IN THE HIGH COURT OF JUSTICE **Claim No. AC-2025-LON-001953**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

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-

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

Interested Parties

CLAIMANTS' SKELETON ARGUMENT FOR ORAL PERMISSION HEARING OF 30 JULY 2025

References in the form **[XX]** are to page numbers in the Permission Hearing Bundle.

Recommended Reading

- The Commission's Guidance dated 25 April 2025 as first published **[267–270]**
- The Commission's Guidance dated 25 April 2025 in its current form **[271-275]**
- Equality Act 2006, sections 3, 8, 9 and 13.
- Equality Act 2010, sections 7 and 158, and Schedule 3, paragraphs 26-28.
- *For Women Scotland v Scottish Ministers* [2025] UKSC 16; [2025] 2 WLR 879. The Supreme Court discusses "the central question" at paras 155-161. A helpful summary of the Supreme Court's reasoning can be found at para 265.

Counsel

- For the Claimants: [redacted]
- For the Defendant: [redacted]

(A) Introduction

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 Claimants say they can. The Guidance, published and defended by the Defendant **("the Commission")**, says they cannot. The Guidance has provided since publication on 25 April 2025 (subject to the subsequent addition of the eight immaterial words indicated in square brackets below):

> "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"

2. If the Commission's Guidance as to the legal position is correct, the law restricts trans people from using the toilets which align with their gender identity in huge swathes of everyday life, including in workplaces, private businesses and using public facilities, regardless of the preference of the employer or service provider in question. Already, as employers and service-providers reverse longstanding policies of inclusion[1] to follow the Commission's Guidance, trans and intersex people are being placed in invidious positions. The experiences of the Second, Third and Fourth Claimants and the examples provided in the SFG at §39 **[38]** are testament to this.

3. This skeleton argument addresses:

    a. The relevant law and factual background;
    b. Why the Claimants have an arguable case on each of the grounds;

        (1) The Guidance misstates the law.
        (2) In publishing the Guidance, the Commission acted in breach of its statutory duties under sections 3, 8 and 9 of the Equality Act 2006 **("EqA 2006")**.
        (3) In the alternative to Ground 1, the statutory framework or part of it is incompatible with the Convention rights of trans people, in which case a declaration of incompatibility is sought.

    c. The Commission's technical arguments against permission: that the Guidance *"no longer exists"*, and amounts simply to a *"short online news update"* relaying *"high-level observations"*.

[1] In line with previous guidance given by the Commission and the Government: see SFG at §§20-24 **[31-32]**

4. As to the Interested Parties, the Minister for Women and Equalities has indicated she is neutral as to whether permission should be given, but if it is given, she will participate in proceedings and seek to assist the Court (§8, **[261]**).

(B) Relevant law and factual background

5. The background to the claim is set out at §§11-49 of the Statement of Facts and Grounds **("SFG") [28-40]**, and the applicable statutory framework at §§50-76 SFG **[41-48]**.

6. Subsections 9(1) and (3) of the Gender Recognition Act 2004 (**"GRA 2004"**) provide that:

> "(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> …
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

7. The Equality Act 2010 **("EqA 2010")** prohibits direct and indirect discrimination on the basis of protected characteristics in a range of contexts, including in workplaces and services. Both sex and gender reassignment are protected characteristics. The definition of gender reassignment is broad, and persons who are "intending to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex" are protected (section 7).

8. In *For Women Scotland v The Scottish Ministers* [2025] UKSC 16 **(*"For Women Scotland"/"FWS"*)**, the Supreme Court considered the meaning of "sex", "man" and "woman" in the EqA 2010 to determine the lawfulness of statutory guidance produced by the Scottish Government about gender representation on public boards, which had stated that the term "woman" in the EqA 2010 included trans women with a GRC. The Supreme Court held that the terms "sex", "man" and "woman" within the EqA 2010 mean "biological sex", "biological man" and "biological woman". In summary it held that:

    a. When interpreting an enactment, the rule in section 9(1) GRA 2004 applies "*subject to provision made… by any other enactment*" (section 9(3)) which means where another enactment expressly disapplies the rule in section 9(1), or "*where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1)*" (*FWS,* para 156).

    b. Based on a detailed analysis of the Act's provisions, the EqA 2010 impliedly disapplied the rule in section 9(1) GRA 2004, and *"sex"* in the Act referred to *"biological sex"* (*FWS,* para 264).

c. An important factor in justifying this conclusion was the enduring obligations under the EqA 2010 not to discriminate against trans people, which meant that the Court's interpretation of the Act "would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)" (*FWS*, para 248).

