

Legal implications arising from the EHRC draft Code of Practice on Services

Introduction

1. The EHRC published its draft Code of Practice on Services on 21 May 2026.
2. In accordance with para 18 of the Main Report, the draft Code is hereby circulated to Members.
3. The draft Code has been laid before Parliament under the negative resolution procedure, and will come into force after 40 days unless either of the Houses of Parliament passes a resolution to reject it.
4. The draft Code is therefore still in draft, and there is not currently any statutory obligation to have regard to it. Nevertheless, Members may wish to take it into account, in so far as it is relevant, on the basis that it is likely to come into force in due course.
5. Of most relevance to the matters under consideration are Chapters 10 and 13 of the draft Code.

Positive Action

6. Chapter 10 is concerned with positive action under section 158 of the Equality Act 2010. Section 158 applies where a service-provider reasonably believes that persons who share a particular protected characteristic suffer a disadvantage connected to that characteristic, or have needs that are different from the needs of persons who do not share it. In those circumstances, a service-provider may take action which is a proportionate means of achieving the aim of enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage, or to meet their needs, and such action will not be unlawful under the 2010 Act. In other words, action taken under section 158 may render lawful acts which would otherwise amount to unlawful discrimination.
7. At para 10.7 it is stated that “some indication or evidence” will be needed to show that one of the statutory conditions for positive action applies, but that the indication or evidence need not be sophisticated statistical data or research. For example, at para 10.8 it is stated that “A decision to take positive action could be based on qualitative evidence, such as consultations with users and non-users or surveys”, as well as “evidence from

focus groups”. Considering such evidence may assist in ensuring that the views of groups with relevant protected characteristics have been taken into account: see para 10.38. In addition, as noted para 59 of the Main Report, it has been recognised in Strasbourg and in the domestic courts that persons with the protected characteristic of gender reassignment tend to suffer a particular disadvantage in being unable to live fully in accordance with their gender on a day-to-day basis.

8. Para 10.30 notes the risk of positive action being taken on an indefinite basis, since the circumstances which initially justify the positive action may change. It is thus recommended at para 10.31 that service-providers should monitor the impact of the action and review its progress. Members should thus consider, if they decide to take positive action, making a plan for reviewing the impact of such action.

Exceptions and single-sex spaces

9. Chapter 13 is concerned with exceptions to provisions of the 2010 Act and deals with single-sex spaces.
10. Para 13.119 notes that the impact of the provision of single-sex services segregated by biological sex is likely to cause disadvantage to trans people. Para 13.120 states that a service provider should consider whether the disadvantage to trans people outweighs the benefits of achieving any legitimate aim of providing sex-segregated services.
11. Para 13.130 notes that if a service provider admits trans people to a service intended for the opposite (biological) sex, then it can no longer rely on the specific exceptions relating to single-sex services.
12. At para 13.131 it is stated that a trans-inclusive service is “very likely” to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it, and could also lead to unlawful harassment against women. It is further stated that a mixed-sex service must be open to all service users.
13. However, as noted in the Main Report, provision of a trans-inclusive service may not amount to direct sex discrimination, since the exclusion would be based on lived gender, not sex. Further, in *R (Good Law Project) v EHRC* it was held that provision of services in this way may not give rise to “less favourable treatment” for the purposes of direct sex discrimination. Any indirect sex discrimination on grounds of sex is in principle capable of justification. Moreover, even if the provision of a trans-inclusive service would

otherwise amount to unlawful sex discrimination, such discrimination will not be unlawful if the service-provider lawfully applies the positive action provisions under section 158 of the 2010 Act (see above).

14. Para 13.142 states that if a service provider is considering providing a single-sex service, they should consider their approach to trans people's use of the service. Further, at para 13.143 it is stated that the impact of separate or single-sex services on trans people should be considered when deciding whether it is justified to have a separate or single-sex service.
15. Para 13.161 notes that personal data about a person's sex may be protected under Article 8 of the Convention, and observes that some people, including some trans people, may wish to keep such information private as far as possible and may find it distressing to be asked about their sex. Further, a request for information about sex which is not a proportionate means of achieving a legitimate aim could amount to unlawful indirect gender reassignment discrimination: see para 13.162. Para 13.165 states that, if it is necessary to ask about sex, it should be done sensitively and discreetly.