

IN THE HIGH COURT OF JUSTICE  
KING'S BENCH DIVISION  
ADMINISTRATIVE COURT

BETWEEN:

THE KING  
on the application of  
(1) GOOD LAW PROJECT LIMITED  
(2) BOT  
(3) BNW  
(4) BBS

Claimants

-and-

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

-and-

(1) HEALTH AND SAFETY EXECUTIVE  
(2) SECRETARY OF STATE FOR WORK AND PENSIONS  
(3) MINISTER FOR WOMEN AND EQUALITIES  
(4) WELSH MINISTERS  
(5) SCOTTISH MINISTERS

Interested Parties

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SUMMARY GROUNDS OF RESISTANCE

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*References in square brackets are to pages of the Claim Bundle. References to the annex accompanying these Summary Grounds are in the form [SGR/pg [x]].*

**A. Introduction**

1. This is a claim for judicial review of what the Claimants describe as “guidance” published by the Commission for Equality and Human Rights (“**the Commission**”) on its website on 25 April 2025 (see section 3 of the Claim Form [11]). The claim is wholly misconceived.
2. In fact, the document the Claimants seek to challenge was not guidance at all, but was simply a short online news update, described, entirely accurately, as “An interim update on the practical implications of the UK Supreme Court judgment” (“**the Interim Update**”). This is a reference to the Supreme Court judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] 2 WLR 879 (“*For Women Scotland*”). The judgment was handed down on 16 April 2025. In summary, the Supreme Court held that (a) the terms “man”, “woman”

and “sex” in section 11 and 212 of the Equality Act 2010 (“**the 2010 Act**”) refer to biological sex; and (b) a person who has a Gender Recognition Certificate (“**GRC**”) issued under the Gender Recognition Act 2004 does not have a sex (or certificated sex) which is the opposite of their biological sex for the purposes of the 2010 Act.

3. The judgment attracted extensive public and media attention. There was significant public confusion about what had been decided by the Supreme Court, and what steps duty-bearers were required to take to comply with the judgment.
4. Before the *For Women Scotland* judgment, the Commission had recently reviewed its Code of Practice for Services, Public Functions and Associations (“**the Services Code**” or “**the Code**”), which had not been updated since 2011. The Commission had held a lengthy consultation on a new draft of the Services Code and the revised draft that followed that consultation had been sent to the Secretary of State for consideration. The Commission decided that it would hold a further consultation on further changes that would be needed to the draft Code in light of the *For Women Scotland* judgment.
5. Undertaking further revisions to the Code of Practice requires several steps to be taken, including a period of formal consultation, providing a draft of the revised Code to the Secretary of State for consideration, and laying the draft before Parliament for the statutory period of 40 days. While these steps were put in train, the Commission decided to post the Interim Update on the news section of its website to help promote understanding of the Supreme Court judgment in this interim period. The aim was to produce a brief and concise statement, identifying the key principles from the Supreme Court judgment and setting out some necessarily high level statements on matters that were generating significant public debate. Employers and other duty-bearers were reminded that they must follow the law and should take appropriate specialist legal advice where necessary.
6. The Commission has kept the Interim Update under review, and it has been clarified and amended on a number of occasions. The Claimants have been informed of these amendments in pre-action correspondence. A further letter was written to the Claimants on 27 June 2025, informing them of further clarifications made to the Interim Update. Indeed, the website of the first claimant, Good Law Project (“**GLP**”), makes much of these

changes to the Interim Update and (wrongly) assert that they were made in response to this litigation, claiming the changes as a great success. Despite this, the Claimants continue to pursue their claim, which is targeted at an old version of the Interim Update which has not been available on the Commission's website for several weeks.

