

For the attention of
Leigh Day
Panagram
27 Goswell Road
London
EC1M 7AJ

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0)117 939 2000
[REDACTED]
www.burgess-salmon.com
DX 7829 Bristol

[REDACTED]
[REDACTED]

[REDACTED]

13 June 2025

Dear Leigh Day,

Your client: Good Law Project and others
Our Client: Commission for Equality & Human Rights

Interim Update (the “Interim Update”) and Code of Practice for services, public functions and associations: consultation 2025 (the “Consultation”)

Judicial Review Pre-Action Protocol – Response to letter before claim

We understand you are instructed on this matter and we have consequently responded to you rather than the original author of this correspondence. Please inform us by return if this is not the case.

We refer to your clients’ letter before claim dated 16 May 2025 in which they indicate an intention to challenge an ‘Interim Update’ published on 25 April 2025 and what they call a notice of an intention to undertake a further consultation on the Code of Practice for services, public functions, and associations (“the Code”). These matters followed the Supreme Court judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 (“**For Women Scotland**”) and its immediate social aftermath.

This letter is a formal response to your letter and is set out in accordance with the Pre-Action Protocol for Judicial Review under the Civil Procedure Rules.

1 THE PARTIES.

- 1.1 We understand that the proposed claimants are as set out in the letter before claim. Due to the current application we understand is being made in respect of anonymity we do not repeat the individual names here, however, we note the lead claimant would be Good Law Project Limited of [REDACTED] [REDACTED] (“Good Law Project”).
- 1.2 We understand that Leigh Day represents all proposed claimants, that we should use your contact details (as above) for all communications, and that soft copy communications are preferred. Please confirm that email correspondence to the recipients of this letter (as above) is acceptable for all communications including service of court documents on all claimants if necessary.

[REDACTED]

- 1.3 The Defendant would be The Commission for Equality and Human Rights (commonly known as the Equality and Human Rights Commission), Arndale House, The Arndale Centre, Manchester M4 3AQ. Please address further correspondence to us on behalf of the EHRC. Correspondence and court documents are accepted on receipt by email to both [REDACTED] [REDACTED] in Word, PDF and email formats subject to a size limit of 10MB.

2 THE 'INTERIM UPDATE' AND THE FURTHER CONSULTATION

- 2.1 In summary, the Supreme Court held in *For Women Scotland* that the terms "man", "woman" and "sex" in ss.11 and 212 of the Equality Act 2010 ("**EA2010**") refer to biological sex. One of the matters considered by the Court was whether a person who has a Gender Recognition Certificate ("**GRC**") issued under the Gender Recognition Act 2004 has a sex (or 'certificated sex') which is the opposite of their biological sex for the purposes of the EA2010. The Supreme Court held that such a person does not.
- 2.2 This represented a change in the understanding of the law for many, including the EHRC. Its understanding prior to the Supreme Court judgment, consistent with the jurisprudence to that point, had been that the protected characteristic of 'sex' in the EA2010 referred to one's birth sex or as certificated in a GRC, such that persons with a GRC acquired the 'sex' certificated on their GRC, and became a 'man' or 'woman' for the purposes of the EA2010 accordingly.
- 2.3 The EHRC thus recognises that earlier guidance and versions of the Code proceeded on that premise, which is now held to be wrong.
- 2.4 The Supreme Court was also clear that the EA2010 protects trans people by virtue of the protected characteristic of gender reassignment (and the phrase 'trans people' is used in this letter to refer to people with the protected characteristic of gender reassignment). Trans people are also protected under the EA2010 by virtue of the protected characteristic of sex (their biological sex) and through discrimination by perception (put simply, where they are perceived as the other sex).
- 2.5 During October 2024 to January 2025, the EHRC had engaged in a significant consultation exercise in respect of the Code. It remained in the course of preparing revisions to the Code when the *For Women Scotland* judgment was handed down. Following that judgment, the legal premise of certain, limited, parts of the Code has fallen to be revised. It is against that background that the EHRC is now conducting a further period of consultation in respect of proposed revisions to the Code which take account of the Supreme Court's judgment. All the Proposed Claimants referred to in your letter have been and remain welcome to respond to that consultation, which opened on 20 May and will close for responses on 30 June 2025.
- 2.6 In the immediate aftermath of the *For Women Scotland* judgment, the EHRC became conscious that persons affected were seeking immediate assistance on certain matters, and that a number of persons and organisations were purporting to describe the effect of the judgment in terms which differed, sometimes widely. It decided that, as well as the further consultation referred to above, it would assist to provide some observations – brief and high-level at that stage – relating to some of the matters being referred to in the public discourse. Against that background, on 25 April 2025 it published on its website "*An interim update on the practical implications of the UK Supreme Court judgment*". In the section of the website titled "Media centre" as "News" which is distinct from and separate to the "Guidance and advice" section of the website.
- 2.7 The Interim Update is now different from when it was initially published (and from the version which you have set out in your letter) and remains subject to change as appropriate. It remains a live webpage, downloadable in pdf, which may be changed. It is not statutory or non-statutory guidance as such and has not been placed in the section of the website containing such guidance accordingly. The EHRC has received feedback about the Interim Update from a range of stakeholders including as to its clarity. In that context it is keeping its contents under active review. Any changes to the Interim

