IN THE HIGH COURT OF JUSTICE

Claim No. AC-2025-LON-001953

King's Bench Division

Administrative Court

In the matter of an application for Judicial Review

B E T W E E N:

The King on the Application of

(1) GOOD LAW PROJECT LIMITED
(2) RQR (proposed)
(3) SQS (proposed)
(4) TQT (proposed)

Claimants

-and-

EQUALITY AND HUMAN RIGHTS COMMISSION

Defendants

-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

STATEMENT OF FACTS AND GROUNDS

References in the form [XX] are to page numbers in the claim bundle.

Introduction

1. On 25 April 2025, the Defendant (**"the Commission"**) published guidance on its website (**"the Guidance"**). This was nine days after the handing down of the Supreme Court's judgment in *For Women Scotland v the Scottish Ministers* [2025] UKSC 16 ("*For Women Scotland*"). The Guidance purports to *"highlight the main consequences of the judgment"*. In reality, it contains a series of legal errors and has been published in breach of the Commission's statutory duties. This claim particularly concerns the unlawful advice contained within the Guidance regarding access to toilets both in workplaces and made available by service-providers.

2. Although the Guidance was called an "*Interim Update*", this is a misnomer. The Guidance in fact contains the Commission's settled advice to employers and service-providers on the provision of bathroom facilities. Neither the existing Service Provider Code of Practice nor the amendments under consultation, nor the consultation itself address the issues raised by the Guidance and under challenge in this claim. The Guidance asserts that this advice arises as a consequence of *For Women Scotland* yet pertains to issues that were not mentioned at all in *For Women Scotland.* The Guidance impacts acutely on the lives of trans people across the country, as well as on intersex people and all those who may be perceived as trans, including in particular, women who have a masculine gender expression or otherwise do not conform to traditional expectations of femininity. Employers and service-providers across Great Britain have already acted upon the Guidance to the detriment of trans and intersex people. The Guidance is causing humiliation, fear and distress. It is causing trans people who transitioned years or decades before *For Women Scotland* to be outed" (to have their trans status disclosed to others without their consent). Regardless, the Commission has made clear that the Guidance represents its settled view of the law and it will not change its advice in any further document that it may later publish. Indeed, it has not announced any plans to publish any further document at all for employers.

3. By this claim the Claimants ask the Court to quash the relevant aspects of the Guidance and/or make a declaration that it is unlawful on grounds that:

    a. It is an unlawful statement of policy or guidance, providing an inaccurate and misleading statement of the law, in which the Commission encourages and approves unlawful conduct by those to whom the Guidance is directed (**Ground 1**);

b. 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 (**Ground 2**);

c. In the alternative to Ground 1, if the Guidance reflects an accurate statement of the law (and the law cannot be read compatibly), the statutory regime is incompatible with trans people's rights under article 8 and/or 14 of the European Convention on Human Rights ("**the ECHR**"), and the Claimants will ask the Court to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 ("HRA1998") (**Ground 3**). The Ministers served as interested parties ensure compliance with section 5 HRA 1998.

The Claimants and Proposed Claimants

4. The First Claimant is the Good Law Project Limited. It is a private company limited by guarantee with a particular focus on the use of litigation to advance equality for trans persons in the UK. It is one of the largest advocates for transgender rights in the United Kingdom. It has organised, raised money for and financially supported almost all of the leading public law cases on trans rights since 2020. Its crowdfunders to support litigation on trans rights issues following the handing down of the judgment in *For Women Scotland* decision attracted contributions from over 17,000 individuals, including trans people and those who support trans equality.

5. Applications have been made for an order safeguarding the anonymity of three proposed further claimants who ask to be joined as Claimants to the claim if they are granted anonymity. The application is for a withholding order, reporting restrictions, and an order restricting non-party access to court documents ("the anonymity order"). These proposed Second, Third and Fourth Claimants are trans and intersex persons who have been personally affected by the Commission's Guidance.

6. In light of these applications, information that might identify the Claimants is contained in a separate confidential schedule. The proposed claimants have applied for the anonymity order in advance of issuing (or here being joined as claimants) in accordance with the procedure recommended by the Administrative Court Guide.

7. [redacted]

[redacted]

8. [redacted]

9. [redacted]

Interested Parties

10. The Claimants have named five interested parties. The Health and Safety Executive (**"the HSE"**) is the statutory regulator for health and safety in Great Britain. Its functions include preparing statutory codes of practice to provide practical guidance with respect to the requirements imposed by health and safety regulations. The guidance challenged in this case is based upon the Commission's interpretation of these requirements. The Secretary of State for Work and Pensions is the sponsoring minister of the HSE. The Minister for Women and Equalities is responsible for strategic oversight of policy and legislation on equalities and most likely to be responsible for the consequences of any declaration of incompatibility pursuant to ground 3. The Welsh Ministers and the Scottish Ministers have been joined as interested parties in view of the significant and wide-reaching implications of the Commission's Guidance on devolved matters and the potential for a declaration of incompatibility (see section 5 of the Human Rights Act 1998).

Background

(a) The human rights of trans people

11. The right of trans people to personal development and to physical and moral security in the full sense enjoyed by others in society has long been recognised as falling within the scope of Article 8 ECHR (recently reiterated in *TH v The Czech Republic* App no 33037/22 (ECtHR, 12 June 2025) at paras 48–53) In *Goodwin v United Kingdom* (2002) 35 EHRR 18 (at para 90), the European Court of Human Rights ("**ECtHR"**) explained 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."

12. In reaching this conclusion, the Court emphasised the importance of states recognising trans people's change of gender (at para 77):

> "It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, *Dudgeon v the United Kingdom* judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."

13. While the judgment in *Goodwin* refers to post-operative trans people (using the dated term *"transsexuals",* now considered pejorative), the ECtHR has since confirmed that the right to respect for private life under Article 8 applies fully to gender identity as a component of personal identity for all individuals, including trans people who have not undergone gender reassignment surgery or other medical treatment (see *AP, Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) at paras 94–95), and *TH v The Czech Republic* at para 48. From the outset, in passing the GRA 2004, the UK chose not to make legal gender recognition conditional on undergoing surgery or any particular form of medical treatment.

