimate aim.

Cadman v Health and Safety Executive [2004] IRLR 971 CA is helpful. It found that there is no rule of law that justification (in relation to indirect discrimination) must have consciously and contemporaneously featured in the decision-making processes of the duty bearer (in this case an employer); however it may be more difficult to discharge the burden of establishing justification where there is no evidence to show that it ever applied its mind to the question

of whether there was another way of achieving the legitimate aim that would avoid or diminish the disparate adverse impact on the protected group.

As Sex Matters said in our response to the October 2024 consultation in relation to Chapters 5 and 10 where the objective justification test is explained, we think it is legally incorrect to present the objective justification test in the Equality Act as the four-part *Bank Mellat* test of human-rights proportionality instead of the simpler two-stage test associated with "proportionate means to a legitimate aim" in the Equality Act.

We do not know whether the general presentation of the objective justification test has been changed following responses from the October 2024–January 2025 consultation, but the approach and language in this section (such as "less intrusive approach") suggest that it continues to assume that the Bank Mellat approach should be taken.

The *Bank Mellat* case concerned the lawfulness of the UK Treasury's interference with an international bank's financial dealings, based on whether or not it was a proportionate and rational response to the statutory purpose of hindering Iran's nuclear development.

By contrast, Schedule 3 Part 7 of the Equality Act concerns the day-to-day operations of duty bearers, which include small shops, cafes, high-street services, nursery schools, community halls and sports clubs. Starting from the Sex Discrimination Act 1975, legislators sought to draw broad and simple safe harbours around familiar single and separate-sex services, which were recognised as a public-policy good, in order to prevent them being prohibited when sex discrimination became unlawful.

The list of legitimate aims are built into Schedule 3 Part 7, which does not evince an intention to require the operators of such ordinary, everyday services to become experts in human-rights law in order to provide separate toilets, changing rooms or showers for women and men.

When the proprietor of a clothing shop considers whether to provide a female-only changing room, unisex changing room or separate-sex changing room, it is unclear that any human rights are at risk of being breached, whatever she decides, or that she needs to understand anything about fundamental human rights in order to make the decision.

Slotting the clothing-shop proprietor into the role of the Treasury in the *Bank Mellat* case is using a rocket-propelled grenade to crack a nut.

The more applicable authority is *Seldon v Clarkson Wright and Jakes (A Partnership) [2012] UKSC 16* , which concerns lawful age discrimination by employers (lawful age-based rules). This situation is much closer to single-sex services (that is, lawful sex-based rules). However in the case of single and separate-sex services the test is even simpler. The Equality Act gives an open-ended exception for age-based rules, allowing them when they can be "objectively justified". In *Seldon*, the Supreme Court held that direct discrimination can be justified only by an aim that is in the public interest and consistent with the social policy of the state. In the case of single and separate-sex services, a wide range of legitimate aims

has already been set out by the legislature in Schedule 3 Part 7 EqA, relating to different needs of women and men, effectiveness of providing services, hospitals, bodily privacy, religious practices and so on.

The EAT said in *Seldon*, with which the Court of Appeal and the Supreme Court agreed:

> "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue."

In most situations where service providers are providing facilities such as toilets (which are covered by building regulations), or specialist services such as those that follow the Rape Crisis National Service Standards (RCNSS), they should not have to reinvent the wheel each time in considering the benefits of mixed or single-sex services, since they are implementing general rules and policy decisions that have been established at higher level than the individual organisation. They can simply follow established standards, regulations and policy frameworks.

For example; the UK has ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). Its purpose includes ensuring that countries have robust "policies and measures for the protection of and assistance to all victims of violence against women and domestic violence". There are suites of policies, both by the UK government and by regional authorities, to address violence against women and girls (VAWG), including by provision of single-sex services.

To take just one example within this, in the Domestic Abuse Act 2021, the government introduced a statutory duty on Tier 1 local authorities in England to provide support for victims of domestic abuse and their children within safe accommodation, including refuges. To accompany the new duty the government published statutory guidance making its expectations clear to local authorities concerning how this new duty should be delivered on the ground. All safe accommodation under the duty must be single-gender or single-sex, and must meet either Department for Levelling Up, Housing and Communities (DLUHC), Women's Aid, Imkaan or other nationally recognised quality standards for domestic-abuse support services.

Service providers are commissioned to provide a service to meet these standards (which are consistent with the legitimate aims in paragraph 26(1) for separate-sex services and 27(6) for single-sex services). The individual service providers do not need to undertake a human-rights balancing exercise questioning whether it is legitimate for them to provide a single-sex service at all.

Wrongly importing the *Bank Mellat* test and its language, such as for a "less intrusive option", makes it appear legally difficult to operate ordinary single-sex services. It undermines the predictability and workability of the Equality Act.

The approach that should be applied to objective justification in the Equality Act in general, and specifically in relation to the single and separate-sex service exceptions, is the simpler test in *Seldon,* and in *Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15*, which says: "To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so."

Importing the *Bank Mellat* human-rights test has led the EHRC to invent stronger justification than the Equality Act requires for single and separate-sex services.