Update resulting from stakeholder feedback will be made as soon as reasonably possible in the coming days.

2.8 On the page as originally uploaded, it referred to an intention to conduct a further consultation exercise on the Code to launch in mid-May and last for two weeks. The EHRC subsequently decided to extend the period to six weeks and the page was changed accordingly.

2.9 The webpage as it currently appears, and as is relevant to your proposed claim, states as follows:

“An interim update on the practical implications of the UK Supreme Court judgment

We have made some proposed changes to our code of practice for services, public functions and associations as a result of the UK Supreme Court judgment.

Our new consultation on these proposed changes is now open.

[Read about the new consultation and submit your response \[hyperlink\].](#)

*Following the UK Supreme Court judgment in *For Women Scotland v The Scottish Ministers*, we are also working to update our statutory and non-statutory guidance.*

We know that many people have questions about the judgment and what it means for them. Our updated guidance will provide further clarity. While this work is ongoing, this update is intended to highlight the main consequences of the judgment. Employers and other duty-bearers must follow the law and should take appropriate specialist legal advice where necessary.

Key information

The Supreme Court ruled that in the Equality Act 2010 (the Act), ‘sex’ means biological sex.

This means that, under the Act:

- *A ‘woman’ is a biological woman or girl (a person born female)*
- *A ‘man’ is a biological man or boy (a person born male)*

If somebody identifies as trans, they do not change sex for the purposes of the Act, even if they have a Gender Recognition Certificate (GRC).

- *A trans woman is a biological man*
- *A trans man is a biological woman*

This judgment has implications for many organisations, including:

- *workplaces*
- *services that are open to the public, such as hospitals, shops, restaurants, leisure facilities, refuges and counselling services*
- *sporting bodies*
- *schools*

- associations (groups or clubs of more than 25 people which have rules of membership)

*In **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.*

*It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.*

In workplaces and services that are open to the public:

- *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*
- *in some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities*
- *however where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use*
- *where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*
- *where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men*

[...]

Our work to update our guidance

Our updated guidance will be available in due course. We are working at pace to incorporate the implications of the Supreme Court's judgment.

We aim to provide the updated Code of Practice to the UK government by summer, for ministerial approval ahead of the full draft Code being laid in Parliament after the summer recess.

The Code will support service providers, public bodies and associations to understand their duties under the Equality Act and put them into practice.

We are currently reviewing sections of the draft Code of Practice which need updating. Our public consultation is open until 30 June. It will help us to understand how the practical implications of this judgment may be best reflected in the updated guidance. The Supreme Court made the legal position clear, so we will not be seeking views on those legal aspects.

The consultation launched in mid-May and is open for 6 weeks, until 30 June. We are seeking views from affected stakeholders.

In the meantime, we will continue to regulate and enforce the Equality Act 2010, ensuring protection for all protected characteristics including those of sex, gender reassignment and sexual orientation".

- 2.10 At the time of writing, an attempt has been made by Liberty to challenge the six-week length of the consultation period. Following an oral hearing, the High Court has refused permission for the challenge to be brought. Swift J described the Interim Update as a document "referring to the Supreme Court judgment, summarising the conclusions and the meaning of the protected characteristic of sex and the

linked definition of section 212 and making some observations on how that might affect the provisions of the 2010 Act in the workplace, services and in schools” (Judgment §7). In relation to the further consultation for revising the Code (the procedure for which is set out in sections 14 and 15 of the Equality Act 2006), Swift J, dismissing the application, commented inter alia that “it is in the public interest to pursue the section 14/15 process promptly” (§25).