7. It is a matter of public record that GLP has been extremely critical of the Supreme Court's judgment, describing it as "unforgivable<sup>1</sup>". GLP immediately began crowdfunding to challenge the judgment, with Mr Maugham confirming in his witness statement that GLP has raised over £600,000 for this purpose [74]. It appears that this claim is nothing more than an ill-conceived attempt to find a "target" for GLP's fundraising. The Interim Update is not an appropriate target, for the reasons set out below. The Commission has grave doubts as to whether GLP has standing to bring this claim, for the reasons set out by the Divisional Court in *R (Good Law Project Limited and Runnymede Trust) v The Prime Minister* [2022] EWHC 298 (Admin). However, as there are also three proposed individual claimants, the Commission does not invite the Court to spend time and resources on this issue at this time.
8. As to the proposed second, third and fourth Claimants, the Commission notes that their names are not listed in the Claim Form despite the statement at section 9 that they would be added as claimants if an anonymity order was granted. Such an order was made by Chamberlain J on 30 June 2025, but, as far as the Commission is aware, no attempt has been made to add them as parties to the claim. The Order of 30 June provided that the names of the second, third and fourth claimants and the unredacted claim documents can be withheld from the public (and the Commission has no objection to this). However, no order has been made, and no order could properly be made, withholding the identities of the Claimants and the unredacted claim documents from **the other party to the claim**. If they wish to proceed with this claim, the second, third and fourth claimants need to provide unredacted claim documents to the Commission and apply to be added as claimants.
9. As to the substance of the claim, it is entirely without merit and permission should be refused for the following reasons.

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<sup>1</sup><https://goodlawproject.org/the-supreme-court-ignored-trans-voices-im-ashamed-of-what-our-law-has-become/>

10. **First**, the claim is academic. The Claimants seek permission to challenge a version of the Interim Update which, as they have been informed repeatedly, no longer exists. The version of the Interim Update which is currently live on the Commission's website is materially different from the version that the Claimants contend is unlawful. The Claimants were told in the pre-action protocol response that further amendments would be made shortly, yet still pursued this claim. The Claimants were specifically informed of a further version of the Interim Update, which addressed the matters about which the Claimants complain in this claim, by letter dated 27 June 2025. They were invited to reconsider the claim, and confirm whether they intended to proceed with it. The Commission has not had any response to that letter. The Claimants have not identified any reason why the Courts should expend valuable time and resources determining an academic claim, let alone why they have continued to seek such heavy expedition in respect of an academic claim, particularly in circumstances in which the Code of Practice is in the process of being updated. Still further updates were made to the Interim Update on 9 July 2025, in light of the closure of the consultation.
11. **Second**, and in any event, the claim is unarguable because the Interim Update is not a "policy" to which the principles in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 apply. It is expressly "interim" and has been produced to provide some brief, initial, and high level observations to assist duty bearers pending the revision of the Commission's statutory and non-statutory guidance in light of *For Women Scotland*. The Interim Update is not, and has never purported to be, a statement of the Commission's policy. It is not, and has never purported to be, a comprehensive analysis of what is a complex legal position. That will be set out in the revised Code of Practice. It cannot possibly be said to "*authorise or approve*" unlawful conduct, particularly in circumstances where the Interim Update expressly recommends that duty-bearers "*must follow the law*" and "*should take appropriate legal advice*".
12. The two points above are more than sufficient for the Court to refuse permission. However, for the avoidance of doubt, the Commission does not accept that the Interim Update breaches the principles in the *A* case, even if they had applied. The various arguments advanced by the Claimants in support of their contention that the Interim

Update “*positively authorises unlawful conduct*” are contrary to the reasoning of the Supreme Court in *For Women Scotland* and are bound to fail.

13. The Commission is well aware that trans people and others with protected characteristics may be concerned about what the judgment in *For Women Scotland* means for them. The Commission has repeatedly stated that trans people should be treated with dignity and respect. So too should people who are not trans, including biological women who reasonably wish to be able to access single-sex spaces in accordance with the law. Respect for all is core to the Commission’s work in ensuring that people do not face discrimination or harassment including because of or related to their protected characteristic(s). The Commission is working at speed to update the Services Code, after carefully considering the consultation responses to the draft Code published as part of the consultation. The version of the Code submitted to the Secretary of State will contain the Commission’s detailed consideration of the implications of the complicated legal issues that arise in this field.

## **B. The Facts**

### *(1) The Role of the Commission*

14. The Commission is Britain’s independent equality and human rights regulator, established pursuant to Part 1 of the Equality Act 2006 (“**the 2006 Act**”). It has a raft of powers, including:

- (1) By s.14 of the 2006 Act, the Commission may issue a code of practice designed to ensure or facilitate compliance with the 2010 Act or promote equality of opportunity. Before issuing a code of practice under s.14, the Commission is required to comply with various procedural requirements, including: publishing proposals; consulting appropriate persons; and submitting a draft to the Secretary of State for approval: ss.14(6)-(7). If the Secretary of State approves the draft, it will be laid before Parliament and subject to a negative resolution procedure before being issued by the Commission as a Code of Practice: ss. 14(7)-(8).
- (2) By s.13 of the 2006 Act, the Commission may publish or otherwise disseminate ideas or information or give advice. The procedural requirements applying to a

code of practice under s.14 of the 2006 Act (as summarised above) do not apply to information or advice given pursuant to s.13.