14. The significance of the two passages of *Goodwin* cited above was discussed by the Supreme Court in *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, where at para 29 Lady Hale held that:

> "This puts it beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their 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."

15. Parliament sought to respond to the "*unsatisfactory situation*" of the "*intermediate zone*" identified in *Goodwin v UK* (at para 90) by enacting the Gender Recognition Act 2004 (**"the**

GRA 2004")[1]. The GRA 2004 enabled trans people to apply for a gender recognition certificate (**"GRC"**). When a full GRC is issued to a person, the person's gender becomes the acquired gender "*for all purposes*", subject to certain exceptions, pursuant to section 9(1) of the Act. The intention of this section was to remedy the lacuna identified by the ECtHR in *Goodwin* (*R (C) v Secretary of State for Work and Pensions* at para 20). In *Grant v United Kingdom* (Application No 32570/03) (2007) 44 EHRR 1 at [41] the ECtHR held that there was a breach of the Applicant's article 8 rights up until the passing of the GRA 2004, after which her victim status ceased in respect of the matters complained of in that case.

(b) The development of discrimination protections for trans people

16. Alongside developments in the case law of the ECtHR came developments in equality law to protect trans people from discrimination. Many of these developments came from EU law to which the UK was bound to give effect as a Member State.

17. In the landmark case of *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, the European Court of Justice held that the Equal Treatment Directive (that is, Council Directive 76/207/EEC) required Member States to prohibit discrimination arising from gender reassignment. The case led to the enactment of the Sex Discrimination (Gender Reassignment) Regulations 1999, which amended the Sex Discrimination Act 1975 to prohibit direct discrimination on the grounds of gender reassignment in the employment field.

18. In this context, the Court of Appeal decided the case of *Croft v Royal Mail* [2003] EWCA Civ 1045, [2003] ICR 1425, a case about whether preventing a trans employee from using the toilet which aligned with their gender identity would constitute direct gender reassignment discrimination. The Court expressly considered the requirement under regulation 20 of the Workplace Regulations 1992 (**"the Workplace Regulations 1992"**) to provide separate toilets for women and men (at para 34). The Court held that, past a certain point in transition, trans people would have a right to use the toilets which aligned with their gender identity and failure to respect that right would amount to direct gender reassignment discrimination. On the facts

[1] The GRA 2004 was also prompted by the declaration of incompatibility made in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467: see *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 *at* [63].

of the case, the Claimant, who had only transitioned at work relatively recently, had not reached that stage. 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. Protection from sex and gender reassignment discrimination was extended to cover the provision of goods, facilities and services by the Sex Discrimination (Amendment of Legislation) Regulations 2008. The EqA 2010 amended and consolidated existing anti-discrimination law, with the aim to "*reform and harmonise equality law*". Some of the substantive changes introduced by the EqA 2010 in relation to gender reassignment discrimination include the removal of requirement that the process of gender reassignment be undertaken "*under medical supervision*", which had been included in the Sex Discrimination Act 1975 (s.7 EqA 2010), and the introduction of express provision which prohibited indirect discrimination on grounds of gender reassignment (equally with seven other protected characteristics) in a range of contexts, including at work and in the provision of services (ss. 19, 29 and 39 EqA 2010).

(c) Equality and Human Rights Commission and UK Government guidance prior to *For Women Scotland*

20. Since the passage of the EqA 2010, employers and service-providers have been assisted in understanding their obligations to trans staff and service-users by practical guidance published by the Commission and the Government Equalities Office.

21. In the context of service provision, the Commission issued a statutory "*Code of Practice on Services, Public Functions and Associations*" ("**the Service Provider Code of Practice**"). This was first laid before Parliament shortly after the EqA 2010's enactment in October 2010 and issued in April 2011. It includes guidance on how service-providers should approach trans

people's access to single-sex services. The Service Provider Code of Practice was issued pursuant to the Commission's statutory power under section 14(1) of the EqA 2006. At para 13.57 [**CB/134**], the Service Provider Code of Practice states that:

> "If a service-provider provides single- or separate sex services for women and men, or provides services differently to women and men, **they should treat transsexual people according to the gender role in which they present**. However, the Act does permit the service-provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate [aim]." (emphasis added)

22. This paragraph was approved by Henshaw J in *Authentic Equity Alliance v Equality and Human Rights Commission* [2021] EWHC 1623 (Admin), who held in particular that the guidance accurately reflected the obligations under the EqA 2010 to avoid direct and indirect discrimination on grounds of gender reassignment (per paras 8 and 13–18).

23. In the workplace context, the Government Equalities Office (**"GEO"**) had published non-statutory guidance for employers on *"Recruiting and retaining transgender staff"* **("the GEO Guidance"**) as early as November 2015 which stated at p 14 [**CB/138**]:

> "Use of facilities – **a trans person should be free to select the facilities appropriate to the gender in which they present. For example, when a trans person starts to live in their acquired gender role on a full time basis they should be afforded the right to use the facilities appropriate to the acquired gender role.** Employers should avoid discriminating against anyone with the protected characteristic of 'gender reassignment'. Where employers already offer gender-neutral toilets and changing facilities, the risk of creating a barrier for transgender people is alleviated." (Emphasis added)

24. The GEO guidance was removed in April 2024 with the Government stating it was *"out of date"*. It remains unclear which parts of the guidance were considered out of date and why.

(d) The judgment in *For Women Scotland*

25. The Supreme Court's decision in the case of *For Women Scotland* was handed down on 16 April 2025. The decision concerned a challenge to the Scottish Government's statutory guidance on the Gender Representation on Public Boards (Scotland) Act 2018. The issue for

determination was whether trans women who had obtained a GRC under the GRA 2004 fell within the definition of *"women"* for the purposes of statutory guidance which the Scottish Ministers promulgated under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018. This concerned the improvement of women's representation on Scottish public boards. This in turn raised the question of the definition of *"woman"* under the EqA 2010 because *"Equal Opportunities"* are a reserved matter, outside the legislative competence of the Scottish Parliament.