2.11 We make the following further general observations about the webpage:

- (a) it is expressly “interim”. It is intended to assist in circumstances where revisions to the Code, including to reflect the For Women Scotland judgment, are being consulted upon and considered;
- (b) it is distinct from, and distinguishes itself from, both statutory and non-statutory guidance of the sort routinely published by the EHRC (see the words “*we are working to update our statutory and non-statutory guidance*” and the fact that it was deliberately published in the “Media Centre” section of the website);
- (c) its substance is limited to addressing only certain matters arising from the judgment;
- (d) it expressly emphasises that “employers and other duty-bearers must follow the law and should take appropriate specialist legal advice where necessary”. Consequences of the judgment which it identifies must be seen in that context;
- (e) it is, deliberately, sought to be expressed in non-technical and simple language.

2.12 The Interim Update falls within the EHRC’s powers under section 13 of the Equality Act 2006 (“EA2006”) (including under s13(1)(a) (to disseminate information) and (d) (to give advice). The EHRC recognises that these matters are highly sensitive and important for a wide range of stakeholders, whether they are trans or not trans, and in various senses. Both trans people, and people who are not trans, should be treated with dignity and respect. This principle is core to its work in ensuring that people do not face discrimination or harassment including because of or related to their protected characteristic(s). The EHRC also has a role in supporting duty bearers in understanding changes or clarifications to the law and must do so consistently with legal precedent.

2.13 You have referred to matters of factual background in your letter which we do not consider it necessary to address here. Where we have not addressed something we should not be taken necessarily to agree with it.

2.14 The EHRC reiterates its invitation to you and all relevant stakeholders to work with us to get the best result from the further consultation and subsequent necessary amendments to the Code. It is intended that the amended Code will provide both an analysis of the law and practical guidance for duty bearers on how to ensure compliance with the law, which will include how to avoid discriminating against any and all groups with protected characteristics. The EHRC encourages and welcomes your active engagement and participation in the further consultation.

3 GROUNDS OF CHALLENGE

Ground 1: (a) workplace toilets, and (b) toilets in services open to the public

3.1 You suggest that the Interim Update encourages and approves unlawful conduct contrary to the principle in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 [2021] 1 WLR 3931. In that case Lords Burnett and Sales, with whom the other Supreme Court Justices agreed, made clear at [34] that it is “*not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors*” and “*was to be read objectively, having regard to the intended audience*”. “*The drafter of a policy statement is not required to imagine whether anyone might misread the policy and then draft it to eliminate that risk*”. At [38] their Lordships said:

“38. In our view, Gillick sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 181F (reading the word “permits” in the proper way as “sanction” or “positively approve”) and by adapting Lord Templeman’s words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? [...] the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others”.

Initially, we note that this analysis related to policy guidance and the Interim Update is (as noted above) not guidance of that sort: it is as per Swift J, some “observations” on how For Women Scotland might affect obligations of duty bearers. In addition, the Interim Update expressly directs readers to take their own legal advice. In light of this it is unrealistic *in limine* to suggest that it authorises or approves unlawful conduct.

3.2 Your contention relates to one bullet point only of the Interim Update, namely that saying:

“In workplaces and services that are open to the public:

- *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”.*

3.3 Your argument is that this observation positively authorises or approves unlawful conduct by those to whom it is directed. It does not do so.

(a) Workplace toilets

3.4 Above the bullet points, the summary observation is made that “*in **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed*” (bold in original). While your concern relates to toilets, this observation concerned changing and washing facilities as well. This falls to be read with the last of the bullet points which states that “*where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men*”.

3.5 Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 (“WPR1992”) provides that:

(1) *Suitable and sufficient sanitary conveniences shall be provided at readily accessible places; and*

(2) *...sanitary conveniences shall not be suitable unless:*

- (c) *separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.*

3.6 To similar effect see regulation 21 on “Washing facilities” (which refers to showers or baths, and not hand basins), and regulation 24 “Facilities for changing clothing”. In particular regulation 24(2) states “*the facilities mentioned in that paragraph shall not be suitable unless they include separate facilities for, or separate use of facilities by, men and women where necessary for reasons of propriety*”.

3.7 As a preliminary point, you suggest that the Interim Update fails to recognise that the provision of separate lockable rooms satisfies this requirement. The Interim Update is intended to be drafted in simple language. The legal language of Regulation 20 is “sanitary conveniences”. We agree that such

a convenience may be suitable where it is in a separate room the door of which is capable of being secured from inside. Similarly washing facilities and changing rooms will be suitable where they are in rooms that can be secured from the inside. This is recognised in the last bullet point: “*where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men*” i.e. to that extent single-sex toilets do not need to be provided.

