The Rt Hon Bridget Phillipson MP
Minister for Women and Equalities
By email only

22nd May 2026

Dear Bridget

We welcome the new *Code of practice on services, public functions and associations*, which was produced by the Equality and Human Rights Commission as part of its mandate as regulator of the Equality Act 2010, and which you laid before Parliament on 21st May.

We were, however, surprised and dismayed to see that it includes a new section on "asking about sex", which includes legally incorrect advice presented as being a requirement of the Data Protection Act 2018 (DPA), UK General Data Protection Regulation (GDPR) and Article 8 ECHR. **This advice undermines the rest of the guidance, recreates the problem which the guidance sets out to solve, and harms women's rights.**

1. The section is outside the EHRC's mandate

The code of practice is issued under the Equality Act 2006, which provides at s.14:

(1) The Commission may issue a code of practice in connection with any matter addressed by the Equality Act 2010.
(2) A code of practice under subsection (1) shall contain provision designed—
  (a) to ensure or facilitate compliance with the Equality Act 2010 or an enactment made under that Act
  (b) to promote equality of opportunity.

The section on "asking about sex" goes well beyond this mandate. There are no specific provisions on asking about sex in the Equality Act. The detailed guidance in the section does not reference case law and in practice undermines rather than facilitates compliance with the act.

The correct regulator to produce guidance on data protection is the Information Commissioner's Office.

2. The section mis-states UK GDPR

It is correct that age, sex, race, nationality and ethnic origin, sexual orientation, information on disability and gender reassignment are personal information protected by data-protection legislation as well as being protected characteristics in the Equality Act.

But the EHRC misdirects users of the guidance when it states at 13.175: "Information about sex is sensitive and **should be treated as special category personal data**." Likewise at 13.182:

"Information about sex is **likely to constitute special category data** for the purposes of the Data Protection Act 2018 (DPA) and UK General Data Protection Regulations (GDPR)."

These statements are wrong in both fact and law. For the vast majority of people, information about their sex is not sensitive (and it is very rarely possible for anyone to keep their sex private over sustained periods).

Article 9 (1) UK GDPR defines special categories of personal data as:

> "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation."

Sex is not special-category data. It is ordinary personal data which can be used routinely, just like other personal information such as name or age that must also be used fairly, lawfully and transparently with appropriate security. Processing such data does not require meeting one of the additional tests in GDPR Article 9(2).

3. The section incorrectly requires a spurious human-rights balancing test

Paragraph 13.161 says:

> "Personal data includes information about a person's sex which may also be protected under Article 8 of the European Convention on Human Rights (ECHR). In particular, it is important to be aware that some people, including some trans or gender non-conforming people, may wish to keep such information private as far as possible and may find it distressing to be asked about their sex."

UK GDPR is the primary domestic legislation codifying and enforcing the fundamental right to data protection that stems from Article 8. There is no requirement for individual service providers to go beyond this by treating sex as special-category data, or to undertake human-rights analysis before processing information in line with GDPR/DPA. The argument that asking for information about a person's sex is a breach of Article 8 was made unsuccessfully by the government before the most recent census to try to defend the decision by the Office for National Statistics to direct people to answer the sex question according to their preferred sex rather than their actual sex. In a judicial review brought by women's-rights campaigners it was judged to be arguable at permission stage that the ONS decision was unlawful.

Information received orally or via the evidence of someone's own eyes and ears that is acted upon without data processing does not come under the scope of UK GDPR/DPA.

It is also unnecessary to consider the unknowable mental state of individuals before collecting or acting on routine information about them. It may indeed be the case that some individuals find it distressing to be asked about their sex, but it is impossible for a service provider to know or to guess which individuals, and the information that a particular individual suffers from such feelings will in itself be sensitive.

If a person wants to keep a piece of personal information private in a given situation, whether because of feelings of distress or anything else, they can "prefer not to say". However, refusal to

give information that is asked for, or to allow it to be recorded where it is needed, may mean the person is unable to access a service. This is not a breach of Article 8, any more than it is to require a person to confirm that they are over 18 to buy alcohol, or that they have parental responsibility to enrol a child in school and interact with that school and others with a duty of care in relation to that child.

4. The section undermines safeguarding

An organisation that follows the guidance and treats sex as "special category" data will need to apply this to everyone.