9. The EqA 2010 creates exemptions that permit service-providers to provide separate-sex services if they wish to do so, without facing discrimination claims based on sex or gender reassignment (set out at §§55-57, SFG **[42]**). In order for these exemptions to apply, specific conditions must be met, including that the provision of the separate-sex service, rather than a "joint service", is objectively justified, (i.e. a proportionate means of achieving a legitimate aim).

10. The only obligation on employers relating to the provision of single-sex toilets at work is Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 **("the Workplace Regulations 1992")**, which provides that:

> "20. (1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.
>
> (2) Without prejudice to the generality of paragraph (1), 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..."

11. On 25 April 2025, nine days after the handing down of judgment in *For Women Scotland*, the Commission published *"An interim update on the practical implications of the UK Supreme Court Judgment"* (**"the Guidance"**) **[267]**, which purported to "highlight the main consequences of the judgment". It states that 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". Following the publication of the Guidance, the Second, Third and Fourth Claimants were each directed by their employers to cease using the toilets which correspond to their lived gender.

12. The Guidance has been subject to minor revisions since it was first published (including one to correct a misleading sentence about the requirements upon employers relating to toilet provision, which forms part of the Claimants' claim). The current version is at **[271]**. The sentences that give rise to the Core Question have not been amended, and the Commission defends them in its Summary Grounds of Resistance (**"SGRs"**).

(C) Arguable case on the grounds

Ground 1: The Guidance misstates the law

13. The Guidance misstates the law and will induce unlawful conduct by those to whom it is directed and/or purports to give a full account of the law, but fails to achieve that by misstatement or omission (per *A v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931 ***("A v SSHD")*** at paras 34, 38, 39, 46) as further particularised at §§80-97 SFG **[49-58]**. The issues in workplaces and services are distinct, because of the separate statutory bases for the Commission's mistaken conclusions.

14. As to workplaces, the statement in the Guidance (as first published on 25 April, but since deleted) that "In workplaces, it is compulsory to provide sufficient single-sex toilets" was incorrect on any reading of Regulation 20, because (as is now accepted by the Commission), Regulation 20 does not require conveniences to be provided separately for women and men where they are provided in a separate room with a lockable door. This sentence was consequently deleted from the Guidance on 24 June 2025, the day after the claim was served on the Commission. The Claimants are entitled to a declaration that that aspect of the Guidance was wrong. That declaration is necessary, given that the Commission acknowledges public confusion on these issues at §18 SGRs **[209]**, but the Commission has not publicly acknowledged that earlier drafts of the Guidance contained mistakes, which exacerbated that confusion. Consequently, employers have relied on this misstatement of law so as to exclude trans and intersex people from the toilets of their acquired gender (see the email of BNW's employer dated 01 May 2025 at Exhibit BNW-01, which repeats the Commission's mistake **[confidential suppl. bundle, p 23]**).

15. With the exception of this point, all other aspects of the Claimants' claim relate to the Core Question and sentences of the Guidance which have remained unamended since its publication.

16. The Supreme Court's conclusions in *For Women Scotland* were expressly limited to interpretation of the EqA 2010 and its relationship to section 9 of the GRA 2004 (*FWS*, paras 2, 25, 94, 264). They were reached after detailed consideration of the provisions of the EqA 2010. The Commission has offered no explanation for its interpretation of the law. On Regulation 20, it merely refers to "the background of what the Supreme Court decided" and "following the Supreme Court's decision" (§50(1) SGRs) **[218]**. Such an approach is directly contrary to the Court's express guidance that other legislation must be considered carefully on its own terms (*FWS*, para 108).