26. Allowing For Women Scotland's appeal, the Supreme Court held that the statutory guidance was erroneous in stating that the term *"woman"* within the meaning of 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"*. The term *"biological sex"* is not defined in the judgment and is not a statutory term, but by *"biological"*, the Court appears to have been referring to a person's sex as recorded at birth (see para 6).

27. The Court was not suggesting that being trans is contrary to biology. The Court did not expressly consider how intersex people fit into its two "*biological*" sex categories. Neither did it imply that the word "*biological*" can describe the sex of individuals who have medically transitioned to a different sex[2].

28. The Supreme Court expressly stated that its analysis was confined to the interpretation of the EqA 2010, holding at para 2 that *"It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word 'woman' other than when it is used in the provisions of the EA 2010."*

29. The Supreme Court's judgment contains no reference to the provision of toilet facilities, whether in workplaces or elsewhere. At paras 211–221, the Court discusses the exemptions for service-providers in paras 26–28 of Schedule 3 to the EqA 2010 relating to separate-sex and

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[2] The Claimants consider that trans and intersex people form part of the rich biological diversity of human existence, a diversity which necessarily defies neat binary classifications. For this reason, where references are made to *"biological sex"* in these grounds, quotation marks are used to make it clear that Claimants refer to the term as used by the Supreme Court in *For Women Scotland*, to mean sex as recorded at birth.

single-sex services. These provisions establish to what extent, if service-providers wish to provide services on a single-sex basis, they may qualify for exemptions protecting them from discrimination claims under the EqA 2010 (see further below at paras. 52-54). At paras 248–264, the Supreme Court emphasised the enduring obligations upon duty-bearers under the EqA 2010 to protect trans people's rights, including the prohibitions on direct and indirect discrimination on the basis of gender reassignment. The Court relied on these protections as an important factor justifying its conclusion in favour of a "*biological sex*" interpretation of the EqA 2010, holding that this interpretation *"would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)"* (at para 248).

(e) Reaction to the judgment in the public domain

30. Although the judgment was limited to the meaning of "*woman*" within the definition of the EqA 2010, the implications of the judgment have not been well understood. Since the judgment, commentators in the media and on social media have repeatedly stated that trans women are not women and trans men are not men at all. The Daily Telegraph carried as a front page headline the sentence "*Trans women are not women*" [**CB/139**]. In response to this confusion and misinformation, reports soon emerged that some organisations were beginning to adopt policies that wholly disregarded the rights and needs of trans people, notwithstanding the Supreme Court's insistence that its interpretation would not disadvantage trans people or reduce their legal protections. For example, the British Transport Police amended its strip-searching policy to state that searches in custody would be conducted "*in accordance with the biological sex of the detainee*" [**CB/140**].[3]

31. On 17 April 2025, in an interview on BBC Radio 4's Today Programme, the Chair of the Commission, Baroness Kishwer Falkner, was asked about trans people's concerns about access to toilets following the judgment. She responded that: *"they should be using their powers of advocacy to ask for those third spaces, but I think the law is quite clear that if a service provider*

[3] "British Transport Police amends strip-searching policy after supreme court gender ruling", The Guardian, 17 April 2025, https://www.theguardian.com/uk-news/2025/apr/17/trans-women-uk-railways-strip-searched-male-officers

says we are offering a women's toilet, trans people should not be using that single-sex facility. The steer from the Supreme Court is quite clear in that regard".

32. On 22 April 2025, in an interview on BBC Radio 4's Today programme, the Minister stated that "*the ruling was clear that provisions and services should be accessed on the basis of biological sex*" and that the law about trans people's ability to access single-sex spaces would apply *"right across the board"* [**CB/143**].[4]

(f) The Commission's Guidance

33. In this context, nine days after the handing down of judgment in *For Women Scotland*, on 25 April 2025 the Commission published *"An interim update on the practical implications of the UK Supreme Court judgment"* ("the Guidance").

34. In relevant part, the Guidance reads:

> "Following the UK Supreme Court judgment in *For Women Scotland v The Scottish Ministers*, we are 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

[4] "Toilet use based on biological sex, says minister", BBC News, 22 April 2025, https://www.bbc.co.uk/news/articles/c5y42zzwylvo

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…"

35. Accordingly, the Guidance states that employers and service-providers should exclude trans women from women's toilets and trans men from men's toilets. Further, it states that it is compulsory for employers to provide toilets segregated in this way. This is a wholly legally erroneous position: it rests on an incorrect interpretation of the Workplace Regulations 1992;

and it stands in stark contradiction with the Supreme Court's statement that a *"biological sex"* interpretation would not disadvantage or remove important protection from trans people. As a result, the Guidance wrongly authorises and approves unlawful discrimination, breaches of human rights, and violations of the privacy rights of trans people which may attract criminal liability under the Gender Recognition Act 2004. These arguments form the basis of the Claimants' Ground 1.

36. The EHRC has since informed the Claimants in correspondence that the webpage on which the Guidance appears is live and subject to amendment [**CB/279]**. 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.

37. At the same time as publishing the Guidance, the Commission also announced its intention to update the Service-Provider Code of Practice, consistently with the legal position set out in the Guidance:

> **"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 the end of June for ministerial approval.
>
> 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. We will shortly undertake a public consultation 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 will be launched in mid-May and last for two weeks. We will be 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." (Emphasis added)

38. Accordingly, it is clear that while it is styled as an *"interim"* update, the Guidance represents the Commission's settled advice as to the implications of the judgment in *For Women Scotland* for trans people's use of toilets at work and when accessing services. The Commission states

that the Guidance was published *"to highlight the main consequences of the judgment"*, and the Notice emphasises that the Commission will not be considering views on the legal aspects of the updates to its statutory Service-Providers Code of Practice because "*the Supreme Court made the legal position clear*". Further, the Commission has not announced any updates to its statutory Code of Practice for Employers or indicated that it intends to produce any advice for employers on this issue other than the Guidance. Again, none of these aspects of the Guidance have been updated as of 15 June 2025, albeit the timing of the consultation has been amended (see further below).