- 3.8 In the bullet point which you challenge, the references to “the women’s facilities” and “the men’s facilities” are to “single-sex facilities” (i.e. toilets, changing rooms and washing facilities such as showers) *where lawfully provided*. “Facilities” is a broader concept than “toilets”.
- 3.9 Against the background of what the Supreme Court decided, with which the Interim Update deals in its preceding section, the bullet point is simply pointing out that where separate facilities *are lawfully provided* for “men” and “women”, this means for *biological* men and women. The corollary is that, where such facilities are provided, biological men (trans women) should not be permitted to use the women’s facilities and vice versa, *even if* the trans woman has a GRC. Following the Supreme Court’s decision, where facilities are lawfully provided separately to the sexes, they are provided separately to those sexes as defined by their biological sex, whether or not the user has a GRC and however they identify their gender.
- 3.10 A person who follows that observation, which is intended to reflect no more than what was decided by the Supreme Court, will not engage in unlawful conduct contrary to the legislation with which the EHRC is concerned. In the workplace, Part 5 of the EA2010 applies. Contrary to your claim, if a person followed the observation in the bullet point, there would be no gender reassignment discrimination contrary to Part 5:
- i. There would not be direct gender reassignment discrimination: a relevant individual would be treated in the same way if they did not have the protected characteristic of gender reassignment i.e. in the same way as others of their sex (meaning, following *For Women Scotland*, biological sex).
 - ii. There would not be indirect gender reassignment discrimination if the duty bearer also follows the other bullet points within the Interim Update, namely that
 - *trans people should not be put in a position where there are no facilities for them to use*
 - *where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*
 - *where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men.*

That is in circumstances where, although the employer will be lawfully providing separate men’s and women’s facilities as part of the overall facilities which it provides, it will also provide mixed facilities where possible and ensure that trans people have facilities for them to use. If this is followed, trans people will not be left in a position where they are required to use facilities of the sex or gender with which they do not identify. The employer’s approach, taken as a whole, will not give rise to an unjustified disadvantage for the purposes of section 19 EA2010.

(b) Toilets in services open to the public

- 3.11 So far as your challenge to the bullet point relates to facilities in services open to the public in the form of toilets, the bullet point must be read with the preceding explanation that:

*"It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act..."*

- 3.12 This makes plain that those providing services open to the public *may or may not* seek to provide single-sex facilities, including changing rooms, washing facilities and toilets, and that they may only do so, consistently with the EA2010, where *"it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act"*. In a given situation it may or may not be proportionate to do that: see Schedule 3 to the EA2010.
- 3.13 The bullet point which you challenge concerns the position only so far as there *are* single-sex facilities in services open to the public (such that, *ex hypothesi*, their provision pursues a legitimate aim and it is proportionate for them to be provided).
- 3.14 In that situation, if a person followed the observation in the bullet point, there would be no breach of the part of the EA 2010 concerned with gender reassignment discrimination in the provision of a service to the public (i.e. Part 3):
- I. There would not be direct gender reassignment discrimination: the person would be treated in the same way if they did not have the protected characteristic of gender reassignment i.e. in the same way as others of their sex (meaning, following *For Women Scotland*, biological sex).
 - II. There would not be indirect gender reassignment discrimination, because *ex hypothesi* the provision of the single-sex toilets as a service open to the public would be a proportionate means of achieving a legitimate aim.
- 3.15 For the reasons summarised above the bullet point in the Interim Update which you challenge does not fall foul of the principle in *A v SSHD*. A person following it would not breach the law.
- 3.16 That includes not merely domestic law but also human rights law, so far as the person was also exercising a public function as a public authority for the purposes of section 6 of the Human Rights Act 1998 ("**HRA**") and so was subject to a separate obligation to act compatibly with human rights, including inter alia the Article 8 rights of trans persons.
- 3.17 On a correct analysis your human rights argument adds nothing. Your argument is, in short, that it would breach a trans person's human rights to be denied access to a toilet corresponding with their gender identity. However, assuming that the obligation in section 6 HRA applies to decisions as to access to workplace toilets¹:
- (a) Read as a whole, the observations in the Interim Update, if followed, will not leave any trans person in a position where they are required to use facilities of the sex or gender with which they do not identify (and will avoid any risk of the person 'outing' themselves).
 - (b) Even if there were an interference by a public authority with Article 8 (read alone or with Article 14) it would be justified on the same basis on which separate facilities were lawfully being provided under the EA2010.
 - (c) The EHRC does not consider there to be any inconsistency between the Supreme Court's ratio and ECHR law, but even if there were the domestic court would be obliged to follow the Supreme Court.
 - (d) In any event, the case law to which you refer falls very far short of demonstrating that a trans person has a human right to access the single-sex facilities corresponding to the sex or gender