15. The Services Code is one of the statutory codes of practice issued by the Commission under section 14. As explained above, the Commission is in the process of revising that Code. Between October 2024 and January 2025, the Commission engaged in a significant consultation exercise in respect of the Code. It was in the process of revising the Code following that consultation when the Supreme Court handed down judgment in *For Women Scotland* on 16 April 2025.
16. The Supreme Court judgment represented a change in the understanding of the law for many, including the Commission. 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 2010 Act referred to one's sex at birth 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 2010 Act accordingly. The Commission thus recognises that earlier guidance and versions of the Code proceeded on that premise, which has now been held to be wrong.
17. In light of the judgment, the Commission recognised that certain parts of the draft Code would need to be revisited. Accordingly, the Commission quickly began work on reviewing the Code and announced on 25 April 2025 that it would shortly undertake a further public consultation on the proposed amendments to the Code. That consultation was subsequently launched on 20 May 2025 and remained open until 30 June 2025.
18. At the same time, the Commission was aware that individuals and organisations affected by the Supreme Court's judgment were seeking immediate assistance on its consequences, and that a number of persons and organisations were purporting to describe the effect of the judgment in terms which differed, sometimes widely. As such, as well as the consultation in relation to updates to the Code, the Commission concluded that it would assist to provide some initial, brief and high-level observations in relation to some of the matters being referred to in the public discourse pursuant to its powers under s.13 of the 2006 Act.

19. It was against that backdrop that, on 25 April 2025, the Commission posted the Interim Update (i.e. a webpage headed “*An interim update on the practical implications of the UK Supreme Court judgment*”) on its website. The Interim Update was posted in the section of the Commission’s website titled “Media centre” and was labelled as “News”. This is distinct from and separate to the “Guidance and advice” section of the website.

*(2) Amendments to the Interim Update*

20. The Interim Update is a live webpage which is subject to change. The Commission has kept the contents of the Interim Update under active review.

21. The version of the Interim Update challenged by the Claimants is at [69]. That version reflected certain changes that had already been made to the version originally posted on 25 April 2025. In particular:

(1) On 30 April 2025, the Interim Update was amended to accurately reflect the position in respect of toilet provision for schools in Scotland.

(2) On 30 May 2025, a “banner” was added to the top of the Interim Update to refer to the fact that the Commission was proposing changes to the Code and that the consultation on those proposed changes had opened.

22. Subsequently, the Interim Update has been further amended a number of times. The version of the Interim Update currently available on the Commission’s website is annexed to these Summary Grounds: [SGR/pg/2]. It remains subject to change. In summary, the further changes that have been made are as follows:

(1) On 6 June 2025, the Interim Update was amended to reflect the fact that the consultation had been extended from two weeks to six weeks, and to update the intended timing for providing the Code to the Secretary of State for approval.

(2) On 24 June 2025, the Interim Update was amended to add detail to the section on facilities in workplaces and to state more comprehensively the requirements under the Workplace (Health, Safety and Welfare) Regulations 1992. These changes were accompanied by a statement from the Commission explaining the

rationale for the changes, which is also annexed hereto: [SGR/pg/8]. The decision to make these changes was taken by the Commission's Board on 18 June 2025 (i.e. several days before the claim documents in this claim were served on the Commission, as to which see further below).

- (3) On 1 July 2025 the banner was updated to reflect the fact that the consultation on the Code had closed.
- (4) On 9 July 2025, the banner was updated again to read as is shown in the annexed version.

23. The Interim Update remains a live document and subject to change as appropriate.

*(3) Chronology of these proceedings*

24. On 16 May 2025, the Claimants sent a 32-page pre-action letter to the Commission in respect of a prospective challenge to the Interim Update. [80] The Claimants sought a response within seven days.
25. In subsequent correspondence, the Commission explained that it would not be able to provide a full pre-action response by the proposed deadline. On 30 May 2025, the Commission informed the Claimants that it would be able to provide a full response by 13 June 2025. [120] It asked the Claimants to confirm that no claim would be issued prior to receipt and proper consideration of that response, and reserved the Commission's position on costs in the event that a claim were to be issued before its response.
26. Instead of waiting for the Commission's pre-action response, unbeknownst to the Commission, GLP filed a claim form seeking judicial review of the Interim Update on 6 June 2025, accompanied by a Statement of Facts and Grounds ("SFG"). [4] The Claim Form sought an order for an expedited timetable and a rolled-up hearing. The second, third and fourth Claimants were not named on the Claim Form. However, on the same date, the Claimants issued an application for anonymity on behalf of the second, third and fourth Claimants. The application for anonymity was served on the Commission, but inexplicably, the claim documents filed by GLP were not.



