

B E T W E E N:

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

Claimants

-and-

THE EQUALITY AND HUMAN RIGHTS COMMISSION

Defendant

-and-

Others

Interested Parties

REPLY

1. Organisations and individuals across the country are in urgent need of clarity from the Courts about this core question: Can service providers and employers choose to permit trans people to use men’s and women’s toilets in accordance with their identity? (**“the Core Question”**). The Guidance, defended by the Defendant (**“the Commission”**), says that they cannot. The Claimants say that they can. The Commission should be united with the Claimants in pressing for the Court’s clarification on this issue. Instead, in its Summary Grounds (**“SGRs”**), the Commission asserts on tenuous procedural grounds that its Guidance is not amenable to judicial review, arguing the Guidance “no longer exists” and amounts simply to a “short online news update” relaying “high-level observations”.
2. The Commission seeks to deflect attention from its Guidance by casting aspersions on the motivations of those bringing the claim (§7 SGRs¹). This is unbecoming of a regulator. The effects of the Guidance on the Second, Third and Fourth Claimants, including irreversible breaches of their rights to privacy, are set out in their statements and at §§7-9 of the Statement of Facts and Grounds (**“SFG”**). The reason why each of the Claimants seek clarity as to the law is self-evident.

(i) The Guidance “no longer exists”

3. The Commission relies on the fact that the Guidance first published on 25 April 2025 is hosted on a live webpage, which has been updated several times. On this basis, it repeatedly says that the version subject to challenge “no longer exists” (§10, §34, §48 SGRs) and argues that, as a result, the claim is academic. This argument rests first on a mischaracterisation of the claim. The SFG explained that “this claim challenges both the Guidance as it was first posted, and the live version as it appears on

¹ “It appears that this claim is nothing more than an ill-conceived attempt to find a “target” for GLP’s fundraising.”

the webpage” (§36). The updated versions of the Guidance retain the material in the original Guidance that was and is subject to challenge, and which falls within the scope of this claim as pleaded.

4. Second, this argument rests on a mischaracterisation of the changes that have been made to the Guidance. The Guidance undoubtedly still exists. It is still live and is still marked as “published 25 April 2025”. Much of it is unchanged from 25 April 2025. The sentences that give rise to the Core Question in this claim have not been amended, and the Commission defends them. Specifically, the following wording subject to challenge is wholly unchanged:

In workplaces and services that are open to the public [the words “where separate single-sex facilities are lawfully provided” have been added here]:

- 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”

This extract contains all the wording gives rise to the Core Question: Can service providers and employers choose to permit trans people to use men’s and women’s toilets in accordance with their identity? That wording continues to have an acute practical impact on trans people’s lives, as illustrated by the individual Claimants’ witness statements and in the examples given in the Claimants’ SFG.

5. A public authority cannot evade judicial review of its published guidance, merely by pointing to peripheral alterations it has made to a fluid document. Such amendments do not render a challenge academic: the changes made have not resolved the issues raised in this claim. There is one relevant sentence which has been deleted since the claim was served on the Defendant. The original version stated: “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”. This was legally incorrect on any interpretation of the Workplace Regulations 1992 and gave the misleading impression that workplaces must offer single-sex toilets for their employees, a flaw identified in pre-action correspondence and in the claim at §81 SFG. This sentence was deleted from the Guidance on 24 June 2025, 39 days after the point was raised in pre-action correspondence and the day after the claim was served on the Commission. That concession is welcome. While it does not resolve the Core Question, the Claimants are entitled to a declaration that that aspect of the Guidance was wrong.
6. Following the Commission’s SGRs it is now clear that the Core Question will not be resolved without determination by the Court. The Commission has never publicly substantiated its advice by public legal analysis, but it has stuck resolutely to its assertions as to the implications of the *For Women Scotland*

Judgment. There is no prospect of it taking a different view of the law in the Service Provider Code of Practice. Indeed in its consultation on the Code it stated that the “Supreme Court made the legal position clear, so we will not be seeking views on those legal aspects”. The Commission has not used its SGRs to notify the Court of any intention to produce any document that would supersede the Guidance as to the position for employers.

(ii) The Guidance is merely a “short online news story”

7. Next, the Commission argues that the Guidance cannot be subject to a challenge pursuant to *R (A) v SSHD* [2021] 1 WLR 3931 on the basis that it is not a ‘policy’, but was merely “news”. Again, this argument rests on a mischaracterisation of the Guidance. It relies on the name of the Guidance, “Interim Update”; that the Guidance was placed in the news section of its website and on generic statements inserted into the Guidance to the effect that readers “must follow the law” and “should take appropriate legal advice”. These arguments ignore the reality of the context and content of Guidance:

- a. The Commission admits that its aim was to assist those affected by the Supreme Court’s judgment to understand its consequences (§18 SGRs) and has been correcting the Guidance to have a material impact on the way in which duty bearers behave (§§20-22 SGRs).
- b. The Commission delivered this Guidance from its position as the national regulator with statutory authority to give guidance in this area. Indeed, in its pre-action response, the Commission admitted that the Guidance amounted to giving ‘advice’, within the meaning of s.13 Equality Act 2006 (“**EA 2006**”)². Both ‘advice’ and ‘guidance’ fall within s.13(1)(d) EA 2006 and both are amenable to judicial review.
- c. Inclusion of these implied disclaimers cannot allow the Commission to evade judicial review if its Guidance misstates the law, in circumstances where those reading the Guidance would reasonably rely on it as containing an accurate statement of the law. The Commission was aware, as the regulator, that the Guidance was being read in circumstances where “individuals and organisations affected by the Supreme Court’s judgment were seeking immediate assistance on its consequences” (§18 SGRs).
- d. There is no clear alternative source of legal advice other than this from the regulator.
- e. In substance, the Guidance is a statement by the regulator which purports to tell people how to apply the law and is therefore susceptible to challenge on the basis set out in *R (A) v SSHD* at [41]:
“The test set out in *Gillick* is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed.”