Section 13.3.4 of the consultation draft introduces new conditions not found in the Act. It says that when considering the benefits of offering a separate or single-sex service, the service provider "should think about whether women's safety, privacy and / or dignity would be at risk in the service if it was shared with men". It directs the service provider to consider a specified range of factors not required on the face of Schedule 3 Part 7: whether women are likely to be in a state of undress, whether there will be limited ability for women to leave or to choose an alternative service, whether the service is provided a result of, or connected with, male violence against women, and whether the physical differences between men and women are relevant to the experience of the service and put women at a particular disadvantage.

These are indeed some of the reasons why women may prefer and benefit from separate-sex facilities. But they are not found in Schedule 3 Part 7, which offers simpler, everyday reasons why single and separate-sex services can be offered, and is neutral between male-only and female-only services.

The guidance should not embroider policy in either direction, but should instead stick to the Equality Act.

The Equality Act provides for many situations where services may lawfully be provided either jointly or separately. These justifications all meet public-policy goals (which are included in the act). It does not say that the service provider needs to have considered an imminent risk to privacy, safety or dignity when choosing between one design choice and another. Separate-sex facilities can be provided where they are more efficient (for example, the reason for providing urinals may be that they are faster to use and easier to clean).

Single-sex services for men are lawful under the Equality Act, even though men's safety is not at risk when sharing with women.

The overengineered approach can be seen in the example at 13.3.6 of the swimming-class provider that offers mixed-sex and single-sex lessons. It talks about "those who will be excluded from the service". However, in the example the service is provided for men and women separately, and also as a mixed service. No one is excluded from learning to swim

with this provider on the basis of either their sex or their preference for mixed-sex or separate-sex classes.

The example goes on to say that there is a particular disadvantage to a "trans man (that is, a trans-identifying woman) who will be excluded from the men-only service" and a "trans woman (that is, a trans-identifying man) who will be excluded from the women-only service", and that "Trans people are likely to be disadvantaged by this, by comparison to people who are not trans."

This does not follow. A single-sex service *by necessity* excludes all members of the opposite sex. It cannot be an argument against a single-sex service for women that it will exclude a particular category of men (those who identify as women), because the *only* way to provide a single-sex service for women is to exclude *all* men (and the group of "all men" will naturally include men with other protected characteristics).

If providing a single or separate-sex service meets one of the gateway conditions which provide the legitimate aims, then it cannot be "disproportionate" that this would involve excluding all members of the opposite sex. This is a feature, not a bug!

It is not necessary to balance the desire of a minority of people to inappropriately share a space or service with members of the opposite sex against the existence of rules that preclude them from doing so.

The point that it is proposed to make in s.13.3.19 – about a service provider not being able to rely on the exceptions if it becomes confused about the categories of "man" and "woman" – should be introduced in the previous section, because it concerns the gateway conditions for single and separate-sex services, not the question of proportionate means to a legitimate aim.

Recommendations

EDIT: 13.3.1 and 13.2.2 to recognise that there is no procedural requirement to "demonstrate" a proportionate means to a legitimate aim in the ordinary course of providing a service.

SUGGESTED TEXT: "It is lawful to provide a separate or single-sex service where doing so meets one of the gateway conditions in the previous section and it is a proportionate means of achieving a legitimate aim. This is often called the 'objective justification test'. There are two parts to the test:

- First, is the aim of the rule or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- Second, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary?"

FOOTNOTE THIS WITH: *Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15 and Seldon* v *Clarkson Wright and Jakes [2012] UKSC 16*. Remove footnote to Bank Mellat in relation to the justification test.

EDIT 13.3.2 to: "The wide range of legitimate reasons for providing a separate or single-sex service is set out in the previous section (relating to Schedule 3 paragraphs 26 and 27). Those gateway conditions relate to biological sex. The rule or practice should therefore relate to biological sex."

EDIT 13.3.3 to make clear that the "proportionate means to a legitimate aim" test in relation to single and separate-sex services is not a high bar.

SUGGESTED TEXT: "13.3.3 When considering whether to provide a service on a separate or single-sex service basis or as a mixed service the service provider should consider

- the benefits of offering the services on A SINGLE OR SEPARATE-SEX BASIS
- the impact on those who are ARE DISADVANTAGED BY THIS LIMITED PROVISION
- the circumstances (such as the size of the building, the population served and whether it is intended to be a universal service)."

DELETE 13.3.4. This does not come from the Equality Act.

EDIT 13.3.5 to address benefits and disadvantages, but make clear it is not necessary to undertake a full human-rights balancing exercise.

SUGGESTED TEXT: "Women's safety, privacy and dignity are often benefits of providing single and separate-sex services. Such services may also be beneficial to people with other protected characteristics, such as older people, disabled people and those who observe particular religious practices. For example, Muslim people may have a particular need for separate-sex services for the observance of their faith. In some situations, replacing separate-sex services with only mixed-sex services, or failing to provide single-sex services, may undermine the effectiveness of the service and give rise to a claim of indirect or direct discrimination.

FOOTNOTE THIS WITH: *Earl Shilton Town Council v Ms K Miller: [2023] EAT 5.*

DELETE 13.3.7 This wrongly states the law and makes single-sex services appear difficult to provide.

EDIT 13.3.8 to make clear that, when considering disadvantages, all relevant protected characteristics should be considered.