But sex is often relevant for everyday life, formal and informal risk assessment, duty of care and safeguarding, as well as for decisions concerning consent and propriety. Sex forms the basis of many ordinary interpersonal relationships, in particular sexual relationships and parenthood. Men are statistically more likely to engage in violent or predatory behaviour, and women are the targets for specific types of male violence.

Creating an environment where people are expected to treat sex as "special category" data, to pretend they don't know what sex other people are, to believe that it is reasonable for people to be offended if asked to confirm their sex and to assume that any individual might not be the sex they appear to be makes it impossible to enforce sex-based rules and creates an environment where ordinary safety and safeguarding are compromised. Neither the Equality Act nor UK GDPR requires this.

The Sullivan Review noted the corrosive effect that misunderstanding sex to be special-category data has on decision-making. Civil servants and others told Professor Sullivan that legal uncertainty and confusion contributed to reluctance to collect data on sex. To quote from her review: "Many data collectors expressed the view that there are obstacles to asking people about their sex. Some believed it might constitute a breach of privacy law or principles, such as ECHR Article 8 rights, Section 22 of the Gender Recognition Act 2004, or GDPR." **This guidance will add to this uncertainty, confusion and reluctance if allowed to stand.**

Furthermore, a man who has gained access to a female-only space is not simply a man within the ordinary male risk profile: he is a man who demonstrably possesses the additional risk factor of not respecting rules that exist to protect women. This section of the code of practice extrapolates from its misunderstanding of Article 8 and UK GDPR to suggest that several layers of evidence are required before a man in this position can be challenged and asked to leave. Recording these concerns in order to evidence them would involve much greater processing of personal information than simply asking people to confirm their sex or to leave the space if they do not wish to, without processing any personal data.

5. The guidance is likely to induce unlawful harassment related to sex

At 13.170 the guidance warns: "It is unlikely to be either practical or appropriate to approach any particular individual to make enquiries about their sex in relation to facilities, such as toilets, which are incidental to the primary service."

There is no legal basis for this instruction, which in effect licenses men to enter women's facilities and claim that it is inappropriate, and possibly unlawful, to challenge them.

Telling women (and staff supervising single-sex spaces) that they must second-guess themselves when they become aware of a man engaging in the deviant behaviour of accessing a female-only space is **unwanted conduct related to the protected characteristic of sex**. It "violates a person's dignity or creates an intimidating, hostile, degrading, humiliating, or offensive environment". Section 111 of the Equality Act 2010 makes it unlawful to instruct, cause, or induce another person to commit an act of discrimination, harassment or victimisation.

For the past 15 years men with the inappropriate desire to use women's spaces have cited legally incorrect advice previously given by the EHRC, which was inserted in the now-superseded 2011 version of the code of practice after consultation with transactivist groups.

The publication of this replacement version with a new, blatant misstatement of the law is insulting and, we believe, an act of mass harassment that could include every woman in Britain. The misstatement appears to have been introduced at a late stage, post-consultation, at the insistence of the government, presumably in order to soften the impact of the EHRC's guidance on groups that continue to advocate for people to be able to evade lawful sex-based rules which exist to protect the Article 8 rights of women.

This undermines the EHRC's independence, contrary to the Paris Principles.

In summary: The section on "asking about sex" is both unnecessary and unlawful. It is likely to result in mass indirect sex discrimination and to undermine safeguarding. It is outside the mandate of the EHRC. It neither explains a specific section of the Equality Act nor refers to any case law to support its assertions. It appears not to have been formulated in consultation with the ICO. It undermines the EHRC's independence.

It is *ultra vires* and irrational for the EHRC and the minister to issue this section of the guidance, and the ICO has allowed the wrong body to take decisions for which it is exclusively responsible. **This section of the guidance should be withdrawn.**

Grassroots women's organisations and human-rights charities such as For Women Scotland, LGB Alliance, the lesbian intervenors and ourselves have spent years fighting systematic state misrepresentations of the Equality Act. We have worked hard to move the government and the EHRC back to a proper understanding of equality law and of women's rights, both by advocacy and by expensive (and successful) court cases. We do not wish to have to continue this fight, but if necessary we will.

Yours sincerely

Maya Forstater
CEO

cc: Mary-Ann Stephenson, Chair, Equality and Human Rights Commission
Paul Arnold, CEO, Information Commissioner's Office