17. The Commission does not offer any response to the Claimants' detailed arguments that Regulation 20, considered on its own terms, cannot be interpreted as requiring employers to exclude trans employees from using workplace toilets that align with their lived gender. Those include *inter alia* that: nothing in the Workplace Regulations 1992 displaces the ordinary operation of section 9(1) GRA 2004 (SFG, §84)

[50]; the Regulations should be read in a trans-inclusive way because of their origins in transposing an EU directive, and because courts are required under section 6(3) of the European Union (Withdrawal) Act 2018 to interpret them in accordance with assimilated case law which requires a trans-inclusive approach (SFG, §83) **[50]**; and a breach of the Workplace Regulations 1992 entails criminal liability for employers, such that the interpretation of Regulation 20 engages the rule against doubtful penalisation and should be construed liberally (SFG, §82) **[50]**.

18. The Commission does not address *Croft v Royal Mail* [2003] ICR 1425, [2003] EWCA Civ 1045, a pre-GRA case considering, in the context of Regulation 20 of the Workplace Regulations, whether preventing a trans employee from using the toilet which aligned with their gender identity constituted direct gender reassignment discrimination. The Court held that, past a certain point in transition, trans employees have a right to use the toilets which align with their gender identity, and failure to respect that right would amount to direct gender reassignment discrimination contrary to section 2A of the Sex Discrimination Act 1975 (section 2A was inserted into the Act following the decision of the European Court of Justice in *P v S and another* [1996] ICR 795). Giving the judgment of the Court, Pill LJ held (at para 46):

> "Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks [to use the women's toilets, rather than a disabled toilet]. I would accept, applying the statement of Lord Nicholls in *Bellinger*, paragraph 41, and *Goodwin* paragraph 90, that a permanent refusal to refuse that choice to someone presenting to the world as a woman could be an act of discrimination even if the person had not undergone the final surgical intervention."

19. The Court of Appeal, expressly considering Regulation 20 (at para 34), concluded that employers were permitted to allow trans employees to use single-sex toilets which align with their gender identity. The Commission does not acknowledge that its Guidance now mandates conduct which the Court of Appeal held was direct discrimination on grounds of gender reassignment. The Commission has provided no explanation of how it reconciles its position with *Croft*, or how it considers trans people have now been stripped of their right to access toilets of their lived gender, no matter how long they had been living in that gender or how complete their transition.

20. <u>As to services</u>, the Commission is yet to provide any answer to the Claimants' argument that it is wrong to say 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", because there are two bases on which service providers can lawfully provide separate toilets for women and men, including trans women and men, set out at §96 SFG **[56]**. The Claimants' position is plainly correct and unanswered (and, for permission, at least arguable).

Human Rights

21. That the Claimants' position is correct is put beyond doubt when human rights principles are considered. The relevant human rights principles and case law are set out in detail at §§11-15 SFG **[28]**. In *Goodwin v United Kingdom* (2002) 35 EHRR 18, the European Court of Human Rights (**"ECtHR"**) held that:

> "Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings... In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

22. The ECtHR further noted that serious interference with private life can arise where there is a conflict between the state of domestic law and an important aspect of personal identity, which can place trans persons in an anomalous position where they experience feelings of vulnerability, humiliation and anxiety (at para 77). As Lady Hale later put the principle, trans people have a right to live "not as a member of a 'third sex', but as the person they have become, as fully a man or fully a woman as the case may be": *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72 at §29). The *Goodwin* decision led to the passage of the GRA 2004, but the GRA 2004 did not extinguish the underlying human rights to which Parliament was seeking to give effect in passing that Act. The law must still be read compatibly with those rights, insofar as possible (section 3 Human Rights Act 1998). The GRA 2004 certainly cannot have placed trans people in a worse position than they were in before that Act was passed.

