IN THE HIGH COURT OF JUSTICE **CLAIM NO**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

SEX MATTERS

Claimant

-and-

MAYOR AND COMMONALTY AND
CITIZENS OF THE CITY OF LONDON

Defendant

STATEMENT OF FACTS AND GROUNDS

A INTRODUCTION AND SUMMARY

1. This application for judicial review concerns the operation of the Kenwood Ladies' Bathing Pond ("the Ladies' Pond") and Highgate Men's Pond ("the Men's Pond"), which are located on Hampstead Heath in North London.

2. The Claimant challenges the admissions rules of the Bathing Ponds, as decided upon by the Defendant's Hampstead Heath, Highgate Wood and Queen's Park Committee at meetings on 20 May 2025 and/or 16 July 2025, and/or by a decision on or around 25 July 2025 to erect new signage at the Bathing Ponds, and/or by decision to post a notice on the Defendant's website on 29 July 2025 or 10 August 2025 (together, "the Decision(s)").

3. The Decisions were prompted by the handing down of the judgment of the Supreme Court in *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16 [2025] 2 W.L.R. 879 ("*For Women Scotland*"). *For Women Scotland* decided that the concept of "sex" in the Equality Act 2010 ("EqA") referred to biological sex, such that a trans-identifying person could not change their "sex" for the purpose of the Act. As recognised in the judgment, and in an "Interim Update" from the Equality and Human Rights Commission ("EHRC") which followed

[**PB/358**][1], single-sex services which could lawfully be provided separately for men and women under Schedule 3 EqA were accordingly services for men and women as defined by biology, and not by any process of self-identification or certification. The Defendant nevertheless decided that men who identify as women (sometimes called "trans women"[2]) could continue to be admitted to the Ladies' Pond, and that women who identify as men (sometimes called "trans men"[3]) could continue to be admitted to the Men's Pond - including, in each case, the communal showers and communal changing areas.

4. On or around 25 July 2025 the Defendant erected signage at the Bathing Ponds. In relation to the Ladies' Pond, this states: "*Those who identify as women are welcome to swim at the Kenwood Ladies' Pond. The Ladies' Pond is open to biological women and trans women with the protected characteristic of gender reassignment under the Equality Act 2010*". Similar signage *mutatis mutandis* has been put up at the Men's Pond. The admissions rules were set out in a statement on the Defendant's website on 29 July 2025, updated with no material change on 10 August 2025.

5. The Claimant's case is that the Decisions were unlawful because the admissions rules are in breach of the EqA. In light of *For Women Scotland*, it would be lawful for the Defendant to operate the Bathing Ponds as separate services for persons of each sex, but it has decided not to do so, and the exceptions from liability from discrimination in Schedule 3 to the EqA do not apply. The issue is whether the rules constitute sex discrimination contrary to section 29 EqA, which relates to service-provision[4]. The Claimant contends that they do, on the grounds that they constitute:

   (1) direct sex discrimination against both women and men (section 29(1) read with section 13 EqA): they deny individual women access to the Men's Pond (so treating them less favourably than a man), and deny individual men access to the Ladies' Pond (so treating them less favourably than a woman);

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1 The Interim Update is the subject of an application for judicial review to be heard in November 2025. The timing of that claim is relevant to the Claimant's application for expedition which accompanies this claim, for the reasons explained in that application.

2 Given that *For Women Scotland* confirmed that a trans woman is a man for the purpose of the EqA, the term "trans identifying man/men" is used.

3 Likewise, the term "trans identifying woman/women" is used.

4 In pre-action correspondence, the Defendant stated that the public sector equality duty in section 149 of the EqA ("PSED") did not, in the particular circumstances of the Defendant, apply, and a contention of breach of the PSED is not advanced. That does not reflect any acceptance that in making the Decisions the Defendant had any adequate regard for their equalities implications, including in relation to sex.

(2) direct sex discrimination against women (section 29(2) read with section 13 EqA): in providing the service on terms or in circumstances which permit the opposite sex to be present in the Bathing Ponds, they treat individual women less favourably than men because a woman is at greater risk of suffering the detriment of her privacy, dignity or safety being compromised than is a man; and/or

(3) indirect sex discrimination against women (section 29(2) read with section 19 EqA): they put women as a group at a particular disadvantage compared with men, put individual women at such a disadvantage, and are not justified under section 19(2)(d).[5]

B FACTUAL BACKGROUND

The Parties

6. Sex Matters is a charity whose objects are to promote human rights based on biological sex, to advance education about biological sex and the law, and to promote the sound administration of the law in relation to biological sex and equality between the sexes. It aims to promote clarity on biological sex in law and policy, including in relation to the EqA sexes.

7. The Defendant manages the swimming facilities at Hampstead Heath pursuant to powers transferred to it under the London Government Reorganisation (Hampstead Heath) Order 1989 (SI 1989/0304) following the abolition of the Greater London Council. The Defendant's Hampstead Heath, Highgate Wood and Queen's Park Committee manages the Ponds.

The Bathing Ponds

8. There are in total four swimming locations on Hampstead Heath, comprising the Kenwood Ladies' Bathing Pond, the Highgate Men's Pond, Parliament Hill Lido and the Hampstead Mixed Pond. The Ponds are open for lifeguarded public swimming from early April through to the end of October. In the winter, the Mixed Pond is closed to the public, but the Hampstead Heath Winter Swimming Club is licensed to swim without lifeguards at certain times of the day. This case concerns the admission arrangements for the Ladies' Pond and the Men's Pond, referred to together as "the Bathing Ponds".

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[5] The admissions rules also indirectly discriminate on grounds of religion against Muslim and Orthodox Jewish people, who self-exclude from the Bathing Ponds because they do not constitute single-sex facilities. However, those matters do not form part of the central remit of the Claimant's charitable objects and are not pursued in this claim.

9. There are a number of other freshwater natural swimming amenities in London, including the Serpentine Lido, the West Reservoir Centre, the Royal London Docks, Eden Docks, Merchant Taylors' Lake, and Beckenham Place Park.

10. The Bathing Ponds, which opened in 1925, are the only ostensibly single-sex freshwater swimming amenities in the capital, and indeed in the country.

11. Admission is by ticket. A sign at the entrance to the Ladies' Pond says: *"Women Only: Men not allowed beyond this point"*. Further signage as above has now been erected.

12. The Bathing Ponds are supervised . The Ladies' Pond is supervised by female staff in the ticket booth and as lifeguards, and the Men's Pond is supervised by male staff. The Ladies' Pond is landscaped with trees and hedges in such a way that the full space provides seclusion and privacy. Bathers at the Men's pond, which is much larger and not completely surrounded by trees, can be seen by passers-by, although the sunbathing/changing courtyard is enclosed.

13. The Ladies' Pond changing hut contains open communal showers (with no shower cubicles) and an open changing area. There are four closed changing cubicles which have gaps at the top and bottom and open onto the changing area. There is one fully enclosed changing room designed to be accessible for disabled users. There is one shower with a shower curtain which is not full length. The open showers and open changing area involve full nudity. There is no place to hang clothes in the curtained shower area, so women enter and leave the showers naked. As well as the indoor showers and changing area, which is comparatively small, there is an outdoor shower and women change outside in an area adjacent to the changing hut and on the grass slope. There are only female toilets, and they are the kind with gaps above and below the cubicle doors.