27. On 13 June 2025, the Commission sent a full pre-action response to the Claimants, setting out its reasons for opposing the claim as it had been described in the pre-action letter. [283] The response stated at §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.”*

28. On 17 June 2025, again unbeknownst to the Commission, GLP filed an updated SFG and Claim Bundle. [24] The claim was issued by the Administrative Court on the same date.
29. The claim was not served on the Commission by GLP until 23 June 2025, six days after it was issued. This was the first time that the Commission became aware that the claim had been filed.
30. On 27 June 2025, the Commission wrote to the Claimants to address various matters, including the amendments that had been made to the Interim Update on 24 June 2025. A copy of this letter is attached at [SGR/pg10]. The letter stated at §2.3:

*“Our client’s PAP response explained that the EHRC had received feedback about the interim update from a range of stakeholders, including as to its clarity. It made clear that the EHRC was keeping the contents of the interim update under active review, and that any changes resulting from stakeholder feedback would be made as soon as reasonably possible. To the degree that your client’s claim raised any realistic concerns about the interim update (which is not accepted) the update will apparently resolve them. Please now reconsider the claim with your clients and confirm whether it is their intention to proceed with it. In the circumstances we will refer to this letter in relation to the costs of any continued action.”*

31. At the time of drafting this document (two weeks after the letter was sent), the Commission has still not received a response to this letter.
32. On 30 June 2025, Chamberlain J gave directions for there to be an oral permission hearing in the last week of the Trinity Term 2025. Chamberlain J also made orders granting anonymity to the Second, Third and Fourth Claimants vis-à-vis the public.

### **C. Reasons for refusing permission**

#### *(1) The claim is academic*

33. It is trite law that the courts do not opine on academic or hypothetical matters. While the Court has a discretion to hear an academic claim, this discretion must be exercised with caution, and the Court will not entertain an academic claim other than in exceptional circumstances where there is good reason in the public interest for doing so: see for example, *R v Secretary of State for the Home Department ex p Saleem* [1999] AC 450, at 457 per Lord Slynn; and *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] 4 CMLR 17, at §§208-210 per Lindblom, Singh and Haddon-Cave LJ.
34. It could not be clearer that this claim is academic. The version of the Interim Update that the Claimants seek to challenge no longer exists. The SFG does not engage with the text of the Interim Update as it currently stands, and the Claimants have never sought to challenge the version that does exist. Accordingly, the proposed challenge to a previous version of the Interim Update is academic.
35. There are no exceptional circumstances, and no good reason in the public interest, for the Court to entertain such an academic claim. That is particularly so in circumstances in which: (a) the Interim Update remains subject to further change; and (b) the Commission is in the process of preparing an updated formal statutory code of practice addressing the consequences of the *For Women Scotland* judgment in detail.
36. The academic nature of the claim should be of no surprise to the Claimants. The Interim Update had already been amended more than once before the claim was commenced. The Commission informed the Claimants in its pre-action response on 13 June 2025 that the

Interim Update remained under review and that further amendments would be made as soon as possible. The Claimants were subsequently invited, on 27 June 2025, to reconsider their claim in light of the changes to the Interim Update that were posted by the Commission on 24 June 2025. There is no justification for the Claimants' continued pursuit of their academic claim in those circumstances. This claim should never have been brought, and the Court is invited to refuse permission accordingly.