SUGGESTED TEXT: "When deciding whether to offer a service on a single or separate-sex basis, the service provider (or person providing a service in the exercise of public functions) should consider the disadvantages this could cause and whether these disadvantages outweigh the legitimate aim, such as the benefits of providing the service on a separate sex basis for the effectiveness of the service. For example, if toilets, changing facilities or

dormitories are offered only on a separate-sex basis, this can disadvantage families, disabled people with opposite sex carers and transgender people."

EDIT 13.3.9–13.3.10 to remove "balancing exercise". Carrying out such an exercise is something a lawyer or judge can do. A service provider who is considering options (or simply moving into a building that already has toilets which meet building standards and workplace regulations) is doing something simpler and is likely to be choosing between a range of options, all of which are lawful.

SUGGESTED TEXT: "Having considered the needs of different potential users, and the circumstances of the overall service, the service provider may conclude that a mix of separate-sex and a joint service (sometimes called unisex or gender-neutral) can be provided, so that no one is excluded. Or it may decide that in the circumstances it is justifiable to provide only a separate or single-sex service, or only a joint service.

"In many everyday situations (such as toilets) there are other considerations, such as building regulations and health and safety at work regulations. Meeting regulatory standards is clearly objective justification for single or separate-sex services under the Equality Act."

EDIT THE EXAMPLES at 13.3.11 to make them simpler and more realistic.

SUGGESTED TEXT: "A service provider operates a motorway service station. Among its responsibilities in operating the concession is to provide toilets for travellers, which is necessary for road safety. It therefore provides a mix of facilities – mainly separate-sex toilets, which are preferred by most users and easier to keep clean, as well as some unisex toilets, which are preferred by some people including disabled people with opposite-sex carers, families with young children, and transgender people."

"A business provides a chain of gyms that are open 24 hours a day and are unsupervised during off-peak hours. It has communal separate-sex changing rooms with doors that are controlled by a membership app with a QR code. This allows members to access only the changing room for their sex. It decides not to provide a fully enclosed unisex lockable room, as it believes this would be a safety risk during unsupervised hours and would undermine the effectiveness of the service."

DELETE Example 13.3.16. It is unrealistic and unnecessary to suggest that a gym in a women's centre should consider whether to open to men, and the existence or otherwise of other gyms in the area is irrelevant (see *Seldon*).

DELETE 13.3.18. This is not called for by the Equality Act. Separate-sex facilities are generally part of building standards.

DELETE 13.3.19. Address this point in the previous section.

DELETE 13.3.20. Address the point about sex discrimination and harassment earlier.

Change 13.4: New content on policies and exceptions for separate and single-sex services

CONSULTATION DRAFT

13.4.1 It will usually be helpful and often necessary for service providers (including a person providing a service in the exercise of public functions) to have a policy setting out whether, and if so how, separate or single-sex services will be provided. When developing a policy, the service provider should consider how the policy should apply in different circumstances to ensure appropriate consideration of all affected interests and provide transparency for service users.

13.4.2 However, individual circumstances may, exceptionally, require a different approach to that set out in a policy. The law in this area is complex, and it is not certain that it is permissible to make exceptions to allow people of the opposite sex to use a separate or single-sex service. It is likely, however, that this will be permissible if doing so adds a necessary flexibility without undermining the aim of the service and / or contributes towards achieving the aim.

Example 13.4.3 A council swimming pool has separate men's and women's changing rooms. One of the aims of having separate-sex changing rooms is to safeguard women's ability to access the facilities and use them safely. A woman is allowed to take her male child under the age of ten into the women's changing room. This does not undermine the aim, because it is unlikely that young boys pose a threat to women's safety. It also contributes towards achieving the aim, because fewer women would be able to use the swimming pool if they could not bring their children with them.

13.4.4 In most situations, when a potential service user wishes to access a single-sex service for the opposite biological sex, the service provider (including a person providing a service in the exercise of public functions) should consider whether it can accommodate the needs of the service user in a way which achieves a fair balance without compromising the single-sex nature of the service.

13.4.5 The service provider (including a person providing a service in the exercise of public functions) should consider whether it can offer a separate service to that individual and others in similar circumstances. If it is possible to do so, the service will remain a single or separate-sex service, with an additional separate service for those that share that individual's circumstances.

13.4.6 For example, if a leisure centre offers women-only water aerobics sessions, and it is approached by a man who would like to access the service, the leisure centre should consider whether it could offer a water aerobics session that is also open to men at a different time or on a different day. If it is possible to do so, the service would remain a

separate or single-sex service, but with an additional separate service that is also open to men.

13.4.7 Another example of a less intrusive measure would be adapting a service to enable the service to be used by people of both sexes. For example, it may be possible to offer toilets in individual lockable rooms to be used by both sexes.

13.4.8 It may be that offering alternative arrangements is not reasonably possible for the service provider (or person providing a service in the exercise of public functions) or that doing so would undermine the service that is being provided. This may be because of the type of service being provided, the needs of the service users, the physical constraints of any building, or because of the disproportionate financial costs associated with making those arrangements. The service provider may take account of the fact that if it admits the individual it may cease to be a separate or single-sex service (read paragraph 13.3.19).

The explanation of the legal rights and responsibilities set out in the new content on policies and exceptions for separate and single-sex services is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☑ **Strongly Disagree**
- ☐ Do not know

Commentary

This section is confusing and dangerous, as it suggests there can be exceptions to the exceptions and that these should be considered on a case-by-case basis.

We think it is wrong in law.