14. Adjacent to the Ladies' Pond is "The Meadow", which is an area used by women and girls for sunbathing and picnicking. Admission to the Meadow is free of charge but is covered by the same admissions rules. Semi-nude topless sunbathing is common.

15. In summary, the facilities are designed and advertised for use respectively by women and men and nudity is common.

The Decision and the current admissions rules

16. In April 2019, the Defendant published a document entitled Gender Identity Survey: Report[6]. The survey had been launched in July 2017 by Charles Edward Lord[7], then Chair of the Defendant's Establishment Committee, with the words *"It shouldn't be controversial. It shouldn't be a debate. Trans women are women, trans men are men."* Against that background, on 2 May 2019, the Defendant adopted a Gender Identity Policy [**PB/138**] which operated a "presumption of inclusivity" and allowed trans-identifying men to access the women-only Ladies' Pond and trans-identifying women to access the Men's Pond. The policy provided that 'trans people' (which was said to include 'gender fluid' people) would only not be able to access their preferred facility on a case-by-case basis where evidenced and supported by an Equality Impact Assessment.

17. The policy was explained in a press notice issued on the Defendant's website the same day[8], which stated: *"The City of London Corporation has adopted a new gender identity policy following a widespread public survey. … For the City Corporation, the new policy will mean that: … "Transgender people are not discriminated against in the provision of City Corporation services and are able to access services relating to their gender identity …".*[9]

18. On 16 April 2025, the Supreme Court handed down its judgment in *For Women Scotland*, referred to above and addressed in detail below.

19. On 9 May 2025, the Defendant issued a statement on its website relating to *For Women Scotland*, stating *inter alia* that it was *"carefully considering the judgment"* **[PB/363].**

20. On 20 May 2025, there was a meeting of the Defendant's Hampstead Heath, Highgate Wood and Queen's Park Committee[10]. A transcript of the meeting (and the committee subsequent meeting on 20 July 2025) has been prepared by a PA at the Claimant's solicitors, Marianne Morris. The transcripts are exhibited at **MM1/1** and **MM1/2 to** Ms Morris' witness

[6] https://democracy.cityoflondon.gov.uk/documents/s113794/2019.04%20Gender%20Identity%20Report.pdf

[7] Charles Edward Lord was forced to recuse himself as a member of the panel due to hear the Employment Tribunal case of *Higgs v Farmor's School* on the grounds of apparent bias following his publicly expressed opinion on those who advocate for women's sex-based rights: *Higgs v Farmor's School* [2022] ICR 1489.

[8] https://news.cityoflondon.gov.uk/city-adopts-new-gender-identity-policy/ **[PB/225].**

[9] Notwithstanding that language, in 2020 Mr Lord referred to the services the subject of the policy as "single-sex facilities": https://celord.com/2020/04/24/trans-rights-should-be-supported-not-reversed-a-cautionary-note-to-the-minister-for-women-equalities-liz-truss-trussliz-geogovuk/ **[PB/234].**

[10] https://www.youtube.com/watch?v=KdMcy4FSfyQ

statement [**PB/300 and 306**]. At the meeting, the Defendant's Chair described the existing arrangements as *"allowing people who are of a particular gender to use either the men's or women's" but that legal advice had been sought in circumstances where "clearly we are presenting these as single-sex facilities"*. The Chair described how the policy adopted in 2019 "*basically allowed people to use a suitable facility according to their gender. Of course, that was based on what has turned out to be a misinterpretation of the law"* and described one of the questions arising post *For Women Scotland* as *"what is it that we should do?"*. The officer stated: "*obviously the starting point at the moment is these are single sex facilities that we, because of the gender identity policy, had decided were open to others"*. But instead of recommending that, post *For Women Scotland*, the admission arrangements now needed to reflect that single-sex facilities needed to be based on biological sex as opposed to gender identity, the officer recommended that it would be "appropriate" to "*review the swimming facilities on the Heath to decide what arrangements to adopt going forward"*.

21. The Defendant's published minutes record that *"there was likely to be very strong resistance that we move away from the idea of single sex swimming provision"* and note that: *"The Chairman explained that the men's and the women's ponds are presented as single sex facilities, subject to the Gender Identity Policy. He further noted that the temporary position had been to continue the existing policy whilst they seek legal advice"* **[PB/366]**.

22. On 30 June 2025, the Defendant issued a second update on its website on the effect of *For Women Scotland*, confirming that *"The current arrangements remain in place during the review. To understand who can currently access our bathing facilities, please read our Gender Identity Policy",* [**PB/370**].

23. On 16 July 2025, there was a further meeting of the Hampstead Heath, Highgate Wood and Queen's Park Committee, together with the Policy and Resources Committee[11]. In advance of the meeting a report was prepared by Andrew Impey (Deputy Director of Natural Environment) [**PB/372**], who recommended a formal consultation process on access arrangements for the Ponds, and who invited the Committee to make a decision as follows:

*"**Agree that the current access arrangements remain unchanged** pending the carrying out of the consultation exercise and consideration of its product by this Committee and the Policy and Resources Committee in due course",* (emphasis added).

[11] https://www.youtube.com/watch?v=0sCZHuAeW2s

24. The report acknowledged at paragraph 3 that *"the judgment has also clarified that, if a service provider admits transgender people to a service intended for the opposite biological sex, it is not a separate-sex or single-sex service under the Equality Act 2010."* It further noted that *"… it was previously understood - based on the EHRC Code and other guidance available at the time - that these spaces were operating as separate-sex or single-sex facilities under the Equality Act 2010, but all of this guidance has now been withdrawn following the Supreme Court decision"*, §4.

25. The report went on to state, at paragraph 7:

> *"7. The Supreme Court judgment does not mean that the current practice regarding admissions necessarily must change. However, as the current practice was previously based on guidance that misinterpreted the law, the practice would have to be reconsidered and justified under the Equalities Act 2010 in the light of the recent judgment. It is therefore appropriate to now review the swimming facilities on the Heath, in order to assess and decide what arrangements are most appropriate to adopt going forward and to ensure that those arrangements are compliant with the Equality Act 2010.*
>
> *8. In relation to the Men's Pond and the Ladies' Pond, this will need to involve a clear assessment and justification of the reasons for continuing to provide segregated facilities, if that is the approach to be adopted.* ***In deciding whether or not they should continue to be trans-inclusive spaces, or should become biological single-sex spaces****, the competing needs of different user groups with their own protected characteristics will need to be considered and balanced. Either way, it will need to be demonstrated that the arrangements which are finally approved are a proportionate means of achieving a legitimate aim as required by the Equality Act 2010",* [emphasis added].