39. The impact of the Guidance should not be underestimated. The Commission's guidance is relied upon by employers and service-providers across Great Britain to inform them about their duties. Every day since the Guidance was issued employers and service-providers have updated their policies, citing the Guidance. The employers of the Second, Third and Fourth Claimants have each changed their policies in response to the Guidance. High-profile changes of policy by employers and service-providers, including by the Scottish Parliamentary Corporate Body have been widely reported in the national media [**CB/146-154**].[5]

(g) Developments following the publication of the Guidance

40. On 14 May 2025, the Commission announced that it would be extending its consultation period on the updates to its Service Provider Code of Practice from two weeks to six weeks. It stated that *"the consultation will seek views on whether these updates clearly articulate the practical implications of the judgment and enable those who will use the Code to understand, and comply with, the Equality Act 2010. The Supreme Court made the legal position on the definition of sex clear, so we are not seeking views on those legal aspects"*.

41. On 16 May 2025, the Claimants served their letter before claim upon the Defendant and the Interested Parties [**CB/76-107**]. The Claimants requested a response from the Defendant and

[5] "Trans women banned from female toilets in Holyrood", BBC News, 9 May 2025, https://www.bbc.co.uk/news/articles/cpw78jv2gk5o; "Update on Facilities and Services at Holyrood"; Scottish Parliamentary Corporate Body, 8 May 2025, https://www.parliament.scot/about/news/news-listing/spcb-sets-out-its-interim-response-to-supreme-court-ruling; "Barclays to bar trans women from using its female bathrooms", The Guardian, 30 April 2025, https://www.theguardian.com/business/2025/apr/30/barclays-boss-confirms-bank-will-bar-trans-women-from-using-female-bathrooms

the Minister for Women and Equalities within an abridged period of 7 days in view of the urgency of the matter.

42. On 19 May 2025, the Commission replied requesting an extension of time for reply to allow an extraordinary five weeks to respond to the letter before claim [**CB/108**]. The Commission's letter stated that:

> "The EHRC is not in a position to respond within the shortened timeframe you have requested, nor the usual 14-day timeframe in this case. The LBA raises significant and complex issues under four separate and detailed grounds for review. These will need to be explored carefully and properly considered. Unfortunately, it will not be possible to do so within 14 days. You have also requested 'decision-making documents underlying this Interim Update, including any impact assessments, non-privileged legal analysis, human rights analysis and relevant correspondence with Commissioners.' This requires us to review a broad range of detailed and sensitive information, and it will take us time to do so."

43. On 20 May 2025, the Commission launched its consultation on the updates to the Service-Provider Code of Practice [**CB/155-159**]. The Consultation draft indicates that there will be no change to the substance of the legal advice given in the Guidance in relation to separate and single-sex service provision by service-providers (see para 13.3.19 [**CB/171**] and para 13.5.7 and [**CB/175**]).

44. On 21 May 2025, the Claimants responded to the Commission's request for an extension, to say that they were willing to extend the deadline for a response to the standard 14 days, after which they would issue a claim without further notice unless the Guidance was withdrawn and the consultation suspended pending the taking of proper legal advice [**CB/111**].

45. On 22 May 2025, the Minister wrote to the Claimants to state that the usual 14 days would be needed to reply to the pre-action letter [**CB/112**]. The Claimants agreed to this request.

46. On 30 May 2025, the Minister served a response to the letter before claim [**CB/114-115**]. The Minister stated:

> "The Minister considers that it is for the Commission, as an independent public body, to respond to any matters in relation to the exercise of its statutory functions or powers, including any questions related to the publication of the Interim Update; its interpretation of the Supreme Court's decision in the case *of For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 ("For Women Scotland"); and its

consultation on the draft Code of Practice on Services, Public Functions and Associations. Furthermore, we do not consider the Minister is properly identified as a defendant to the substantive grounds currently formulated in the letter. We consider the Minister might appropriately be an interested party, depending on the basis on which any claim is commenced.

In regard to the issues raised in your PAP Letter, for the reasons set out above, the Minister does not consider it necessary to address these as they relate to decision(s) of the EHRC. The Minister reserves her position in relation to the issues raised and reserves the right to respond to these issues at an appropriate time in due course…"

47. On 30 May 2025, the Commission stated that it would be able to respond in full with appropriate disclosure by 13 June 2025 (four weeks after the letter before claim was served) [**CB/116**]. The Commission granted itself twice as long as the two weeks indicated in the pre-action protocol to respond on the premise that it needed the time for disclosure. When the letter was in fact served on 13 June, the Commission declined to provide any disclosure. The Claimant notes that this conduct is likely to have involved a breach of the Commission's duty of candour. The inference the Court will be asked to draw is that the Commission's Guidance was not informed or properly informed by legal advice, particularly as to whether the Guidance is consistent with human rights law.

48. The Commission has not agreed to withdraw the Guidance pending this challenge, despite being unable to properly defend the advice it has given from a human rights perspective (see 3.17 of the pre-action response). Nor did it suspend or qualify the consultation exercise which (if this claim is well-founded) is operating on a flawed premise. As a result, employers and service-providers continue to act on the Guidance, and it continues to cause harm. In order to prevent further harm, the Claimants reluctantly reached the view that the Guidance had to be challenged as a matter of urgency, so that the Court can consider whether the Guidance is arguably unlawful as soon as possible.