In *Seldon v Clarkson Wright and Jakes [2012] UKSC 16*, the Supreme Court approved the following guidance from the EAT: “Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' It is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered rather than the impact on the individual.”

As stated by the Supreme Court: “Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.”

In *Buchanan v Commissioner of Police of the Metropolis*, the Court of Appeal agreed with the EAT that: "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue."

Thus there is no difference between having the rule "no men allowed" and enforcing that rule. **The service provider does not need a further justification for enforcing the rule**.

If in reality the service provider is operating a de facto written or unwritten policy that it will not enforce the rule (for example if it puts up a sign that says "women only" but then allows men in), then it is not following the policy that is objectively justified and which meets one of the gateway conditions set out in paragraph 26 or 27 of Schedule 3.

As the Supreme Court says at paragraph 216 of FWS: "The gateway conditions in paragraph 27(2) to (7) cannot be coherently applied if sex does not carry its biological meaning."

All organisations that have encouraged people to think that these rules are the start of a negotiation have been going outside the law. This includes the NHS, the civil service, police forces and for many years the EHRC. Although the Equality Act provides considerable latitude regarding whether to provide a joint, separate or single-sex service in any particular setting, **once the service is provided (that is, once the sign is put up), there is no further need or indeed room for flexibility, as this undermines the objective justification for the policy linked to the gateway conditions.**

Paragraph 13.4.2, which states that "individual circumstances may, exceptionally, require a different approach to that set out in a policy", is wrong in law and unworkable. This paragraph suggests the discredited "case-by-case" approach to allowing people to use opposite-sex services. This is in conflict with the Supreme Court's judgment in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16* and the general approach to legitimate aims in discrimination cases.

The law in this area is not particularly complex. The issue is that many organisations (including, for many years, the EHRC) have got the law wrong and are now resisting complying with it.

Transgender people and their lobbyists have become accustomed to not accepting the answer No to their demands to access opposite-sex spaces, and have been led to believe that they can operate outside ordinary rules.

Example 13.4.3, of a council swimming pool allowing women to take younger boys into the women's changing room, is not "a different approach to that set out in a policy". **It is a policy.** It is no use to families who want to use the pool if they do not know the changing-room policy before they set out for a swim, or if the decision will be made on the fly, at the discretion of particular managers. It is also bad for staff if they do not know what rules they

are meant to communicate and enforce (or if they risk disciplinary action for not doing their job).

In this example, the policy of the pool is: “Adults can bring children up to age 10 into the changing room with them.” This is a lawful policy that can be communicated online. The service remains a single-sex service for adults (including those with accompanied infants). Similarly, a women’s refuge that admits mothers with boys aged under eight remains a single-sex service with a clear sex-based (and age-based) rule.

The reasoning about considering safety on a case-by-case basis is dangerous, and unsupported by the Equality Act. It undermines the ability to communicate and enforce clear rules. In the example about the swimming-pool operator, boys aged 11 and 12 are not excluded from the women’s changing because they “pose a threat to women’s safety” but because age 10 has been chosen as the cut-off for the rule.

The example of a woman with a male infant is not in any way comparable to a cross-dressing or transsexual adult male suggested by s.3.4.4 who wishes to access a female-only facility. The guidance should take care not to suggest that the former (a lawful policy) is an example that can be used to justify the latter (an unlawful policy/ non-compliance/ ambiguous rules).

It must be made clear to service providers and to transgender individuals (and to their advisors and clinicians, and charities that represent or work with them) that seeking to use opposite-sex facilities is unacceptable and likely to expose those service providers and individuals to accusations of harassment related to sex.

At 13.4.5, the suggestion that a service provider should consider whether it can offer a separate service to an individual who wishes to use opposite-sex facilities is misguided. The needs of people for whom single-sex facilities are unsuited should have been considered much earlier in provision of the overall service (in relation not just to transsexuals but to disabled people with opposite-sex carers, families and so on). The answer, in terms of the facilities available, will either be “Yes, we have a unisex option” or “No, we do not have a unisex option.” This answer can be provided as visitor information online. There is no need or indeed scope for individual negotiation.

Nor does the leisure centre at 13.4.6 need to reconsider its service offering because it is approached by an individual. It can simply direct him to the classes that are mixed-sex. (An individual can of course submit customer feedback suggesting a change in provision.)

13.4.7 again raises an issue that has already been addressed much earlier. It does not need to be revisited. The language of “less intrusive measures”, which comes from Bank Mellat, should be removed.

Recommendations such as “The service provider may take account of the fact that if it admits the individual it may cease to be a separate or single-sex service” are both legally and practically unworkable. Many service providers are large, multi-site businesses that need to

be able to train large numbers of staff and to communicate policies widely. If they decide to do things that is a matter of policy. Vague guidance to take things into account is unworkable.

A service provider such as National Rail employs a general counsel in its headquarters, and thousands of frontline staff interacting with and directing members of the public. Staff dealing with the public need to be trained to give clear, simple, consistent, lawful directions. Individual staff members cannot be expected to call the general counsel to ask for help deciding whether to admit a particular individual to an opposite-sex facility, or to act on individual discretion.

Recommendations

EDIT 13.4.1 to make clear that there isn't a lawful option of a different policy where "women" means the heterogenous group of "women and men with the protected characteristic of gender reassignment".