26. The Committee decided to accept the recommendation. Thus, it resolved not to change the current admission arrangements, but instead to continue them notwithstanding the judgment in *For Women Scotland*, and whilst continuing them to conduct a consultation exercise. A future decision would then be taken as to "*whether or not the [relevant Ponds] should continue to be trans-inclusive spaces, or should become biological single-sex spaces".*

27. The recommendation accepted by the Committee was made on the premise that to continue the arrangements would be lawful. For the reasons below this was wrong.

28. On or around 25 July 2025, new signage was put up at the Bathing Ponds which set out the admissions rules. In relation to the Ladies' Pond, this states:

"*Those who identify as women are welcome to swim at the Kenwood Ladies' Pond. The Ladies' Pond is open to biological women and trans women with the protected characteristic of gender reassignment under the Equality Act 2010*".

29. Similar signage *mutatis mutandis* was put up at the Men's Pond.

30. The admissions rules reflected in this signage are not the same as the provision in the Gender Identity Policy. Taking the case of the Ladies' Pond, entry for trans-identifying men is now for "*trans women with the protected characteristic of gender reassignment under the Equality Act 2010"* so does not include, for example, non-binary and gender fluid individuals, or any other trans person not possessing the protected characteristic of gender reassignment. It further appears that the Defendant no longer operates a "presumption of inclusivity" or says that it will exclude trans individuals only following an Equality Impact Assessment.

31. On 29 July 2025 and 10 August 2025, the Defendant issued a further statement [**PB/379 and 381**] on its website, confirming that:

    (i) *"those who identify as women are welcome to swim at the Kenwood Ladies' Bathing Pond. The Ladies' Pond is open to biological women and trans women with the protected characteristic of gender reassignment under the Equality Act 2010".*

    (ii) *"Similarly, those who identify as men are welcome to swim at the Highgate Men's Bathing Pond. The Men's Pond is open to biological men and trans men with the protected characteristic of gender reassignment under the Equality Act 2010."*

Pre-action correspondence

32. On 17 June 2025, the Claimant's solicitors wrote to the Defendant under the Pre-Action Protocol for Judicial Review [**PB/320**]. The Defendant replied on 1 July 2025, raising claims of various bars to the claim including prematurity and standing (which are addressed below) [**PB/341**].

33. The Defendant denied that its decision-making was unlawful or that the admissions rules were directly discriminatory against either men or women or indirectly discriminatory against women or otherwise unlawful. In spite of its position as previously stated, the letter now denied that the Bathing Ponds were single-sex facilities (see e.g. §§44, 61). It stated in terms "*the Corporation is expressly not seeking to rely on the exceptions under paragraphs 26 - 28 of Schedule 3 EqA …",* (§33).

34. The Claimant replied on 4 July 2025 *inter alia* making Part 18 requests including asking about signage which the Defendant had intimated it would erect and asking the Defendant to "*Please confirm the definition of trans-identifying males (trans women) who are able to use the Ladies' Pond"* [**PB/353**].

35. The Defendant replied on 18 July 2025, stating that the new signage would be put up on or around 25 July 2025 [**PB/356**]. In answer to the above question, the letter stated: "*the current access arrangements permit trans women to access the Ladies' Pond. Male service users who do not identify as female are not eligible to access the Ladies' Pond. Trained staff are expected, where necessary, to exercise their discretion in enforcing the access arrangements, consistent with the privacy of service users."* This was a narrower expression of the category of biological men permitted admission to the Ladies' Pond than previously expressed under the Defendant's Gender Identity Policy.

36. The signage erected on or around 25 July 2025 put matters in slightly different terms. For the purposes of the claim, the admission rules as set out on the signage are treated as the accurate and public-facing statement of the Defendant's position.

C LEGAL FRAMEWORK

Services and public functions

37. Section 29 EqA contains prohibitions relating to the provision of services, including those provided in the course of a public function. So far as relevant, it provides as follows:

"(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment".

38. Section 31 EqA ('Interpretation and exceptions') provides, so far as relevant:

"(2) A reference to the provision of a service includes a reference to the provision of goods or facilities.

(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function. […]

(6) A reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service. […]".

39. Section 31(10) gives effect to Schedule 3 "Services and Public Functions: Exceptions" which at §§26-27 provides for single sex facilities and services (see below).

40. Section 29(2) provides two express examples of forms of "detriment" which may found a claim of discrimination (at (a) and (b)). More generally, "detriment" is treatment which a reasonable person would or might consider in all the circumstances to be detrimental to them: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL §§33-35; *Derbyshire v St Helens Metropolitan Council* [2007] ICR 841 §§27, 66, 67. In *Earl Shilton Town Council v Miller* [2023] EAT 5 §26 the treatment in question, whereby women often had to use the men's toilets with the ensuing risk of seeing a man using a urinal was held to have *"clearly constituted a detriment".*

The protected characteristics

41. Section 4 of the EqA sets out nine protected characteristics which include "sex" and "gender reassignment".

"Sex"

42. In relation to the protected characteristic of sex, section 11 EqA provides that:*" (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."* Section 212 provides that: "*"woman" means a female of any age; and "man" means a male of any age".* References to 'sex' in the Act are therefore to being 'male' or 'female'.

43. In *For Women Scotland Ltd v Lord Advocate* 2022 S.C. 150, the Court of Session considered whether the definition of "woman" could be expanded to include men with the protected characteristic of gender reassignment ("trans women"), in circumstances where the Scottish Parliament had enacted 'positive action' measures relating to the representation of women on boards, but where "woman" had been defined to include those with the protected characteristic of gender reassignment, living as women. Finding that the measures were inconsistent with the EqA and therefore outwith the legislative competence of the Scottish

Parliament, Lord Justice Clerk (Dorrian), delivering the opinion of the Court (comprising also Lord Malcolm and Lord Pentland), found: -

> *"Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a 'female of any age'.* ***Provisions in favour of women, in this context, by definition exclude those who are biologically male****",* §36 (emphasis added)[12].

44. The case was appealed to the Supreme Court. The Supreme Court went further than the Court of Session. The Supreme Court decided that, even where an individual has a "gender recognition certificate" issued under the Gender Recognition Act 2004 ("GRC") in the 'acquired' female gender: *"in relation to sex discrimination (for the purposes of section and 212(1)), a person with the protected characteristic of sex has the characteristic of their biological sex only: a trans man with a GRC (a biological female but legally male for those purposes to which section 9(1) of the GRA applies) is a woman for the purposes of section and a trans woman with a GRC (biologically male but legally female for those purposes to which section 9(1) applies), is a man and not entitled to be treated as a woman under the EA 2010",* §264.

<u>"Gender reassignment"</u>

45. Section 7 EqA provides that: -

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

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[12] Neither <u>*P v S and Cornwall County Council*</u> [1996] ICR 795 nor <u>*Chief Constable, West Yorkshire Police v A (No 2)*</u> [2005] 1 AC 51 were, the Court held, "*authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined,"* §38. Rather "*incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection".*

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons".

46. As noted in *For Women Scotland Ltd v Lord Advocate* 2022 S.C. 150 *"… it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned",* §37. Although section 7 will cover many people who identify as a member of the opposite sex it does not cover all of those who fall under the 'trans umbrella'[13]. As the High Court noted in *AA v NHS England* [2023] P.T.S.R. 608 (§131), to be covered by the protected characteristic of gender reassignment one must have made a conscious decision to reassign one's gender which can be properly described as settled.