23. Key to the Commission's defence is its refusal to accept the lacuna in the Guidance. 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 **[218]**) and that this advice will "avoid the risk of such person 'outing' themselves" (§55(1) SGRs **[219]**). This is incorrect:

    a. This defence omits consideration of employers and service providers, particularly small ones or those in small premises, for whom it is not possible to offer separate lockable rooms or three sets of toilets: female, male and mixed. If these 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 gender with which they do not identify. The Guidance induces unlawful conduct, and/or misstates the law.

b. Further, the Commission continues to be oblivious to the implications of the Guidance requiring a trans person to use only mixed toilets. Even in the Commission's preferred scenario, where a third set of "mixed" toilets are made available, requiring a trans person to suddenly cease using the toilets marked for their lived sex and start using the toilets marked "mixed" will, in many factual contexts, out them to others as trans. This consequence is made clear by the evidence of the individual Claimants (see e.g. w/s BBS at §12 **[Confidential suppl. bundle, p 28]**). Again, if duty bearers follow the Commission's Guidance, that will induce unlawful conduct in risking trans people to be "outed" in violation of their rights under articles 8 and 14 ECHR.

24. These lacunae in the Commission's defence undermine both the Commission's substantive legal analysis, and any claim by the Commission to have properly considered the human rights implications of its Guidance. The Commission asserts only that any interference with the rights of trans people is justified by reference to the rights of women (§§55(2) SGRs) **[219]**. It offers no explanation or evidence why the grave harms to trans people identified in the claim will be outweighed by the impact on women (a notable omission given that the *status quo ante* has pertained for over 30 years). Still less is there any analysis of why the asserted justification would hold in every factual scenario so as to justify excluding all trans persons from using toilets which align with their gender identity:

a. The interpretation in the Guidance would (if the Commission is correct) lead to trans people being required to use toilets of the sex with which they do not identify, however fully they have transitioned and whatever the consequences for their life as a trans person going forward.

b. Further, the Guidance would apply no matter the particular geography or logistics of a set of toilets, or the needs or demographics of those using them, such that employers and service providers have no ability to weigh up whether, in their specific environment, they are able to protect the rights of women while also respecting the rights of trans people.

25. The Commission is yet to explain how employers and service providers can comply with its Guidance without breaching their obligation under section 22 of the GRA 2004 not to disclose information about the gender history of employees and service-users who have obtained a GRC (see SFG at §85(e)(iii) **[53]**), a duty about which the Guidance is silent. Most fundamentally, the Guidance is wrong on the Core Question: it tells employers and service providers that they cannot provide toilets separately for men and women on a trans-inclusive basis, when they can.

26. For the reasons set out in the Reply (§7, **[264]**), the inclusion of generic, implied disclaimers in the Guidance that readers "must follow the law" and "should take appropriate legal advice" cannot shield the Commission from a finding of unlawfulness if its substantive guidance is incorrect.

27. Ground 1 is plainly arguable. The Commission's Guidance misstates the law. It authorises or induces unlawful conduct: namely unlawful discrimination against trans people (see SFG at §87 **[54]** in workplaces and at §§94-95 in services **[55]**) and human rights breaches.

Ground 2: In publishing the Guidance, the Commission breached its statutory duties

28. The Commission has defended Ground 2 solely on the basis that since the Guidance is substantively lawful, it cannot have acted in breach of its statutory duties (§56 SGRs) **[220]**.

29. This approach to defending Ground 2 fails to engage with the fact that sections 3 and 9(4) EqA 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 section 8 duties, which the Commission accepts it was purporting to do 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, 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 sentences on human rights at §55 SGRs **[219]** provide further indication that the Commission had no regard to the human rights context prior to publishing the Guidance, and now seeks to justify its position retrospectively.

30. 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). Permission should be granted.