SUGGESTED TEXT: "In most cases the fact that a service is provided for one sex or the other can be communicated simply with a single word (man/woman, male/female) or standard icon.

"For the avoidance of doubt, it may be helpful for service providers to publish a statement confirming that this means biological sex, and highlighting any alternative unisex options. Policies can also make clear where, for example, accompanied children of either sex (such children aged under 8) are permitted to enter with a parent of the opposite sex (such as to a women's changing room or a women's refuge). This information can be included on the service provider's website and as information to other organisations that may be referring people to a service."

DELETE 13.4.2. This is the discredited case-by-case approach.

DELETE example 13.4.3. This wrongly suggests discretion.

DELETE 13.4.4. This encourages potential service users to think it is appropriate to access a single-sex services for the opposite biological sex. This is never appropriate.

DELETE 13.4.5. Unisex facilities are already addressed.

DELETE 13.4.6. Justified rules do not need to be reconsidered on a case-by-case basis.

DELETE 13.4.7. Unisex options have already been addressed.

DELETE 13.4.8. Weighing up these factors is well above the pay grade and discretion of frontline staff. Expecting them to do so is not a proportionate means to a legitimate aim.

Change 13.5: Updated section on separate or single-sex services in relation to gender reassignment

CONSULTATION DRAFT

13.5.1 If a service provider (including a person providing a service in the exercise of public functions) is considering providing a separate or single-sex service, they should consider their approach to trans people's use of the service.

13.5.2 The impact of separate or single-sex services on trans people should be considered when the service provider is deciding whether it is justified to have a separate or single-sex service in the first place. Read paragraphs 13.3.8 to 13.3.20 for further information on this.

13.5.3 If a service provider (including a person providing a service in the exercise of public functions) decides to have a separate or single-sex service and allows trans people to use the service intended for the opposite biological sex, the service will no longer be a separate or single-sex service under the Equality Act 2010 (the Act). It is also very likely to amount to unlawful discrimination against others (read paragraph 13.3.19).

13.5.4 If it is justified to provide a separate or single-sex service, then it will not be unlawful discrimination because of gender reassignment to prevent, limit or modify trans people's access to the service for their own biological sex, as long as doing so is a proportionate means of achieving a legitimate aim (Sch 3 paragraph 28).

13.5.5 For example, a trans man might be excluded from the women-only service if the service provider decides that, because he presents as a man, other service users could reasonably object to his presence, and it is a proportionate means of achieving a legitimate aim to exclude him.

13.5.6 A legitimate aim for excluding a trans person from a separate or single-sex service for their own biological sex might be to prevent alarm or distress for other service users. Whether it is reasonable to think that the presence in that service of the trans person will cause alarm or distress will depend on all the circumstances, including the extent to which the trans person presents as the opposite sex. For this reason, a service provider (including a person providing a service in the exercise of public functions) should only consider doing this on a case-by-case basis.

13.5.7 The service provider should consider whether there is a suitable alternative service for the trans person to use. In the case of services which are necessary for everybody, such as toilets, it is very unlikely to be proportionate to put a trans person in a position where there is no service that they are allowed to use.

13.5.8 If the service provider does not act proportionately, this is very likely to amount to direct or indirect discrimination because of gender reassignment (s.13 and s.19).

Example 13.5.9 Group counselling sessions are provided for female survivors of domestic violence. The service provider excludes a trans man from the sessions because he presents as a man and the service provider is concerned that women service users could reasonably be alarmed or distressed by his presence.

The service provider's decision to exclude the trans man from the service could amount to direct gender reassignment discrimination because he has been treated less favourably than a woman without the protected characteristic of gender reassignment. However, in this situation the service provider is likely to be able to rely on the exception from liability explained in paragraph 13.5.4, because the decision to exclude the trans man was proportionate.

13.5.10 If the nature of a service means that it is only, or generally, used by women or by men, this does not mean that it is necessarily a separate or single-sex service under the Act. A service like this does not need to operate according to the rules and principles described in paragraphs 13.2.10 to 13.5.9. However, the Act (Sch 3 paragraph 30) contains a different exception which means that, in services of this sort, it will not be unlawful discrimination if the service provider refuses to serve a person of the opposite sex, if it would be impracticable to provide the service to that person. The service provider can also refuse to adjust the way in which the service is provided to cater for a person of the opposite sex. This exception applies to all protected characteristics in the Act, not just sex.

13.5.11 A hospital provides an Obstetrics and Gynaecology outpatient service. Only women and trans men need to use the service. The hospital provides the service to women and trans men in a way which preserves all users' privacy and dignity.

The hospital can refuse to allow a man or a trans woman to access the service because it does not offer any treatment which is suitable. This means that it would be impracticable to treat a man or a trans woman. It could also be impracticable to do so if it would impact on the privacy and dignity of the women and trans men who use the service.

The hospital can also refuse to adjust the way in which it provides the service.

Example 13.5.12 A trans man attends a gym frequently and uses the women's changing room, consistent with his biological sex. If the gym owner decides that he can no longer use the women's changing room and there is no other changing room he can use this may be a disproportionate decision. If it is disproportionate, the gym owner will not be able to rely on the exception for gender reassignment discrimination (Sch 3 paragraph 28). The trans man will be able to bring a complaint of direct gender reassignment

discrimination, because he has been treated less favourably than a woman who does not have the protected characteristic of gender reassignment.