49. The Commission sent its pre-action response on 13 June 2025. At this point, the Court had not yet issued the Claimants' claims. Therefore, this statement of facts and grounds has been amended to take the correspondence into account, without any need for the Claimants to seek permission to do so. That letter asked the Claimants to engage with the consultation as an alternative to proceeding with this claim (para 5.1), despite the clear statements in both the Guidance and the consultation that the statements of law subject to challenge in this claim are not within the scope of the consultation and despite the fact that neither the consultation nor

the Service Provider Code of Practice will address the position for employers at all. Beyond that, the letter either doubled down on those statements of law, or sought to place a gloss on the Guidance to argue that certain of the challenged sentences have a meaning other than their plain meaning (see further below).

The statutory scheme

(a) EqA 2010: general provisions

50. The EqA 2010's prohibition on discrimination includes direct and indirect discrimination: section 13 and section 19 EqA 2010, respectively. Harassment is defined under section 26 EqA 2010.

51. Both sex and gender reassignment are relevant protected characteristics for the purposes of direct discrimination, indirect discrimination and harassment. The protected characteristic of gender reassignment is defined at section 7:

> "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has 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."

(b) EqA 2010: duties upon employers

52. Employers are under a duty not to discriminate against employees in the way that they afford the employee "*access, or by not affording [them] access… for receiving any other… facility or service*", or "*by subjecting [them] to any other detriment*": section 39(2)(b) and (d) EqA 2010 respectively. Similarly, employers must not harass their employees: section 26 and section 40(1)(a) EqA (with harassment defined in section 26).

(c) Equality Act 2010: duties upon service-providers

53. A service-provider is defined at section 29(1) EqA 2010 as, "*A person… concerned with the provision of a service to the public or a section of the public (for payment or not)*".

54. A service-provider is prohibited from discriminating against a person *inter alia* "*as to the terms on which it provides the service" to them, or by "subjecting [them] to any other detriment*": section 29(2)(a) and (c) EqA. Further, a service-provider must not, in relation to the provision

of the service, harass a person requiring the service or a person to whom the service-provider provides the service: section 29(3) EqA.

55. Paras 26 and 28 of Schedule 3 to the EqA 2010 create exemptions that allow service-providers to provide separate sex services if they wish to do so, without facing discrimination claims. In order to qualify for these exemptions, the provision of separate sex services must meet the conditions in these paragraphs. In every case, these conditions include that the provision of the separate sex service, rather than a 'joint service', must be objectively justified, that is, it must be a proportionate means of achieving a legitimate aim. Two provisions are relevant in the context of toilet provision.

56. First, para 26 of Schedule 3 creates an exemption that protects service-providers from sex discrimination claims when providing a separate sex service:

> "**26 Separate services for the sexes**
>
> (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if
>
> (a) a joint service for persons of both sexes would be less effective, and
>
> (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if
>
> (a) a joint service for persons of both sexes would be less effective,
>
> (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and
>
> (c) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service."

57. Second, para 28 of Schedule 3 creates a similar exemption that protects service-providers from gender reassignment discrimination claims when providing a separate sex service:

> "**28 Gender reassignment**

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are

(a) the provision of separate services for persons of each sex;

(b) the provision of separate services differently for persons of each sex;

(c) the provision of a service only to persons of one sex."

58. These paragraphs are discussed by the Supreme Court in paras 211-221 of the judgment in *For Women Scotland*. The Court used them as part of their analysis as to why "*sex*" in the EqA 2010 means "*biological sex*". Toilets were not mentioned. The Court did not consider whether or when it would be objectively justified to provide toilets that excluded trans service users.

(d) Equality Act 2010: positive action

59. Part 11 of the EqA 2010 relates to the advancement of equality. Within that Part, section 158 provides that the Act does not prohibit a person (including either an employer or a service-provider) from taking positive action which is a proportionate means of achieving a legitimate aim. It provides in relevant part that:

"**158 Positive action: general**

(1) This section applies if a person (P) reasonably thinks that—

(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,

(b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or

(c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

(a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,

(b) meeting those needs, or

(c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

(3) Regulations may specify action, or descriptions of action, to which subsection (2) does not apply.

…

(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act."

(e) Workplace Regulations 1992: Requirements about separate toilets at work for women and men

60. 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..."

61. The Workplace Regulations 1992 were issued under section 15 of the Health and Safety at Work Act 1974 (**"HWSA 1974"**). They were intended to transpose the Workplace Directive 89/654/EEC (**"the Workplace Directive"**). Regulation 20 transposes Annex I, Division 18.3 and Annex II, Division 13.2.3 of the Workplace Directive, which provides that:

> "Provision must be made for separate lavatories or separate use of lavatories for men and women."

62. A breach of this Regulation by any person subject to its requirements is a criminal offence contrary to section 33(1)(c) of the HSWA 1974. Where the employer or person in control of a workplace is a body corporate, prosecutions may be brought against individuals pursuant to section 37(1) of the HSWA 1974. For offences contrary to section 33(1)(c) committed on or after 12 March 2015, the maximum sentence is two years' imprisonment and/or an unlimited fine (HSWA 1974, Schedule 3A).

(f) Gender Recognition Act 2004

63. Section 9(1) of the GRA 2004 provides that:

> "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)."

64. Section 9(3) provides that:

> "Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

65. In *For Women Scotland* at para 156, the Supreme Court explained that the test for whether another an enactment engages the exception in section 9(3) is that the exception will apply where the other enactment disapplies the rule in section 9(1) expressly, and also 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)."* The Court concluded accordingly that the EqA 2010 impliedly made provision disapplying the rule in section 9(1) (para 264).

66. Section 22 of the GRA 2004 creates a criminal offence enforcing the strict privacy requirements imposed upon persons who have in an official capacity (including as an employer, or in the course of the conduct of business) learned about the gender history of a trans person who has been issued with a GRC. Sections 22(1)– (3) provide that:

> "(1) It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person.
>
> (2) "Protected information" means information which relates to a person who has made an application under section 1(1) and which–
>
> > (a) concerns that application or any application by the person under section 4A, 4C, 4F, 5(2), 5A(2) or 6(1), or
> >
> > (b) if the application under section 1(1) is granted, otherwise concerns the person's gender before it becomes the acquired gender.
>
> (3) A person acquires protected information in an official capacity if the person acquires it–
>
> > (a) in connection with the person's functions as a member of the civil service, a constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation,

(b) as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or

(c) in the course of, or otherwise in connection with, the conduct of business or the supply of professional services."