Ground 3: In the alternative to Ground 1, the statutory framework is incompatible with trans people's Convention rights

31. If, contrary to the Claimants' primary reading of the legislation as set out in Ground 1, the Court finds that the Guidance does reflect an accurate statement of the law, and that Regulation 20 of the Workplace Regulations 1992, Schedule 3 of the EqA 2010 and/or section 9 of the GRA 2004 read together mandate the exclusion of trans people from public and/or workplace toilets of their lived gender, then one or more of those provisions are incompatible with trans people's right to private life under Article

8 of the Convention read alone or together with Article 14 (prohibition of discrimination) in that they mandate circumstances in which trans people are unable to realise matters essential to their "physical and moral security" (*Van Kück v Germany* (2003) 37 EHRR 51 at para 18) living as "fully a man or fully a woman".

32. If the legislation cannot be read not incompatibly with Articles 8 and/or 14, the Court should make a declaration of incompatibility pursuant to section 4 HRA 1998.

33. Again, the Commission's position is justified by an unexplained reliance on *FWS*, which is said to be "binding" (§55(3) SGRs) **[220]**. It offers no explanation of why *FWS* 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).

(D) The Commission's Technical Arguments

34. The Commission's technical arguments that the Guidance is not amenable to judicial review because "it no longer exists" and because the Guidance is merely a "short online news story" are addressed in the Claimants' Reply at §§3-7 **[262]**. As explained in Reply, those arguments rely on mischaracterisations of the Claimants' claim and the Guidance itself. These arguments should be rejected. Indeed, they are irrelevant to Ground 3.

35. As to the suggestion that the Guidance no longer exists, it is absurd to suggest that the Guidance no longer exists because small parts of the wording have been amended. The Guidance remains published to the same website, under the same publication date, and still contains almost all the same wording, and all the wording that gives rise to the Core Question. The Claimants' Statement of Facts and Grounds states at §36 **[37]**, "The EHRC has since informed the Claimants in correspondence that the webpage on which the Guidance appears is live and subject to amendment... As of 16 June 2025, none of the sentences subject to challenge in this claim have been amended. This claim challenges both the Guidance as it was first posted, and the live version as it appears on the webpage." Since the Reply was filed, the Defendant has maintained its position in correspondence that the Guidance ceased to exist when certain peripheral words were deleted. In order to avoid any more court time being wasted on this sophistry, the Claimants have applied to amend the claim form to state in terms what is already obvious from their pleading: that they challenge the Guidance both as originally published, and as it appears live insofar as the live version is substantively unchanged from the original version.

36. The Defendant's suggestion that the Guidance is no more than a "short online news story" is no more than an attempt to avoid scrutiny by the Court, when it is clear that the Court's guidance is sorely needed:

    a. The Commission admits that its aim was to assist those affected by the Supreme Court's judgment to understand its consequences (§18 SGRs) **[209]** and has been correcting the Guidance to have a material impact on the way in which duty bearers behave (§§20-22 SGRs) **[210]**.

    b. The Commission accepts that it published the Guidance pursuant to its statutory power as a regulator to give advice under section 13(1)(d) EqA 2006 (Pre-action response at §2.12, **[185]**). In fact, Section 13(1)(d) refers to giving "advice and guidance", and it is not clear whether the Commission believes there to be a material distinction between the two.

    c. There is no clear alternative source of legal advice other than this from the regulator.

    d. 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 *A v SSHD* at §41.

(E) Conclusion

37. When the Commission received the Claimants' pre-action letter, it requested five weeks to reply to *"explore carefully and properly consider"* the complex issues raised by the law in this area **[112]**. As of writing, nine weeks later, the Commission has still not provided any substantive explanation for a legal position it felt able to publish within nine days of the *FWS* judgment. Further, it has refused to provide any account of how the Guidance was drafted or the steps it took to comply with its statutory duties before it published the Guidance. If, for some as yet unexplained reason, the Commission's Guidance is *prima facie* correct in law, then the question of its compatibility with Articles 8 and/or 14 of the ECHR nevertheless arises pursuant to Ground 3.

38. The Court is invited to grant permission, and set a timetable that will ensure that the important issues raised by this claim can be determined as soon as possible within the Michaelmas term.

[redacted]

22 July 2025