

# Removing unlawful toilet policies from workplaces

## Legal case update: 2nd October 2025

Following the UK Supreme Court's decision in *For Women Scotland v Scottish Ministers*, Sex Matters lodged a petition seeking a judicial review of the Scottish Government's continued failure to update its *Trans and Non Binary Equality and Inclusion Policy* in relation to toilets and other single-sex facilities. In particular we sought to challenge paragraph 4.6 which included the statement: "Trans staff should choose to use the facilities they feel most comfortable with."

We took legal action after officials told us that the government would not take immediate action to rectify its policy, but was instead waiting until the Equality and Human Rights Commission (EHRC) updated its code of practice.

**Following our legal action, the Scottish Government has confirmed that it has removed paragraph 4.6 from its policy.** The Scottish Government provides a mixture of male, female and unisex facilities in its buildings and trans staff should follow the same policies and rules as other staff.

This briefing provides a summary of the legal arguments prepared by David Welsh, barrister at Axiom Advocates (Scotland) and Cornerstone Barristers (England and Wales). These arguments are relevant to other service providers and employers in the public and private sectors.

## Summary of legal arguments

### No justification for delay

1. Those bound by the Equality Act 2010 have no power to knowingly act unlawfully, however temporarily. The effect of the UK Supreme Court's decision – and therefore the lawfulness of a policy of is not suspended in any way pending updated guidance from the EHRC.
2. The effect of the policy of allowing trans-identifying staff to "choose to use the facilities they feel most comfortable with" is to authorise or approve men who identify as "trans women" or "non-binary" to use the toilets and changing rooms assigned for the use of women.

### Authorising harassment

3. The Scottish Government provides toilets, changing and washing facilities in its buildings for staff and visitors. That is, as an employer and a service provider.

4. Section 40 of the Equality Act 2010 makes it unlawful for an employer to harass an employee. Section 29 of the act makes it unlawful for a service provider to harass those to whom their service is provided.
5. In accordance with section 26 of the act, harassment is when a person engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.
6. The entry by a man into a toilet or changing room which has been designated for the use of women is, for the women, unwanted conduct relevant to a protected characteristic (sex) and it has, at least, the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for those women. It is therefore unlawful.
7. As the For Women Scotland judgment has confirmed, "men" and "women" in the act are terms that refer to biological sex. Sex for these purposes is binary in nature – one is either a man or a woman (see §171 and §264 of the judgment).
8. As such, the effect of the policy is to authorise or approve of harassment of service users and employees. That is unlawful as a result of (at least) sections 29 and 40 of the Equality Act. The policy is, therefore, unlawful: *R (A) v Home Secretary* [2021] 1 WLR 3931.

## **Failure to meet health, safety and welfare regulations**

9. Separately, employers are required to provide sufficient toilet facilities for male and female employees. These are to be provided as separate facilities on the basis of biological sex. The only permitted exception is where each toilet is contained in a separate room (not a cubicle).
10. Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 provides as follows
  - (1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.
  - (2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless
    - [...] (c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.
11. Part II of Schedule 1 of the 1992 Regulations, read short, provides that toilets should be provided for the exclusive use of women at the rate of 1 toilet per 25 female employees, and for the exclusive use of men at the rate of 1 toilet per 25 male employees.
12. The policy that "Trans staff should choose to use the facilities they feel most comfortable with" means that the provision of toilet facilities is not compliant with Regulation 20 of the 1992 Regulation.

13. Whatever the EHRC guidance may or may not eventually say, it cannot make the unlawful lawful. Therefore, it cannot as a matter of law make the policy of trans-identifying staff to use opposite sex facilities lawful.
14. Duty bearers under the Equality Act are not entitled to continue to act unlawfully pending the issuing of that guidance. The decision is one that no reasonable executive would make if acting reasonably. The decision is irrational and therefore unlawful.