The explanation set out in the updated section on separate or single-sex services in relation to gender reassignment is clear.

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☑ **Strongly Disagree**
- ☐ Do not know

This section is too long and complicated. It needs to be much simpler.

Commentary

Much earlier on (we suggest at 13.3.8), the guidance should make clear that a provider that offers single or separate-sex services can do so lawfully if it is objectively justified, and that it is a good idea to consider disadvantages to all relevant protected characteristics (including gender reassignment) when considering design options.

[**SUGGESTED TEXT** at 13.3.8 (see also earlier – repeated here for clarity): "When deciding whether to offer a service on a single or separate-sex basis, the service provider (or person providing a service in the exercise of public functions) should consider the disadvantages this could cause and whether these disadvantages outweigh the benefits of achieving the legitimate aim. For example if toilets, changing facilities or dormitories are offered only on a separate-sex basis, this can disadvantage families, disabled people with opposite sex carers and transgender people."]

Once this has been considered, there is no need for additional consideration of transgender people. For example, when thinking about toilets, a service that has male and female facilities as well as an accessible unisex option has provided for everyone. A service that does not offer a unisex accessible option is exclusionary to other groups besides transgender people.

13.5.3 does not make sense. A service provider that decides to have a separate or single-sex service and then allows trans people to use facilities intended for the opposite biological sex is acting incoherently. This is like operating a "peanut free kitchen" and suggesting that individual employees can decide to make peanut cookies on any given day. The definition of what a single-sex service is, in terms of gateway conditions, needs to come **MUCH** earlier in the guidance, and needs to be capable of being communicated throughout an organisation with clarity and consistency.

[We suggest **ADDING** this after 13.2.1 (see also earlier, repeated here for clarity):

SUGGESTED TEXT: "These exceptions set out a series of 'gateway conditions' that provide the justification for single and separate-sex services to operate lawfully under the Act. These conditions relate to biological sex. When considering the needs of men and women (and boys and girls), and whether to provide separate-sex services, service providers should be clear that these two groups relate to biological sex, not gender reassignment.

"If a service provider does not apply rules and policies based on biological sex, it is very likely to amount to unlawful direct or indirect sex discrimination."

FOOTNOTE THIS WITH: *For Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1), and The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16 (FWS2)*.]

There is no need to introduce case-by-case consideration of suitable alternatives for trans people who do not wish to use, or who are excluded from using, the service for their own sex. The practical situation that some people prefer unisex facilities is already addressed earlier on.

In practice either there is a unisex option which can be used by a person who does not wish to use facilities for their own sex, or there isn't. If there isn't any unisex accessible option, then other groups are also disadvantaged (in particular disabled people).

13.5.8 and the example at 13.5.12 make providing separate-sex services appear to be more legally difficult than they should.

13.5.11 is ridiculous. There is no question that an Obs and Gyn clinic would need to seriously consider providing services to a man (including a trans woman). Any man making an inquiry about this is either delusional or vexatious.

Given what is known about autogynephilia and fetish associated with crossdressing, it is irresponsible to suggest that service providers (often the female staff of women's services) must treat as if in good faith a request to play out a scenario that may be the masturbatory fantasy of a man who enjoys breaching women's boundaries, (see also the example at 2.2.7 of a man who manoeuvres a receptionist into a side room on the pretext of not understanding that he is male and that it would therefore be inappropriate for him to attend a female-only counselling group).

There are specialist commercial services and associations for such hobbies and role play.

Ignoring the fact that for a proportion of men cross dressing is a paraphilia undermines safeguarding and employers' proactive responsibilities to take steps to protect staff from sexual harassment.

FOOTNOTE WITH: https://pubmed.ncbi.nlm.nih.gov/22005209/

In 13.5.12 the woman who identifies as a "trans man" is being unreasonable. Assuming she has taken some steps to appear to be a man, and asks to be referred to as a man, it is

unreasonable for her then to complain if the gym owner decides that this behaviour is incompatible with using the women's changing room. The justification question about whether or not it is proportionate that a unisex option is or isn't provided remains the same as when it was considered much earlier (and will also include considerations such as the size of the building and whether the service is a universal one).

What should be added is a section on enforcement.

Recommendations

DELETE 13.5.1. This should already have been addressed alongside other protected characteristics at 13.3.8.

DELETE 13.5.2. This should already have been addressed alongside other protected characteristics at 13.3.8.

DELETE 13.5.3. Deciding to have a separate or single-sex service means deciding to communicate a sex-based rule. This is addressed much earlier.

EDIT 13.5.4. to read: "Where a service provider is providing a lawful separate or single-sex service, then it will not be unlawful discrimination because of gender reassignment to prevent, limit or modify trans people's access to the service for their own biological sex, as long as doing so is a proportionate means of achieving a legitimate aim (Schedule 3 paragraph 28)."

EDIT 13.5.5. to read: "For example, a female person who presents as a 'trans man' with a masculinised appearance and who wishes to be referred to as a man is unlikely to feel comfortable using a women-only service and might make other service users feel alarmed. Excluding such an individual is a proportionate means of achieving a legitimate aim."

EDIT 13.5.6 to read: "A legitimate aim for excluding a trans person from a separate or single-sex service for their own biological sex might be to prevent alarm or distress for other service users, and to protect the privacy of the trans person (since that individual might be asked intrusive questions)."