67. Section 22(4) specifies exceptions to the offence created in section 22(1), including where the information does not enable that person to be identified, the person has agreed to the disclosure of the information, and the information is protected by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued.

(g) Human Rights Act 1998

68. Section 6(1) of the Human Rights Act 1998 (**"HRA 1998"**) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A public authority includes a court or tribunal (section 6(3)).

69. Section 3(1) of the Act provides that *"so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

70. If it is not possible to read legislation compatibly, section 4(1), (2) of the Act provide that if the Court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility.

71. In relation to subordinate legislation, under section 4(4) HRA 1998, the Court has the power to make a declaration of incompatibility where the subordinate legislation is made in the exercise of a power conferred by primary legislation and the primary legislation concerned prevents removal of the incompatibility. Where a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal of the incompatibility, the Court is bound by section 6(1) HRA 1998 to treat the provision as having no effect, as to give effect to it would be unlawful (per Leggatt LJ, *JT v First-tier Tribunal* [2018] EWCA Civ 1735 at para 122).

(h) Equality Act 2006

72. The Commission's statutory powers and duties are governed by the Equality Act 2006 (**"EqA 2006"**).

73. Section 3 of the Act places a general duty upon the Commission in the exercise of its functions. It provides that:

> **"3 General duty**
>
> The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which
>
> (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
>
> (b) there is respect for and protection of each individual's human rights,
>
> (c) there is respect for the dignity and worth of each individual,
>
> (d) each individual has an equal opportunity to participate in society, and
>
> (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights."

74. Section 8(1) of the Act provides that:

> "**8 Equality and diversity**
>
> (1) The Commission shall, by exercising the powers conferred by this Part
>
> (a) promote understanding of the importance of equality and diversity,
>
> (b) encourage good practice in relation to equality and diversity,
>
> (c) promote equality of opportunity,
>
> (d) promote awareness and understanding of rights under the Equality Act 2010,
>
> (e) enforce that Act,
>
> (f) work towards the elimination of unlawful discrimination, and
>
> (g) work towards the elimination of unlawful harassment."

75. Section 9 of the Act provides in relevant part that:

> "**9 Human rights**
>
> (1) The Commission shall, by exercising the powers conferred by this Part—
>
> (a) promote understanding of the importance of human rights,
>
> (b) encourage good practice in relation to human rights,

(c) promote awareness, understanding and protection of human rights, and

(d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c. 42) (compliance with Convention rights).

(2) In this Part "human rights" means—

(a) the Convention rights within the meaning given by section 1 of the Human Rights Act 1998, and (b) other human rights.

…

(4) In fulfilling a duty under section 8 the Commission shall take account of any relevant human rights."

76. The Commission's functions under Part 1 of the EqA 2006 include its power under section 13(1) of the EqA 2006 to publish or otherwise disseminate ideas or information and give advice and guidance in pursuance of its duties under sections 8 and 9. In its pre-action response, the Commission accepted that the Guidance was issued under its section 13 powers (para 2.12) including s.13(1)(d) which is its power to give advice.

Ground 1: the Guidance misstates the law

77. Guidance issued by a public body will be unlawful when it authorises or approves unlawful conduct by those to whom it is directed (*R (on the application of A) v Secretary of State for the Home Department)* [2021] UKSC 37, [2021] 1 WLR 3931 at para 36, citing *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Further, guidance will be unlawful where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position (ibid at para 46).

78. In its pre-action response (para 3.2) [**CB/284**], the Commission asserts that the advice it has given in the Guidance under its statutory powers to provide advice and information (in s.13 of the EA 2010) is not the kind of guidance to which these legal principles apply. The Commission does not go so far as to say that the Court cannot say so if the Guidance is purporting to direct people incorrectly as to the law. And in that regard, there is no substantive difference between the Guidance under challenge here and the guidance at issue in *Gillick* itself, or the kinds of guidance with which the Supreme Court was concerned to review in *R*

(on the application of A) v Secretary of State for the Home Department) [2021] UKSC 37, [2021] 1 WLR 3931.

79. Applying the principles outlined in *A*, the Commission has acted unlawfully in promulgating the Guidance, because the Guidance contains misstatements of law and omissions particularised below which:

    a. Authorise and approve unlawful action by those to whom the Guidance is directed;

    b. Breach the duties imposed on the Commission by sections 8 and 9 of the EqA 2006 to provide accurate advice about equality and human rights law;

    c. Present a misleading picture of the true legal position while also purporting to provide a full account of the "*main consequences*" of the judgment in *For Women Scotland*.

(a) The correct position in law regarding workplace toilets

80. The Guidance is wrong in law for the following reasons.

81. First, the statement in the Guidance that "*In workplaces, it is compulsory to provide sufficient single-sex toilets"* is incorrect on any reading of regulation 20 (indeed even one adopting the EqA 2010 definitions of men and women). Regulation 20(2)(c) provides that sanitary conveniences are not 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"* (emphasis added). Therefore, where each convenience is in a separate securable room, that meets the requirement of the regulations. There is no legal basis for the Commission's advice otherwise.