47. Following the Supreme Court's decision in *For Women Scotland,* a trans-identifying person cannot change the nature of their protected characteristic of "sex" i.e. their biological sex, from male to female or vice versa. That is so whether or not they have the protected characteristic of "gender reassignment", and whether or not they have acquired a GRC.

Direct discrimination

48. Section 13 EqA provides that: "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

49. Section 23 EqA provides that: "*(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".*

50. A claim in direct discrimination often involves the making of a comparison between a right-holder and an actual or notional comparator, in order to work out whether the right-holder has been treated 'less favourably'. As Lord Hodge explained in *For Women Scotland*, at [134]:

"… to demonstrate less favourable treatment in subsection (1) an actual or hypothetical comparator is often relied on to demonstrate that a person without the relevant protected characteristic was or would have been treated more favourably by person A. Such a comparator (actual or hypothetical) must be a person who does not share B's protected characteristic. Section 23(1) makes clear that, apart from the protected

[13] The campaign group Stonewall describes 'trans' as *"an umbrella term including (but not limited to) transgender, transsexual, genderqueer, genderfluid, non-binary, agender, trans man, trans woman, trans masculine and trans feminine":* https://www.stonewall.org.uk/resources/list-lgbtq-terms

characteristic, there must be "no material difference between the circumstances relating to each case" when determining whether B has been treated less favourably. Accordingly, where sex is the protected characteristic, a woman relying on section 13(1) must compare her treatment with the treatment that was or would have been afforded to a man whose circumstances are not materially different to hers; in other words, a similarly situated man. Where gender reassignment is the protected characteristic, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman (although there may be situations where the comparator's sex is immaterial to the comparison)."

51. Admission rules can be directly discriminatory where the treatment complained of is said to be "inherent in the act itself" and signage denoting such rules have a long and notable history in discrimination law: see for example *Amnesty International v Ahmed* [2009] ICR 1450 at §33[14] where, in a passage endorsed on a number occasions by the Court of Appeal, Underhill J (President) said: *"In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying 'no blacks admitted', race is, necessarily, the ground on which (or the reason why) a black person is excluded."*

52. If sex (or one of the other protected characteristics) is the reason for the difference in treatment, it does not matter that the duty bearer may have acted with benign motive: see e.g. the observations of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 A.C. 501 and *Chief Constable of West Yorkshire Police v Khan* [2001] 1 W.L.R. 1947[15].

53. In *R (Al Hijrah School) v Chief Inspector of Education, Children's Services and Skills* [2018] 1 WLR 1471, the Court of Appeal considered whether rules in a mixed school by which the pupils were segregated by sex was direct sex discrimination in the absence of an exception for such separate provision (the relevant exception in the schools context being for single-sex schooling in Schedule 11 EqA). Holding that it was, the Court explained that direct discrimination falls to be considered by reference to the position of individual EqA right-holders (in that case, the girls viewed individually, and the boys viewed individually). At §§50-51, Sir Terence Etherton MR and Beatson LJ explained that:

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14 See also *R(E) v Governing Body of JFS* [2009] UKSC 15 [2010] 2 AC 728 esp. at §21 *per* Lord Phillips PSC; §64 *per* Lady Hale JSC; §78 *per* Lord Mance JSC; §114 *per* Lord Kerr JSC; §140 *per* Lord Clarke JSC.

15 And *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155; *James v Eastleigh Borough Council* [1990] 2 AC 751.

"…section 13 of EA 2010 specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective. That is consistent with the following observation by Lord Mance JSC in R (E) v Governing Body of JFS (United Synagogue intervening) [2010] 2 AC 728, para 90:

> *"Finally, I also consider it to be consistent with the underlying policy of section 1(1)(a) of [the Race Relations Act 1976] that it should apply in the present circumstances. The policy is that individuals should be treated as individuals, and not assumed to be like other members of a group: R (European Roma Rights Centre) v Immigration O–cer at Prague Airport (United Nations High Comr for Refugees intervening) [2005] 2 AC 1, paras 82 and 90, per Baroness Hale of Richmond and R (Gillan) v Comr of Police of the Metropolis [2006] 2 AC 307, paras 44 and 90, per Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. To treat individual applicants to a school less favourably than others, because of the happenstance of their respective ancestries, is not to treat them as individuals, but as members in a group defined in a manner unrelated to their individual attributes"*

Viewed in that way, Ofsted's analysis of "less favourable treatment" is correct. An individual girl pupil cannot socialise and intermix with a boy pupil because, and only because, of her sex; and an individual boy pupil cannot socialise and intermix with a girl pupil because, and only because, of his sex. Each is, therefore, treated less favourably than would be the case if their sex was different".

54. *Al-Hijrah* is also authority that mirror rules applying to the sexes may constitute less favourable treatment of one sex. Thus, although it was also the case that boys could not intermix as part of their education with the girls, the Court accepted that insofar as the rules prevented girls from intermixing as part of their education with the boys that could be less favourable treatment of the girls (only). The Court differed as to whether the evidence before the Court, combined with the doctrine of judicial notice, was sufficient to support a holding of such direct discrimination in the case before it. Gloster LJ considered that it was, but a majority of the Court (Sir Terence Etherton MR and Beatson LJ) considered that it was not.

55. Direct sex discrimination cannot be justified. However, section 31(10) EqA, which gives effect to Schedule 3, provides at §§26-27 for various exceptions from liability for discrimination in relation to single sex services and facilities: see below. As was noted by Baroness Hale DPSC *R (Coll) v Secretary of State for Justice* [2017] 1 WLR 2093 paragraph 26 (and by extension paragraph 27) *"proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination",* (§34).

Indirect discrimination

56. Indirect discrimination is provided for at section 19 EqA:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice [referred to as a "PCP"] *is discriminatory in relation to a relevant protected characteristic of B's if—*

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

57. Indirect discrimination focuses on the disadvantage that the right-holder experiences as a member of a group and which is compared with a group that does not share that characteristic. As Lord Hodge DPSC noted in *For Women Scotland* *"the provisions concerning indirect discrimination are specifically directed at the problem of group discrimination and their purpose is to counter group (not individual) disadvantage. They operate where an apparently neutral policy or practice is applied generally to everyone but produces a disproportionate disadvantage for a particular group with a shared protected characteristic",* (§144).

58. Because it focuses on group disadvantage *"it must be possible to reach general conclusions or make general assumptions about a group with a particular protected characteristic", (*e.g. *For Women Scotland,* §145). However, it is by no means a requirement that every person belonging to that group must experience the same or indeed any disadvantage. For example, in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 W.L.R. 1343 ("*Essop*") (in particular, §27), the PCP was that in order to access promotion to certain civil servant grades, a Core Skills Assessment ("CSA") had to be passed. The pass rate of black and minority ethnic ("BME") employees was only 40.3% that of white employees. The Supreme Court, overturning the Court of Appeal, accepted that the PCP placed BME candidates at a substantial disadvantage, notwithstanding that many such candidates were able to pass the CSA.