EDIT 13.5.5 to read: "For example, a woman who identifies as a 'trans man' and has developed a masculinised appearance does not feel comfortable using the women's changing room at the gym, and other women who perceive a man also object. The gym also has a unisex changing room, which it offers her. This is a proportionate means of achieving a legitimate aim.

“However, the gym has a male and a female sauna, with no unisex option. This means in practice that there is no sauna that the ‘trans man’ can use. This is not unlawful gender-reassignment discrimination since it would be disproportionate to expect the gym to build a third sauna.”

EDIT 13.5.8 to read: “Treating a transgender person rudely, or excluding them disproportionately, is likely to amount to direct or indirect discrimination because of gender reassignment (s.13 and s.19).

“For example, a cinema has male, female and unisex accessible toilets, but a staff member refuses to direct a transgender person to the unisex toilet, blocking their path, taunting and interrogating them about why they want to use the unisex option. When the customer complains, the manager laughs and bars them from the cinema. This would be harassment and discrimination and is unlawful.”

ADD: “Communicating, monitoring and enforcing single-sex rules and policies is a proportionate means to the legitimate aim of providing a clear, safe service and avoiding conflict and ambiguity. This can include asking for and recording people’s sex when they register for a service and sharing this information with others.

“This conduct might be experienced as unwanted by a person who does not feel comfortable about their sex or who has a strong desire to use opposite-sex services or who wishes that other people could be forced to pretend they are the opposite sex. But it is a proportionate means to a legitimate aim.

“For example, a political party is running its annual conference. It provides male, female and unisex toilets. It does not place security guards at the doors of the toilets but expects people to comply with ordinary rules. It asks people to provide their sex as part of their registration information and includes a ‘prefer not to say’ option. Sex is not displayed on individuals’ passes, but staff can easily access the information based on the QR code if there is any conflict about who is permitted to use which facilities. A person who has given false registration information in order to try to evade the rules may be removed from the conference.”

DELETE 13.5.11.

DELETE 13.5.12.

Change 13.6: Updated content on communal accommodation

CONSULTATION DRAFT

13.6.1 The Act does not prohibit sex discrimination or gender reassignment discrimination where a person does anything in relation to admitting persons to communal accommodation, or providing any benefit, facility or service linked to the accommodation (Sch 23 paragraph 3(1)). This exception applies if the criteria set out in paragraphs 13.6.4 to 13.6.6 are satisfied.

13.6.2 'Communal accommodation' is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex (Sch 23 paragraph 3(5) to (6)). It can also include:

- shared sleeping accommodation for men and for women
- ordinary sleeping accommodation
- residential accommodation, all or part of which should only be used by persons of the same sex because of the nature of the sanitary facilities serving the accommodation

13.6.3 A benefit, facility or service is linked to communal accommodation if it cannot be properly and effectively provided except to those using the accommodation. It can only be refused to a person if they can lawfully be refused use of the accommodation (Sch 23 paragraph 3(7)).

13.6.4 This exception only applies if the communal accommodation is managed in a way that is as fair as possible to both women and men (Sch 23 paragraph 3(2)).

13.6.5 When excluding a person from use of communal accommodation because of sex or gender reassignment, the service provider, person exercising public functions or association must consider:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
- the relative frequency of demand for the accommodation by persons of each sex (Sch 23 paragraph 3(3))

13.6.6 Excluding a person from use of communal accommodation provided for their own biological sex because of gender reassignment will only be lawful if it is a proportionate means of achieving a legitimate aim (Sch 23 paragraph 3(4)). The matters which a service provider, person exercising public functions or association should consider are similar to those set out in paragraphs 13.2.1 to 13.2.23.

The explanation of the legal rights and responsibilities set out in the updated content on communal accommodation is clear.

- ☐ Strongly Agree
- ☑ **Agree**
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

Any other feedback from your organisation

The guidance on single-sex services must be based on the law, including a recognition that objective justification for lawful rules means that organisations need to be able to have clear policies, often across multiple sites and explained to staff and customers, including with signage, online information and registration forms as well as verbally, on the phone and via training.

Staff must be able to implement policies confidently and know what to do without requiring individual discretion.

Any guidance that a service provider can decide how to apply a policy on a "case by case" basis or that suggests a high level of legal jeopardy when designing or operating separate-sex services is unworkable, and not in line with the law. Many service providers are large organisations. Decisions must be made at a policy level.

Individuals both trans and non-trans need to be able to recognise what simple signs like "male" and "female" mean, and to understand that they are expected to respect the rules. This will involve a reset of expectations for many organisations which have been promoting a "trans inclusive" approach involving encouraging and allowing people to use opposite-sex services that is not in line with the law.

The code should not encourage trans people or others to think that it is appropriate to try to use opposite-sex services and facilities.

While it is helpful to explain concepts clearly, overall we think that the sections of this updated draft on single and separate-sex services and sports are overlong and introduce complexity which is not found in the Act.

It is worth reflecting on the history of this code of practice.

- The original consultation draft of the 2010 Code of Practice dealt with the topic of single-sex services in a few short paragraphs which cleaved tightly to the law and would have been adequate.
  Equality and Human Rights Commission (2010). *Services, public functions and associations: Statutory Code of Practice – Draft for Consultation*.