82. Second, the specific and contextual reading of the EqA 2010 in the *For Women Scotland* judgment does not address toilets or the Workplace Regulations 1992. The Commission's statement that one of "*the main consequences*" of the judgment is that it is compulsory to provide sufficient single-sex toilets is not stated in the judgment to be an express consequence of the interpretation advanced, let alone a "*main consequence*". The Supreme Court in the *For Women Scotland* judgment was careful to say its judgment was confined to the definition of "*woman*" and "*man*" in the EqA 2010. Neither the Workplace Regulations 1992, nor the HSWA 1974, nor the Workplace Directive define "*men*" or "*women*". By contrast, as noted in

the following paragraph, as a matter of EU law, terms such as "*man*" and "*woman*" are to be given a trans-inclusive meaning. There is no sound basis for the Commission's assumption that a definition of those terms as meaning "*biological sex*" in the EqA 2010 is to be read across to different language in other separate legislation. Regulation 20 on its face does not give any indication that "*men*" and "*women*" refer to sex assigned at birth and there is no obvious mandate that employers must exclude trans people from the sanitary conveniences that correspond to their lived gender. The absence of an express meaning of that kind is notable given that a breach of the regulation would entail criminal liability pursuant to section 33(1)(c) of the HSWA 1974, and so engages the rule of interpretation that the criminal law should be clear and give fair notice to an individual of the boundaries of what they may do without attracting criminal liability (see *R v Copeland* [2020] UKSC 8, para 28).

83. Third, EU law as a body of law includes the Equal Treatment Directive which seeks to protect trans people against discrimination on grounds of gender reassignment (*P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, [1996] ECR I-2143) and required Member States within the context of sex discrimination law to treat trans people not as a "third sex" but rather as men or as women in accordance with their reassigned gender (*Chief Constable of West Yorkshire Police v A* [2004] UKHL 21, [2005] 1 AC 51 at para 56). This forms the historical context in which the Workplace Regulations 1992 were enacted. In addition, the Workplace Regulations 1992 are assimilated law within the meaning of the European Union (Withdrawal) Act 2018 and accordingly have to be interpreted in accordance with the assimilated case law cited above pursuant to section 6(3) of the same Act. A reading of regulation 20 which mandates discrimination is not consonant with that body of law.

84. Fourth, in the absence of any statutory definition of "*men*" and "*women*", the GRA 2004, section 9(1) will ordinarily apply to people who have a full GRC. Contrary to the Commission's guidance in the Guidance, the meaning of "*men*" and "*women*" in the Workplace Regulations 1992 must encompass men and women with a GRC by virtue of section 9(1) GRA 2004:

    a. The Supreme Court in *For Women Scotland* did not consider toilets, still less the specialist statutory regime governing workplace toilets: the Workplace Regulations 1992, the HSWA 1974, and the Workplace Directive.

b. *For Women Scotland* concerned the operation of the EqA 2010, and whether a definition of "*sex*" as "*certificated sex*" (which would mean that sex of a trans person with a GRC was their acquired sex for the purposes of the EqA 2010) impeded the operation of discrimination law within the EqA 2010, such that that definition rendered the Act "incoherent or unworkable". Nothing follows from the ratio of *For Women Scotland* that would displace the normal operation of section 9(1) in respect of the Workplace Regulations 1992.

c. The Workplace Regulations 1992 are in a different position than the EqA 2010 vis à vis the GRA 2004. They are secondary legislation, which preceded the GRA 2004. This being the case, it would be surprising if Parliament had not intended section 9(1) GRA 2004 to apply to the definition of "*men*" and "*women*" under the Workplace Regulations 1992.

85. This conclusion becomes clear beyond doubt when one considers the human rights underpinnings of the GRA 2004. Its implications were not subject to analysis in the judgment in *For Women Scotland*:

a. The GRA 2004 was enacted in response to the Grand Chamber's adverse decision in *Goodwin* (and thereafter the declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger*). In *Goodwin* (at para 90), the ECtHR held that the UK had breached its obligations under Article 8 ECHR by relegating post-operative trans people to life in *"an intermediate zone as not quite one gender or another"*.

b. It was already established in the case law of the ECtHR that the *"very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of trans [persons] to personal development and to physical and moral security"* (*Van Kück v Germany* (2003) 37 EHRR 51 at para 18).

c. Since then, human rights jurisprudence has repeatedly confirmed that in order to respect a trans person's article 8 rights, it is necessary to respect their right to live fully as a man or a woman in their acquired sex. Lady Hale described this as *"their 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* op cit, para 29).

d. Access to the toilets of one's lived sex is a paradigm example of a matter essential to one's "*physical and moral security*" and living "*fully a man or fully a woman*". It is therefore difficult to think of legislation more inherently likely to fall within the scope of section 9(1) GRA 2004 than the Workplace Regulations 1992.

e. Further, there is a particular risk of breach of trans people's human rights that would arise from importing the definition "*biological sex*" into regulation 20 that did not arise from applying that definition in the EqA 2010. The GRA 2004's purpose was to avoid any such breach, and section 9(1) and regulation 20 must be construed accordingly:

    i. When the Supreme Court considered the position of single and separate sex services (but not toilets specifically) under EqA 2010, it considered Schedule 3 of the EqA 2010. Under Schedule 3 para 28, a service-provider (not an employer) has a defence to a claim for gender reassignment discrimination when providing single and separate sex facilities on the basis of "*biological sex*" if those services can be objectively justified (see further below). This specifically allows for the consideration of the effect on trans people, and may prevent a single or separate sex service separated by "*biological sex*" from being lawfully provided if the consequences of the exclusion of trans people are disproportionate. This creates a safety valve within the legislation, providing a safeguard for the rights of trans people.

    ii. Regulation 20 would (if the Guidance is correct) contain no equivalent safety valve. It contains a mandatory requirement for single-sex toilets at work, subject to no proportionality test or any other requirement to adequately meet the needs of trans people. In some workplaces, the employer may be able to provide practical workarounds (separate lockable rooms or additional unisex spaces), but the reality is that this will not be logistically feasible for large numbers of employers. In these circumstances, the Regulations would, on the Commission's interpretation, require these employers to provide two single sex spaces separated by "*biological sex*" (one male, one female) regardless of whether the employer would be able to also make practical provision for trans people. The result places trans people in an unworkable position: they

must either choose to enter a space where they may be challenged and harassed or put up with no access to an adequate toilet at work, thus effectively excluding them from the workplace. A trans woman might be forced to enter the men's toilets, dealing with fear and humiliation. A trans man might be forced to enter the women's toilets, dealing with the same emotions, and risking being barred entry by women who perceived that he should not be there. Regulation 20 would then have caused an obvious breach of the trans person's human rights with acute practical consequences.