59. Similarly, the EqA does not require statistical proof that more of those in the protected group suffer the disadvantage than those outside it (although this may be used) and other types of evidence may be used to establish the necessary effect. As Baroness Hale put it in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 [2012] ICR 704, the change in the EqA *"was intended to do away with the need for statistical comparison where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question".*

60. Section 19(2)(b) is concerned with *relative* disadvantage. The word "particular" in the phrase "particular disadvantage" was not intended to connote a disadvantage which is "serious, obvious, and particularly significant" but simply to make clear that people with the relevant protected characteristic must be more disadvantaged than others: that the disadvantage must be particular to them. The subsection does not impose a second threshold requirement as to the severity of the impact on the protected group: see *R (TTT) v Michaela Community Schools Trust* [2024] EWHC 843 (Admin) [2024] PTSR 1627 ("*TTT*") at [220][16].

61. There is no requirement that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does: see *Essop*, §24.

62. The Court will generally apply[17] the well known four-stage analysis *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, §74 per Lord Reed JSC[18], compressed or adapted for domestic discrimination law,[19] and recognising that *per* §20 of *Bank Mellat* the test *"depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine"* these questions.[20] In an indirect discrimination case, justification and proportionality are assessed by reference to the PCP as a whole and the disadvantage which is weighed in the balance under *Bank Mellat* question (4) is the group disadvantage which results from the PCP: see e.g. *The*

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16 Citing *McNeill v Revenue and Customs Comrs* [2020] ICR 515 per Underhill LJ at [16]; *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] 1 C.M.L.R. 14.

17 Should the case go on appeal, Sex Matters reserves the right to argue in a higher Court that *Bank Mellat* does not contain the test for proportionality for the purposes of the EqA (as distinct from for the purposes of the Human Rights Act 1998).

18 See e.g *R ((TTT) v Michaela Community Schools Trust* [2024] EWHC 843 (Admin) [2024] P.T.S.R. 1627, §156

19 See *Higgs v Farmor's School* [2025] EWCA Civ 109 [2025] I.R.L.R. 368, §34.

20 In an indirect discrimination case involving a public body, compliance with the PSED would ordinarily be highly relevant: *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728, §212.

University of Bristol v Dr Robert Abrahart (Administrator of the estate of Natasha Abrahart, deceased) [2024] EWHC 299 (KB) [2024] I.R.L.R. 396, §255.

63. However, in *Lewisham v Malcolm* [2008] 1 A.C. 1399 the House of Lords held that as a matter of principle, the Court may not give effect to and therefore endorse an act which is proscribed as discriminatory. Accordingly, a measure which amounts to unlawful direct discrimination against members of one group (in this case, men) is incapable of justification where it indirectly discriminatory against a(nother) group (in this case, women).

Burden of proof

64. Section 136 applies (see s.136(1)) "*to any proceedings relating to a contravention of this Act"* and is accordingly applicable in a judicial review claim, just as it is in a private law claim brought by an individual. It provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule".

The exceptions in paragraphs 26-27 of Schedule 3 to the EqA

65. Paragraphs 26-27 of Schedule 3 EqA provide exceptions from liability for sex discrimination in relation to *"separate services for persons of each sex"* (§26) or *"by providing a service only to persons of one sex"* (§27).[21] §26(1) provides: -

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

[21] In addition, §28 provides for an exception from gender reassignment discrimination in relation to single sex services and facilities if it is a proportionate means of achieving a legitimate aim. As Lord Hodge noted in *For Women Scotland,* this would permit a woman-only service from excluding a trans-identifying woman who presented as male: §221.

66. A similar exception is provided for at §26(2) "*so far as relating to sex discrimination, by providing separate services differently for persons of each sex*".

67. Accordingly, the provisions have the effect of rendering lawful what would otherwise be unlawful direct or indirect sex discrimination: see *For Women Scotland* at §185. But for the provisions at Schedule 3, §§26-27, the maintenance by service providers of women's facilities which exclude men, or vice versa, amount to direct sex discrimination. The purpose of these provisions was, as Lord Hodge noted at §211, to make it possible to lawfully deliver services or facilities for women only or for men only. He gave specifically the example of separate swimming areas for men and women *"for the protection of a woman's safety or the autonomy or privacy and dignity of the two sexes"*:

> *"These provisions are directed at maintaining the availability of separate or single spaces or services for women (or men) as a group for example changing rooms, homeless hostels,* ***segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes)*** *or medical or counselling services provided only to women (or men) for example cervical cancer screening for women or prostate cancer screening for men, or counselling for women only as victims of rape or domestic violence,"* (emphasis added).

68. The Supreme Court reasoned that if a 'woman only space' was permitted to include trans-identifying males with a GRC[22]: -

> *"fundamentally, 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. For example, it is difficult to envisage how the condition in paragraph 26(2)(a) (a joint service for persons of both sexes would be less effective) could ever be fulfilled when each sex includes members of the opposite biological sex in possession of a GRC and excludes members of the same biological sex with a GRC. In other words, if as a matter of law, a service-provider is required to provide services previously limited to women also to trans women with a GRC even if they present as biological men, it is difficult to see how they can then justify refusing to provide those services also to biological men and who also look like biological men", (*§213).

69. In relation to Schedule 3, §27 at §217 Lord Hodge noted:

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[22] It was never an issue before the Court that being a 'woman' for the purpose of the Equality Act 2010 was a category that could be opted in to by self-identification as permitted by the Defendant's admissions rules. Rather it considered whether 'sex' in the Act included 'certificated sex' under a GRC.

"Likewise, a certificated sex interpretation of the conditions in paragraph 27(6) and (7) (that a person of one sex might reasonably object to the presence of a person of the opposite sex, and the physical contact provision) will not be capable of being fulfilled in practice. Again, it is difficult to imagine how or in what circumstances it might be considered reasonable for a woman to object to members of the opposite sex (in condition (6)) where "the opposite sex" would include trans women without a GRC (who remain legally male) but not to "members of her own sex". This would arise if by operation of section 9(1) of the GRA the group of "members of her own sex" were to include biological men with a GRC, and so legally female who may be physically and outwardly indistinguishable from the former group of trans women without a GRC. While many women in a female-only changing room or on a women-only hospital ward or in a rape counselling group might reasonably object to the presence of biological males, it is difficult to see how the reasonableness of such an objection could be founded on possession or lack of a certificate."

70. The effect of the decision in *For Women Scotland* was accordingly that a service provider can only lawfully regulate access to services and facilities by sex if they do so on the basis of biological sex and if they therefore exclude *all* members of the opposite sex. That was one of the points recognised in the EHRC's Interim Update, published after the For Women Scotland judgment had been handed down [**PB/138**]. It explains that:

"In workplaces and services that are open to the public where separate single-sex facilities are lawfully provided:

- *trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex […]".*

D GROUNDS FOR JUDICIAL REVIEW

(1) Direct sex discrimination against both women and men

71. The admissions rules constitute direct sex discrimination against both women and men (section 29(1) read with section 13 EqA): they deny individual women access to the Men's Pond (so treating them less favourably than men), and deny individual men access to the Ladies' Pond (so treating them less favourably than women).