(2) *The Interim Update is not a "policy"*

37. As to the substance of the claim, the Claimants' principal argument is that the Interim Update is unlawful because it positively authorises or approves unlawful conduct by those to whom it is directed contrary to the principles in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. That argument is hopeless.
38. As is clear from §§1-3 of the judgement, the decision in *A* concerned the contents of a "policy document" or "statement of practice" issued by the Government, which govern how a public authority will exercise its discretionary powers. The Supreme Court in *A* set out the standards to be applied by the courts when called upon to review the contents of such policies. It concerned detailed policy guidance issued by the Secretary of State, which set out the Child Sex Offender Disclosure Scheme.
39. The Interim Update is plainly not a "policy" to which the reasoning in *A* applies, for the following reasons.
40. **First**, the Interim Update is distinct from, and distinguishes itself from, both statutory and non-statutory guidance of the sort routinely published by the Commission. This is made clear on the face of the Interim Update, which says (and has said from the outset): "*we are also working to update our statutory and non-statutory guidance*". It is also reflected in the fact that the Interim Update was deliberately published as "*News*" in the "*Media Centre*" section of the Commission's website, rather than in the "*Guidance and advice*" section.
41. Further, the banner at the top of the current version of the Interim Update now highlights this distinction in even clearer terms:

*“The consultation on proposed changes to our code of practice for services, public functions and associations (Code of Practice), resulting from the UK Supreme Court judgment, closed on 30 June 2025. We are reviewing the consultation responses received and will produce a revised Code of Practice in due course.*

*The Code of Practice will provide formal guidance to service providers, public bodies and associations in relation to their duties under the Equality Act 2010 and how to put them into practice. It will have legal standing under the Equality Act 2006.*

*While our work on revising the Code of Practice is ongoing, duty-bearers should take appropriate legal advice where necessary in relation to all aspects of compliance with the Equality Act 2010 and other relevant law. This includes the matters referred to in this interim update, which is for information only.*

*Please keep checking our website for further updates about the revised Code of Practice, which will provide formal guidance for duty-bearers.”*

42. **Second**, unlike a formal policy, the Interim Update 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.
43. **Third**, the Interim Update does not purport to be a comprehensive statement of the law in this area or the implications for duty-bearers of the *For Women Scotland* judgment. It is expressly limited to addressing only certain matters arising from the judgment.
44. **Fourth**, the Interim Update expressly emphasises that “employers and other duty-bearers must follow the law and should take appropriate specialist legal advice where necessary”. That message has been further emphasised in the latest version of the banner set out above. The information in the Interim Update about the consequences of *For Women Scotland* must be seen in that context.
45. Moreover, in the recent unsuccessful attempt to challenge the length of the consultation in relation to the Code, Swift J described the Interim Update as “a document... referring to the Supreme Court judgment: **summarising** the conclusions in that judgment...and **making**

*some observations on how that might affect the application of provisions within the 2010 Act in workplaces, to the provision of services, and in schools.’: R (Liberty) v Equality and Human Rights Commission [2025] EWHC 1504 (Admin), §5 (emphasis added). Whilst the status of the Interim Update was not in issue in that case, that characterisation is plainly correct.*

46. Accordingly, the contention on which the entire claim is premised – i.e. that the Interim Update was required to comply with the A principles – is hopeless. Permission should be refused for this reason as well.

*(3) The Interim Update does not positively authorise or approve unlawful conduct*

47. In any event, even if the principles in the A case did apply to the Interim Update (which is denied), the Interim Update does not breach those principles. It does not, on any analysis, positively authorise or approve unlawful conduct by those to whom it is directed. The Claimants’ contentions to the contrary are unarguable and fly in the face of the reasoning of the Supreme Court in *For Women Scotland*.

48. The section of the Interim Update about which the Claimants complain reads as follows (with differences between the version challenged by the Claimants and the current version shown in underlining and strikethrough):

~~“In relation to **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~~ requirements are set out in the Workplace (Health, Safety and Welfare) Regulations 1992. These require suitable and sufficient facilities to be provided including toilets and sometimes changing facilities and showers. Toilets, showers and changing facilities may be mixed-sex where they are in a separate room lockable from the inside. Where changing facilities are required under the regulations, and where it is necessary for reasons of propriety, there must be separate facilities for men and women or separate use of those facilities such as separate lockable rooms.

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 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
- 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"~~

49. The contention that the above observations positively authorise unlawful conduct on the part of duty-bearers is nonsensical and misconceived. To the contrary, the observations in the Interim Update, if followed, will assist duty-bearers in complying with the law as set out by the Supreme Court in *For Women Scotland*.

50. As for workplaces:

- (1) Regulation 20(1) of the Workplace (Health, Safety and Welfare) Regulations 1992 ("**the 1992 Regulations**") provides that suitable and sufficient sanitary conveniences shall be provided at readily accessible places. Regulation 20(2)(c) provides that sanitary conveniences shall not be suitable unless 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. Regulations 21 and 24 are to similar effect with respect to washing and changing facilities respectively. Against the background of what the Supreme Court decided, with which the Interim Update deals, where separate facilities *are lawfully provided*, for “men” and “women”, this means for *biological* men and women. Following the Supreme Court’s decision, therefore, where facilities are lawfully provided separately to the sexes, they are provided separately to those sexes as defined by their biological sex.