² “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 Commission's substantive legal arguments

(i) Ground 1: The Guidance misstates the law

8. The Commission stands by its position in the Guidance that the Workplace Regulations require that “where separate facilities are lawfully provided, for “men” and “women”, this means for *biological* men and women” (§50(1) SGRs), but it offers no explanation for this other than assertion of “the background of what the Supreme Court decided” and “following the Supreme Court’s decision”.
9. As to service providers, the Commission describes a binary choice between two kinds of possible toilet provision: single sex provision under Schedule 3 of the 2010 Act, which it is common ground is now defined by “biological” sex (§51(2) SGRs); or “mixed facilities” (§52 SGRs). This reflects the misleading statement in the Guidance that “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”. Again, the Commission has doubled down on its position, without providing any legal analysis in answer to the Claimant’s claim.
10. Key to the Commission’s defence is its refusal to accept the practical consequences of duty bearers relying on the Guidance:
 - a. It states that it has advised duty bearers “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” (§52 SGRs). Further, the Commission says that this advice will “avoid the risk of such person ‘outing’ themselves” (§55(1) SGRs).
 - b. Implicit within this statement is recognition that it will not be feasible for every employer and service provider to offer either lockable rooms, or three sets of toilets: female, male and mixed. If such duty bearers follow the Commission’s Guidance and decide they must offer their existing two sets of single sex cubicles as “biological” single sex toilets, trans people will be left in position where they are required to use facilities of the sex or gender with which they do not identify. This is inevitable in very many cases across the country. That is sufficient to create unlawfulness pursuant to *A*.
 - c. In many contexts, requiring a trans person to only use mixed toilets will out them as trans to others, a consequence made clear by the evidence of the individual claimants. The failure to recognise this seriously undermines any claim by the Commission to have properly considered the human rights implications of its Guidance.

(ii) Ground 2: In publishing the Guidance, the Commission has acted in breach of its statutory duties under Sections 3, 8 and 9 of the Equality Act 2006

11. The Commission has defended Ground 2 solely on the contingent assertion that if the Guidance is substantively lawful, it cannot have acted in breach of its statutory duties (§56 SGRs).

12. This approach to defending Ground 2 fails to engage with the fact that s.3 and s.9(4) EA 2006, in particular, are procedural duties. Section 3 requires the Commission to “exercise its functions under this Part with a view to encouraging and supporting the development of a society in which” the defined statutory aims are met, including that “there is respect for and protection of each individual's human rights”. Section 9(4) requires the Commission to “take account of any relevant human rights” when fulfilling its s.8 duties, which the Commission accepts it was doing in publishing the Guidance. The Commission cannot establish that it complied with these duties without providing a candid explanation of its thinking and process when it issued this Guidance. It has provided no explanation whatsoever of its process or reasoning, let alone disclosure to support that explanation. The Court is simply not in a position to say whether the Commission took into account the human rights of trans people without that candid explanation. The superficial and elastic discussion of human rights at §55 SGRs provides further indication that the Commission had no proper regard to the human rights implications of its advice prior to publishing the Guidance, and now seeks to justify its position retrospectively³. A breach of the duty of candour, including a failure to disclose relevant documents, can itself justify the grant of permission (*R (Sky Blue Sports & Leisure Ltd) v Coventry City Council* [2013] EWHC 3366 (Admin) [2014] ACD 48 at §26). This is a case in which the Defendant seeks to establish that the claim against it is unarguable because of its own default in respect of its duty of candour.

(iii) Ground 3: In the alternative to Ground 1, the statutory framework or part of it is incompatible with the Convention rights of trans people

13. The Commission first denies the practical consequences of duty bearers relying on the Guidance (§55(1) SGRs) without further analysis. Second, it asserts that any interference in the rights of trans people is justified by reference to the rights of women (§55(2) SGRs). It does so without any explanation (or evidence) as to the balance between the harms to trans people and the rights of others either in general or in any examples of specific scenarios. Third, the Commission asserts that domestic courts would be bound by the precedent in *For Women Scotland* (§55(3) SGRs). It offers no explanation of why *For Women Scotland* is binding on these issues when the Supreme Court did not comment on any of these issues (specifically: toilets; the Workplace Regulations; the possibility of service providers providing inclusive toilets outside the scope of Schedule 3; the relevance of the positive discrimination provisions under the Equality Act 2010; or the relevance of human rights obligations to any of these matters). In this way, the Commission maintains its attempts to extend the reach of *For Women Scotland*, without any supporting explanation.

[REDACTED]
[REDACTED]
[REDACTED]

16 July 2025

³ Some sources clearly support that inference: <https://www.theguardian.com/society/2025/may/14/uk-equality-watchdog-to-extend-gender-guidance-consultation-say-insiders>