72. Section 29(1) prohibits discrimination "*against a person requiring the service by not providing the person with the service"*. Section 31(6) defines "service" as including "facilities" and "requiring" as including "seeking to use". Accordingly section 29(1) prohibits discrimination against a

person seeking to use facilities. The concept of "a person" in section 13 falls to be considered by reference to individuals: *Al-Hijrah*.

73. This is a straightforward case of direct sex discrimination contrary to section 29(1) read with section 13. That can be seen on a consideration of comparators in materially the same circumstances:[23]

(i) A woman who does not have the protected characteristic ("PC") of "gender reassignment" cannot gain access to the Men's Pond because the only people allowed in the Men's Pond are biological men (which she is not) or women with the PC of gender reassignment (which she has not). However, if the woman in question were a similarly-situated man (i.e. without the PC of gender reassignment), that person *would* be able to gain access. She is refused access to the Men's Pond because she is a woman.

(ii) The same is true in respect of access to the Ladies' Pond, swapping the sexes. A man who does not have the PC of gender reassignment cannot gain access to the Ladies' Pond because the only people allowed in the Ladies' Pond are biological women (which he is not) or men with the PC of gender reassignment (which he has not). However, if the man in question were a similarly-situated woman (i.e. without the PC of gender reassignment), that person would be able to gain access. He is refused access to the Ladies' Pond because he is a man.

74. It does not matter that not all men are excluded from the Ladies' Pond and not all women are excluded from the Men's Pond:

a. It is not a requirement in a direct discrimination case that all members of a class sharing a protected characteristic be treated less favourably. See *Coll* at §30 *per* Baroness Hale: *"it cannot be a requirement of direct discrimination that all the people who share a particular protected characteristic must suffer the less favourable treatment complained of."*[24]

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23 The material circumstances are those which, excluding the protected characteristic in question, the alleged discriminator does or would take into account when determining the relevant treatment of the claimant or comparator: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, §§134-136 per Lord Rodger).

24 See further Lord Mance JSC in *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728, §89, approving a submission from Counsel for the claimant, *"an organisation which admitted all men but only women graduates would be engaged in direct discrimination on the grounds of sex."*

b. Any argument there cannot be direct discrimination on the basis that that requires exact correspondence between the disadvantaged class and the protected characteristic[25] would be inapplicable. The exact correspondence test is only relevant where sex itself is not a ground for the treatment in question (*Coll*, §29 per Baroness Hale DPSC). However, in this scenario sex itself is plainly one of the grounds for determining eligibility for admission, as well as whether someone has the PC of gender reassignment.

c. It is a basic principle of discrimination law that, to constitute direct discrimination, the protected characteristic in question need only be a reason for the treatment in question. 'No discrimination whatsoever' is permitted: *Nagarajan v London Regional Transport* [1999] ICR 877, HL, 886 E-F *per* Lord Nicholls.

75. The rules breach the express provision in s. 29(1). Denial of access to facilities to someone seeking to use them is *ipso facto* detrimental. However, there are legitimate reasons why individuals may want access to the Bathing Pond of the opposite sex other than transgender identification. For example, the Pond may be closer to home or more accessible, a disabled man may want to be assisted by his female carer, or a mother may want her son to come with her. By way of further example, in her witness statement Ms Forstater refers to an email from a Joyce Glasser who requested to use the Men's Pond during a designated period of time once a week, because the Men's Pond is bigger and is therefore more suitable for long distance lap-swimming. She was refused on the basis that the pools were "single gender" and on the basis that *"both are used by several different religious groups who cannot swim with the opposite gender"* **[PB/92** and **183]**.

76. Direct discrimination cannot be justified. But that is not to say, for the reasons explained, that the Defendant cannot provide separate ponds for each sex. *For Women Scotland* makes clear that that would be lawful by virtue of the exceptions in §§26-27 of Schedule 3 EqA. That is the simple solution in this case.

77. However, faced with the decision of *For Women Scotland* that "sex" refers only to biological sex, the Defendant is constrained to accept that, on its current admissions rules, the exception is not available to it, and specifically eschews any such answer to the claim. Nor does it identify any other basis for avoiding liability.

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25 See e.g. *Patmalniece v Secretary of State for Work and Pensions (AIRE Centre intervening)* [2011] 1 WLR 783 and *Preddy v Bull (Liberty intervening)* [2013] 1 WLR 3741

78. It follows that the rules are unlawful.

(2) Direct sex discrimination against women

79. Further, the admissions rules in respect of the Ladies' Pond constitute direct sex discrimination against women (s. 29(2) read with s. 13 EqA): in providing the service on terms or in circumstances which permit the opposite sex to enter the Bathing Ponds, they treat individual women less favourably than men because a woman is at greater risk of suffering the detriment of her privacy, dignity or safety being compromised than is a man.

80. Section 29(2) contains prohibitions when a service (including facilities) *is* provided. In that situation the service-provider is prohibited from discriminating against a person as to the terms on which they provide the service to the person or by subjecting the person to any other detriment.

81. As above, the concept of detriment is broad. It plainly includes the experience of one's privacy, dignity and/or safety being compromised.

82. As they apply to the women and men who are provided access to the facilities, the rules expose women to the presence of men (i.e. trans-identifying men) when in a state of partial or full nudity, and expose men to the presence of women (i.e. trans-identifying women) in such a state. Under the rules, a woman is at greater risk of suffering the detriment of her privacy, dignity and/or safety being compromised than is a man. On that basis, they treat individual women less favourably than men. They are therefore directly discriminatory against women: see *Coll* at §30. This is not an analysis of the relative disadvantage caused by the rules for women as a group such as would apply under indirect discrimination. An indirect discrimination analysis is unnecessary. An analysis of direct discrimination in relation to section 29(2) is dispositive, and no question of justification arises.

83. The evidence served with the claim supports that a woman is at greater risk of suffering the detriment of her privacy, dignity and/or safety being compromised than is a man. The practical implications of allowing men into the Ladies' Pond for privacy, dignity and safety are obvious. It bears emphasis in that respect that, as Ms Forstater explains in her witness statement at §42 [**PB/76**], most trans-identifying men have a penis and testicles. Demonstrably, many women are uncomfortable and unhappy with the prospect or reality of having men (whether trans-identifying men or otherwise) in the Ladies' Pond. It is experienced by a substantial number of women as a violation of their dignity and privacy, as

something that makes them feel vulnerable and at risk, that precludes them from feeling safe and away from the male gaze and from predatory or intrusive male behaviour, and that interferes with their comfort and enjoyment; see Ms Forstater's witness statement at §§20(d), and 31 to 36 [**PB/69** and **73-75]**. As further demonstrated in Ms Forstater's witness statement at §§141 to 174 [**PB/110-124**], it leads to women changing their behaviour, whether by self-excluding altogether or by behaving in a more vigilant, inhibited or self-protective manner. The risk of the detriment being suffered by men is clearly lower: to any extent that men experience compromise to their dignity, privacy and/or safety by being in the presence of women in the context of full or partial nudity, it is both less common and of a lesser degree or nature.