- (2) It was clear from the original text of the first paragraph above, taken with the final bullet point, that employers can comply with their duties by providing either single-sex facilities for men and women, or by providing facilities in separate lockable rooms that could be used by either sex. That straightforwardly reflects employers’ obligations under the 1992 Regulations, read in light of the decision in *For Women Scotland*. Any alleged ambiguity is based on an entirely artificial reading of the Interim Update. In any event, whilst they do not amount to a change in substance, the amendments to the Interim Update put the position beyond any possible doubt.

51. As for toilets made available to the public by service providers:

- (1) There is no mandatory requirement equivalent to those applying to workplaces under the 1992 Regulations.
- (2) The Interim Update has been clear from the outset that: (a) it is not compulsory to operate single-sex facilities; (b) a service provider can choose to operate single-sex facilities if that is a proportionate means of achieving a legitimate aim under paragraph 26 or 27 of Schedule 3 to the 2010 Act; and (c) if a service provider does choose to operate a single-sex facility, it must be on the basis of biological sex in accordance with *For Women Scotland*. Again, there was no genuine ambiguity in the previous draft, but, if there had been, the addition of the words “*where separate single-sex facilities are lawfully provided*” as set above would have resolved it.

52. In addition, the third and fourth bullet points set out above advise employers and service providers who choose to provide single-sex facilities to also provide mixed facilities where

possible and to ensure that trans people have facilities to use. If this advice 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, thereby avoiding any unjustified disadvantage for the purposes of section 19 of the 2010 Act to those with the protected characteristic of gender reassignment.

53. Accordingly, far from positively authorising unlawful conduct, the Interim Update will assist employers and service providers to minimise the risk of acting unlawfully. At the very least, the Interim Update is capable of being operated lawfully and does not inevitably lead to unlawful outcomes. That is sufficient for compliance with the principles in A: see e.g. §35, §63.

54. Moreover, the express statement in the Interim Update that duty-bearers “*must follow the law and should take appropriate specialist legal advice where necessary*” further highlights the unreality in the Claimants’ contention that the Interim Update authorises unlawful conduct.

(4) Ground 3

55. As for Ground 3, neither the Interim Update nor the principles of domestic law it summarises are incompatible with the rights of trans people under the European Convention on Human Rights. In short:

- (1) As a matter of fact, the observations in the Interim Update, including the third and fourth bullet points set out above will, if followed, 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 the risk of such person ‘outing’ themselves).
- (2) Even if such consequences did somehow follow from the Interim Update, there is no ECtHR case law that imposes a positive obligation on Contracting States to ensure that a trans person is treated for all purposes in domestic law as being of the sex or gender with which they identify. In particular, there is no ECtHR case law to the effect that trans people can always access toilet facilities designed and operated for those of the opposite biological sex. Article 8 is a qualified right, which can be interfered with where justified, including “*for the protection of the*



*rights and freedoms of others*". The relevant "others" for this purpose includes non-trans people, particularly women. Even if there were somehow 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 single-sex facilities were lawfully being provided under the 2010 Act. There is no inconsistency between the Supreme Court's decision in *For Women Scotland* and the jurisprudence of the ECtHR.

- (3) In any event, if there were such an inconsistency (which is denied for the reasons given above), the domestic courts would be bound by the doctrine of precedent to follow the Supreme Court decision in *For Women Scotland*: see, for example, *Kay v Lambeth LBC* [2006] 2 AC 465 at §§40-45 per Lord Bingham.

(5) *Ground 2*

56. Finally, Ground 2 adds nothing to Grounds 1 and 3. Given that the Interim Update is lawful, the Commission did not breach its duties under ss.3, 8 or 9 of the 2006 Act by posting it on its website, and keeping it under review thereafter. The contrary position is hopeless.

**D. Conclusion**

57. For the reasons set out above, permission to apply for judicial review should be refused. The Commission seeks its costs of preparing the Acknowledgement of Service and these Summary Grounds of Resistance. A schedule of costs is attached.

[REDACTED]  
[REDACTED]  
[REDACTED]

11 July 2025

[REDACTED]