- Following lobbying by transgender activist groups, the final published version departed from the law and said that service providers should treat "transgender people according to the gender role in which they present". It also gave the unworkable guidance that any decision to exclude an individual transsexual from an opposite-sex space should take place only after discussion with other users, but also while maintaining confidentiality and taking care to "avoid a decision based on ignorance or prejudice".
  Sex Matters (2025). 'The Equality Act: 15 years old today!'

- The EHRC defended this guidance in a judicial review permissions hearing in 2021, arguing that it "is 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." It said it was "unarguable that the COP is premised on a 'fundamental misconception'".
  Sex Matters (2021). 'Are single-sex services legal?'

- In October 2024, in the previous consultation draft of the updated code, the EHRC was still arguing that "if the justification for limiting or denying trans persons' access to the single sex service for their acquired gender does not outweigh the potential discriminatory effects, it is likely to be unlawful to do so." That draft failed to reference the judgment in *For Women Scotland v The Lord Advocate and The Scottish Ministers [2022] CSIH 4* (FWS1) or to explain its implications.
  Sex Matters (2025). 'The Code of Practice must be clear"

- In November 2024 the EHRC argued in the Supreme Court that "sex" in the Equality Act means "certified sex" and that the proper way to provide "single sex services" for women is to include males with a GRC within the group of "women" (with the possibility of then excluding some of these males with a GRC). This is despite having argued in the AEA case in 2021 that it would be discrimination to exclude someone without a GRC.

It is notable that while the Supreme Court has now quashed the idea that sex is difficult to define, the draft code has now expanded in a different way, namely by suggesting that single-sex services are fiendishly difficult to justify.

The current draft of the code is over-elaborate and leaves the door open to the idea that men who have the protected characteristic of gender reassignment may aspire to use women's spaces (and that women with the protected characteristic of gender reassignment may aspire to use men's spaces), and that such individuals may be excluded only on an individualised case-by-case basis.

This is not surprising since the regulator of the Equality Act has been committed to this misinterpretation of the law for so long and has done so much to promote it, and because it continues to be the focus for internal and external activist lobbies.
Sex Matters (2024). *Timeline of efforts to sabotage the EHRC's work to protect everyone's rights*.

Rather than adding more detail to the code, which only serves to make it appear more complex and vulnerable, a better approach would be to scale it back with fewer examples and greater simplicity and clarity. The law can be summarised in a single paragraph:

Men are male, women are female (a.11) This characteristic is biological and immutable (FWS1 and FWS2). Providing single and separate-sex services is lawful in a wide range of familiar situations (Schedule 3). There are also other exceptions in relation to associations, sports, schools and so on. Having the protected characteristic of gender reassignment does not change a person's sex or give that person the right to access opposite-sex services (FWS1 and FWS2). Transgender people are protected from discrimination in general (s.7), but not from discrimination in relation to single and separate-sex services as long as the service provider's conduct is a proportionate means to a legitimate aim (Schedule 3 paragraph 28). In practice, unisex options are often available.

Any statement that cannot be backed by direct reference to the Act or to case law should be removed.

The EHRC could, however, usefully provide guidance on what service providers should do to help customers and staff understand the rules, and what they should do when customers do not understand the rules or seek to breach them. This would be in line with other guidance on proactively seeking to identify and mitigate the risk of sexual harassment.

Suggested addition

"If a service provider provides single or separate-sex services for women and men, it is likely to attract some individuals who do not wish to comply with the rules and who seek to use opposite-sex facilities. Allowing them to do so could result in sexual harassment, sex-based harassment and conflict and hostility related to other protected characteristics.

"Encouraging compliance with the rules is therefore a proportionate means to a legitimate aim and a good defensive step against harassment.

"Among the steps service providers can take to encourage compliance are ensuring signage and policies are clear, and offering and signposting a unisex alternative where possible.

"In some cases an organisation will be able to control use of services routinely via its registration processes. In other situations, service users are expected to comply with clearly communicated rules.

“Service providers should consider the risks of individuals seeking to breach the rules. They should undertake a risk assessment and:

- consider what steps could reduce those risks
- consider which of these steps it would be reasonable to take
- implement those reasonable steps.

“In deciding whether a step is reasonable, the factors that may be relevant include (but are not limited to):

- the size and resources of the organisation
- the nature of the environment
- the risks that present of individuals using opposite-sex services
- the likely effect of taking a particular step and whether an alternative step could be more effective
- the time, cost and potential disruption of taking a particular step, weighed against the benefit it could achieve
- whether the steps taken appear to have been effective or ineffective, for example whether further incidents have occurred.

“These steps do not have to be resource-intensive or complex. For example clear signage, a written policy and a unisex option encourage transgender people to feel welcome and to understand that they are expected to comply with the same rules as everyone else, without needing to be challenged.

“It should be clear how individuals can complain if sex-based rules are not followed, and these complaints should receive a substantive response

“If staff need to step in to clarify and enforce rules on single-sex services, they do not need to check IDs or ask for proof of sex. They can operate on the basis of their own observations to protect propriety. The evidence of their own eyes and ears is usually a sufficiently accurate guide, despite the possibility of an occasional mistake.”

Sex Matters (2023). *Data matters: How to collect personal data on sex and transgender identity*.

Sex Matters (2025). *Providing single-sex services with confidence*.

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