84. As noted above, it is not a requirement when considering direct discrimination that all of the class who are affected should be at a disadvantage. It is therefore nothing to the point that many women may be content to be naked and share a shower and changing area with trans-identifying males.

85. Further, it is not a requirement when considering direct discrimination[26] that it be demonstrated why a substantial number of women should experience a detriment, though it will be obvious why they do. The objectification of women and the social regulation of intimacy and privacy between the sexes have generated internalised norms and taboos. Many centuries of continuing male violence and sexually predatory behaviour against women have engendered well-founded fears.

86. It makes no difference that mirror rules apply in the Ladies' and Mens' Ponds. *Al-Hijrah* illustrates that mirror rules do not preclude their treating one sex less favourably.

87. Indeed (and should such an analysis be necessary), the admissions rules subject women to harm or detriment of the kind recognised by Gloster LJ in her judgment in *Al-Hijrah* (see §§146-172). In summary:

    a. The rules must be seen in a historical and social context that positions women and girls as fundamentally less important than and inferior to men and boys, and as less entitled to and able to exercise agency or control both at the societal and individual level. In that context the rules endorse and perpetuate the violation of women's legitimate boundaries and thereby promote and perpetuate the inferiority of

[26] See *Essop.*

women as a sex-class. Fundamentally, the rules de-legitimise the fair and reasonable fears and concerns that many women feel, and stigmatise the setting of proper boundaries and, in doing so, posit and disparage women as unimportant in comparison with men.

b. Further, the rules must be seen in the context of the prevalence of sexually predatory and intrusive behaviour from men that has no mirror of any statistical significance in the risk posed by women to men. As the evidence shows (and as in any event is well-known), some 98% of offenders in sexual crimes are men, and trans-identifying men have male patterns of offending. Low-level sexual harassment and sexually intrusive behaviour is perpetuated almost uniquely by men against women and is shamefully commonplace. Against that background, the rules perpetuate an environment characterised by vulnerability and risk that has no equivalent in the Men's Pond.

88. As in relation to Ground One, the Defendant makes no attempt to argue that any direct discrimination is rendered lawful by virtue of the exceptions in Schedule 3, and does not rely on any other basis by which liability could be avoided.

(3) Indirect sex discrimination against women

89. Further or alternatively[27], the admissions rules put or would put women at a particular group disadvantage compared to men and put or would put individual women at that disadvantage. The disadvantage is the greater risk, compared to men, of experiencing compromise to their privacy, dignity and/or safety. While many men too experience a disadvantage in having otherwise male-only spaces used by trans-identifying women, women are at a particular disadvantage compared with men in the reverse situation, for the reasons summarised.

90. On that analysis, the only issue is whether the Defendant can show the rules to be a proportionate means of achieving a legitimate aim. It cannot.

91. First, as a matter of law it is impermissible to justify pursuant to section 19 EqA a measure that is indirectly discriminatory against one group (women) if that same measure is directly

[27] Grounds 2 and 3 are in addition to Ground 1, but in the alternative to each other.

discriminatory under section 13 against another group (men), since it is well established that a court cannot give effect to and therefore endorse a discriminatory act.[28]

92. Secondly, whatever the "legitimate aim" which may be relied on by the Defendant, the Defendant could not show the rules to be a proportionate means of achieving it. In particular, they could not be justified by a need to avoid unlawful discrimination against trans-identifying men having the protected characteristic of gender reassignment. Admissions rules providing for entry according to sex alone would be lawful.

    a. First, it is clear from the judgment of the Supreme Court in *For Women Scotland* that the exclusion of trans people from services or facilities provided for the sex with which they identify will not constitute direct gender reassignment discrimination because the Court makes clear that, where sex is a material circumstance – as it will be by definition in relation to single-sex or sex-segregated services – the relevant comparator for the purposes of a complaint of direct gender reassignment discrimination by a trans person is someone of the same (biological) sex as that person (*For Women Scotland*, §134): see further e.g. *Macdonald v Ministry of Defence* [2003] ICR 937, §§64-66 per Lord Hope.[29] A person of the opposite sex would not be permitted entry whether or not they had the PC of gender reassignment.

    b. Secondly, while a measure that excluded trans-identifying men (i.e. males with the PC of gender reassignment) may put trans-identifying men at a particular disadvantage compared with those without that PC, such discrimination would plainly be justified pursuant to paragraph 26 of Schedule 3. As the Supreme Court explained in *For Women Scotland* Court at §211: *"These provisions are directed at maintaining the availability of separate or single spaces or services for women (or men) as a group*

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28 *Lewisham v Malcolm* [2008] 1 A.C. 1399 §§19, 101, 104, 160.

29 To the extent that the Court of Appeal's judgment in *Croft* previously suggested anything different, that cannot now be regarded as good law since that case pre-dates both the GRA 2004 and the EA 2010 and the Court of Appeal's analysis proceeded on the basis of two assumptions that the Supreme Court's decision in *For Women Scotland* makes clear are wrong, namely (i) that undergoing a 'process' of gender reassignment referred to in the definition of that protected characteristic would entail a change in legal 'sex' for the purposes of discrimination legislation (*Croft*, 1439A-B, 1442G per Pill LJ), which is explicitly rejected by the Supreme Court in FWS, at §200; and (ii) that the GRA would modify the meaning of 'sex' for the purposes of discrimination legislation and so determine the point at which someone's 'sex' would change for those purposes (Croft, 1439G-H per Pill LJ), which is of course the key point rejected by the Supreme Court in FWS.) Thus, treating trans people in the same way as non-trans members of the same (biological) sex, by excluding them from single sex or sex-segregated facilities provided for members of the opposite sex, will not constitute direct gender reassignment discrimination.

– for example changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes)…". As it further explained (§§211-221), such services can only coherently be justified based on the relevant needs and interests of the sexes if they are operated on the basis of biological sex. The entire premise and justification for providing single sex services at all collapses into incoherence if they are instead provided on a partially mixed-sex basis. As the Supreme Court put it: *"if a service provider… provide[s] services previously limited to women also to trans women [i.e. men who identify as women]… even if they present as biological men, it is difficult to see how they can then justify refusing to provide those services also to biological men and who also look like biological men"* (§213).

93. The Defendant has to date identified no legitimate aim. The Claimant reserves its right to advance its position responsively.

94. In the premises, the admissions rules constitute unlawful discrimination and the Decision(s) by which they were decided upon following *For Women Scotland* were unlawful.

E ALLEGED PROCEDURAL BARS TO PERMISSION

(1) Prematurity

95. The Defendant had to choose between changing the admissions to restrict entry by biological sex alone or not. They chose not. They did so formally. The evidence from the meeting of 16 July 2025, referred to above, puts the matter beyond doubt. Those Decisions arose out of a changed legal landscape and a fundamentally altered understanding of the law as it was understood in this precise context. The Defendant has also made material changes to its admissions rules - significant enough to warrant new signage at both Bathing Ponds and an announcement on its website. The argument that there was not a decision giving rise to a justiciable issue is untenable.