¹ Such decisions will not engage section 6 HRA even where the employer is a public authority because certain of their functions are not functions of a public nature (for the purposes of section 6(3)(b) HRA), if the nature of the act is private: see section 6(5) HRA).

with which they identify, especially having regard to considerations of privacy, dignity and safety, including as referred to by the Supreme Court: see e.g. paragraphs [42], [52], [211], [217].

- 3.18 In the premises your contention that the Interim Update is unlawful applying *A v SSHD* is misconceived.

Ground 2: Breach of statutory duties in issuing the Interim Update

- 3.19 You say that, in circumstances where (you say) the Interim Update is flawed and was first published nine days after the *For Women Scotland* judgment, *“the publication of the Interim Update was reckless and in breach of the Commission’s statutory duties under sections 3, 8 and 9 of the Equality Act 2006”*.

- 3.20 The EHRC has not acted recklessly, and has not acted in breach of those or any duty. It appropriately acted with due speed in the circumstances explained above.

- 3.21 This is an unsustainable allegation which is improperly made absent clear evidence (of which there is none).

Ground 3: Declaration of Incompatibility, directed to the Minister

- 3.22 Ground 3 in your letter is directed to the Minister for Women and Equalities.

Ground 4: Unlawful consultation

- 3.23 This adds nothing. You claim that “the scope and premise of the consultation will necessarily be undermined by the Commission’s own erroneous understanding of the law”. It is not accepted that there has been an erroneous understanding for the reasons given.

4 OTHER INTERESTED PARTIES

- 4.1 The EHRC does not identify any other party which it considers to be an interested party in the decision being addressed by the proposed action.

5 ADR PROPOSALS

- 5.1 We note your willingness to consider proposals for alternative dispute resolution (“ADR”). We consider the most effective way of achieving formal clear guidance for all is for stakeholders to engage with us to update the Code (and other formal legal guidance). Such updates of the EHRC’s statutory guidance will necessarily supersede the interim update.

6 REQUESTS FOR INFORMATION AND DOCUMENTATION

- 6.1 You have requested copies of decision-making documents underlying the Interim Update, including any impact assessments, non-privileged legal analysis, human rights analysis and relevant correspondence with the Commissioners. However, your proposed claim concerns only argument about the law (i.e. whether what is said in the Interim Update is consistent with it). Ground 1 involves a comparison between the Interim Update and the law (cf. *A v SSHD* at [41]); and Grounds 2 and 4 are advanced on that premise. Ground 3 is not directed to the EHRC. You do not propose otherwise to challenge the process by which it was decided to issue the Interim Update, and in any event the EHRC considers that it has candidly explained the reasons for that above. In the circumstances and having regard to the terms of your request, the EHRC does not consider it necessary or appropriate to provide the documents you have requested.

- 6.2 This information is provided as an initial response given the time available and your rejection of our request for a four-week extension of time to respond to your letter in greater detail.

7 THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

- 7.1 Please address further correspondence to us on behalf of the EHRC. Correspondence and court documents are accepted on receipt by email to both [REDACTED] [REDACTED] in Word, PDF and email formats subject to a size limit of 10MB. We are prepared to use fully secure file sharing platforms however service is not accepted by that route without express prior agreement.

As set out above, the EHRC fully understands that trans people and others with protected characteristics may be worried about what the judgment in For Women Scotland means for them. The EHRC has been unambiguous in its statements that trans people deserve respect and must be treated with dignity. The EHRC is clear that trans people remain protected by the EA2010, the HRA and, more generally, by both civil and criminal law. The EHRC is concerned to ensure that the interests of trans people following the judgment in For Women Scotland are properly reflected in the Services Code of Practice and other guidance. We invite you to engage with the EHRC constructively in that respect as the best means of obtaining clear and effective guidance on which you and your clients can rely.

Yours faithfully

BURGES SALMON LLP

[REDACTED]