96. Further, the illegality identified herein is not obviated by the Defendant's averred intention to carry out a *"review and consultation exercise"* (PAP response §7b) in relation to access to the Ladies' and Men's Ponds. As a result of the Defendant's Decisions, the admissions rules are being operated unlawfully now. Nothing in any "information gathering/consultation exercise" (PAP response §20) can have the effect of justifying, avoiding or mitigating the

clear discriminatory and unlawful effect of the current rules. Accordingly, the Defendant's contention that the claim is premature is without merit.

(2) Standing

97. The Claimant plainly has *"a sufficient interest in the matters to which the application relates"* (s.31(3) Senior Court Act 1981) and accordingly has standing to bring this claim.

98. Ms Forstater's witness statement at §§3 to 14 explains the nature of Sex Matters' work [**PB/62-66**]. Its objects are to promote human rights based on biological sex, to advance education about biological sex and the law, and to promote the sound administration of the law in relation to biological sex and equality between the biological sexes. It aims to promote clarity on sex in law and policy, including in relation to the EqA. It is, accordingly, a charity whose objects are wholly aligned with the issues in this case.

99. As observed in *R (The Good Law Project and the Runnymede Trust) v The Prime Minister and the Secretary of State for Health and Social Care* [2022] EWHC 298 ("*The Good Law Project")*, it is commonplace for campaigning groups and charities to have standing in relation to matters within their areas of interest and expertise[30]. It was precisely on the basis of its interest and expertise that Sex Matters was given permission to intervene in *For Women Scotland*. At §35 of the Judgment, the Claimant's submissions were singled out as "particularly helpful" giving *"focus and structure to the argument that "sex", "man" and "woman" should be given a biological meaning"*. Its arguments before the Court were accepted in full as accurately setting out the law. Its expertise has thus received endorsement at the highest judicial level.

100. There is no special rule in relation to standing where discrimination contrary to either the legacy anti-discrimination laws (e.g. the Sex Discrimination Act 1979 or the Race Relations Act 1976) or the EqA is claimed as a form of illegality. So, in *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another* [2005] 2 A.C. 1 the House of Lords held that the system operated by immigration officers at Prague Airport was inherently

30 Well known examples of this include *R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329 where Greenpeace was held to have standing as a *'campaigning organisation which has as its prime object the protection of the natural environment,"* (§70). Other examples include *R. (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin) where CND challenged the decision to invade Iraq. Other examples include *R (Public Law Project) v Lord Chancellor* [2016] AC 1531, *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd* [1995] 1 WLR 386; *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219; and *R (Motherhood Plan) v HM Treasury* [2021] EWCA Civ 1703. The last case shows that even a newly established campaigning organisation may be permitted to complain of a breach of public law.

and systemically discriminatory on racial grounds against Roma, contrary to section 1(1)(a) of the Race Relations Act 1976. At first instance[31], the defendants had argued that the claimant (a campaigning and advocacy group) ought not be permitted to advance an argument of discrimination in the Administrative Court, it being said that it was not the appropriate venue for what they submitted was *"in essence a claim of discrimination against individuals — HM and the non-claimants"*. The defendants contended that those individuals therefore had an alternative remedy and the claim brought by the European Roma Rights Centre ought not be permitted. However, as Burton J found (in reasoning not interfered with by the Court of Appeal or the House of Lords), *"these proceedings are not (or not primarily) put forward by the Claimants on the basis of an individual claim, whether for damages or otherwise by HM, and certainly not by the non-claimants. The evidence in relation to them is sought to establish or support a case that the Prague operation has been carried out discriminatorily"* (§53). [32]

101. In R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2020] EWCA Civ 542 [2021] 1 W.L.R. 1151 there was no dispute raised as to the standing of the JCWI, described as *"particular advocate for fairness, equality and proper respect for human dignity for immigrants"* (§4) in contending that certain provisions of the Immigration Act 2014 would result in (it was said) inevitable unlawful race discrimination by landlords against would-be tenants. There was no dispute that the case could be brought.[33]

102. The Defendant's reliance on The Good Law Project at §31-32 is misplaced. That case concerned an individual appointment to a post where *"it is obvious that an individual could bring proceedings*

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31 [2002] EWHC 1989 (Admin)

32 It is also common in public law claims alleging discrimination against individuals for the Court to be invited to and to make findings that there has been discrimination against whole classes of individuals not before the Court. For example, in R (DMA) v Secretary of State for the Home Department [2021] 1 W.L.R. 2374 the Secretary of State had discriminated against disabled people accommodated by the Home Office by failing, at a systemic level, to make reasonable adjustments to take the steps it was reasonable to take to avoid the disadvantage to disabled individuals (§§291 and 293).

33 See also R (Adiatu and Or) v HM Treasury [2020] EWHC 1554 (Admin) [2020] P.T.S.R. 2198 in which the Independent Workers' Union of Great Britain was held to have standing in relation to a Government coronavirus job retention scheme and which was challenged *inter alia* on the basis of unlawful sex discrimination contrary to section 19 EqA 2010. Holding that *"the starting point is that it would be unfortunate if these claims were to be decided on standing issues alone. They have been brought by the IWGB, together with Mr Adiatu and until recently Mr Ali, in the public interest and as a matter of great urgency. Whatever the outcome of these challenges may be, it is much better that they are determined on their merits rather than on a procedural ground, such as standing"* the Divisional Court determined that the Union did have sufficient interest as *"… the IWGB has 5,000 members, and it is safe to assume that, amongst them, there will be women who are in employment and so who are within the scope of SSP. … In any event, the IWGB is in the same position as an interest group or pressure group, and such bodies are often regarded as having sufficient standing to bring a claim for judicial review."*

in the Employment Tribunal under the Act"; it was in those circumstances said that *"where no individual has done so, we find it difficult to accept that a claim for judicial review could nevertheless be brought by other individuals or an NGO",* (§22). By contrast with *The Good Law Project* this is not an individual case alleging breach based on individual facts, nor a claim for damages. Rather, the claim is that the Defendant has made a decision in respect of admissions rules which will inevitably discriminate and are doing so. The Claimant is very far from a *"mere busybody"* with "*who interferes in something with which he has no legitimate concern"* as referred to by as Lord Reed in *Walton v Scottish Ministers* [2013] SC 67 (§92); it is a highly respected stakeholder and contributor on an important issue of considerable public concern.

F RELIEF SOUGHT

103. For all the reasons set out above, the Claimant seeks:

a. a declaration that the Defendant's Decisions in respect of its admissions rules were unlawful;

b. a declaration that the admissions rules are directly discriminatory against men and women;

c. a declaration that the admissions rules are indirectly discriminatory against women;

d. an Order quashing the Decisions and the admissions rules; and,

e. costs.

TOM CROSS KC
11 KBW

SARAH STEINHARDT
Doughty Street Chambers

19 August 2025