iii. Further, such an interpretation would breach the privacy rights of trans people, expressly protected in the GRA 2004 and noted by the Supreme Court in *For Women Scotland* (see paras 78 and 256). Those rights are protected expressly by the GRA 2004. Under section 22 of the GRA 2004, it is a criminal offence for an employer to disclose protected information which it has acquired in its capacity as an employer to any other person unless an exception applies. Protected information includes any information about the gender history of trans employees who have obtained a GRC (GRA 2004 section 22(2)). That information is confidential. It is not understood how the Commission believes employers can adopt the kinds of policies encouraged in the Guidance without breaching confidence and/or committing a criminal offence contrary to section 22 of the GRA 2004. For trans persons who are not 'out' at work, having their gender history disclosed by their employer is likely to cause great distress and may put them at risk of harm. As noted by the Supreme Court in *R (C) v Secretary of State for Work and Pensions* at para 1:

> "… a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

f. When Parliament enacted the GRA 2004, it cannot have intended these consequences. It intended to protect the human rights of trans people who obtained a GRC by creating a mechanism which ensured their gender would be recognised for all purposes. It would be contrary to any sensible interpretation of section 9(1) if the Workplace Regulations were read so as to breach the human rights of trans people in this way.

86. Fifth, a "*biological sex*" interpretation of regulation 20 is directly contrary to the Court of Appeal's judgment in *Croft*. The Court of Appeal expressly considered regulation 20 (at para 34) and concluded that employers were permitted to allow trans employees to use single sex toilets which align with their gender identity.

87. Sixth, as *Croft* confirms, the correct position under the law is that any employer who adopts a blanket policy of excluding trans employees from using toilets which align with their gender identity is likely to engage in indirect gender reassignment discrimination contrary to sections 19 and 39 of the EqA 2010 (and possibly also direct gender reassignment discrimination contrary to sections 13 and 39 of the EqA 2010 in view of the Supreme Court's comments in *For Women Scotland* at para 134). Denying a trans person access to toilets at work that align with their gender identity would subject them to an obvious detriment within the meaning of section 39(2) of the EqA 2010. Such a policy would amount to a provision, criterion or practice which would put any trans employees at a particular disadvantage when compared with non-trans employees for the purposes of section 19(2)(c) of the EqA 2010. The employer would then be required to show that the policy was a proportionate means of meeting a legitimate aim in accordance with section 19(2)(d) of the EqA 2010. The Guidance incorrectly reads as if there is no such justification requirement upon employers.

88. Seventh, in addition, employers which are public authorities remain bound by their duty under section 6(1) HRA 1998 not to breach the rights of their trans employees under the Convention. Blanket exclusionary policies are likely to breach the rights of trans employees to respect for private life under Article 8. In addition, such policies may amount to discrimination contrary to Article 14 read with Article 8 by treating trans people differently without justification and/or failing without justification to treat trans women differently from cis women (i.e. women who are not trans) and trans men differently from cis men (*Thlimmenos* discrimination) despite their different position.

89. Eighth, as noted above, employers who seek to adopt blanket exclusionary policies also risk committing the criminal offence of disclosing protected information about a trans employee with a GRC in breach of section 22 of the GRA 2004. That is further indicative that Parliament cannot have intended these results (and that the legislation must be read so as not to produce such results).

90. If, contrary to the above, the Guidance presents an interpretation of the Workplace Regulations 1992 which is correct on ordinary principles of statutory construction, such an interpretation is incompatible with the rights under articles 8 and 14 (read with 8) of the ECHR of the Claimants, trans people and others. If a conventional reading of the Workplace Regulations 1992 is that set out in the Guidance, those regulations are incompatible with Article 14 read with article 8 in (a) treating trans people differently without justification and/or (b) failing without justification to treat trans women differently from cis women and trans men differently from cis men (*Thlimmenos* discrimination) despite their different position. Consequently under section 3 HRA 1998, the legislation must be read compatibly so far as possible to do so; otherwise pursuant to section 6 HRA 1998 the Workplace Regulations 1992 would fall to be disapplied (see below – Ground 3). In that case, the Guidance is still erroneous.

91. Accordingly, for the reasons above the Guidance encourages and approves unlawful conduct by employers. Indeed, it mandates it.

(b) The correct position in law regarding toilets open to the public

92. Toilets made available to the public by service-providers (who could be businesses, third-sector organisations or public bodies) are not governed by any equivalent specialist statutory regime. There is no equivalent obligation to provide single sex toilets that are open to the public.

93. A service-provider who provides toilets that are open to the public may wish to provide men's and women's toilets. Contrary to what is said in the Guidance, there is more than one way that a service provider could choose to do this.

94. A service-provider could choose to provide single sex toilets based on so-called "*biological sex*" that excluded trans people from using toilets which align with their gender identity. If it did so, then it would risk a claim for gender reassignment discrimination under para 28 of

Schedule 3 to the EqA 2010 if it could not show that the single sex toilets were a service that was a proportionate means of achieving a legitimate aim. It is highly unlikely that blanket exclusionary policy would be a proportionate means of achieving a legitimate aim. Further, a public authority providing toilets in this way could also face a claim for breach of a trans person's article 8 and article 14 rights under section 6 HRA 1998.

95. In the assessment of proportionality, a court or tribunal would need to consider the significant impact of such a policy on trans employees in the balancing exercise. The effects will often include (i) the effective outing of trans staff who are not 'out' to their colleagues, (ii) the stigmatising and humiliating suggestion that trans people offend the privacy and dignity of their colleagues merely by using single-sex toilets in line with their gender identity. Further, a relevant factor will often be the effect on disabled employers of there being an increased demand for the use of accessible toilets in the workplace which would now need to be used by trans employees with no genuine access needs.

96. Alternatively, a service provider could choose to offer inclusive provision, with for example, one set of toilets for both cis and trans women, and one set of toilets for both cis and trans men. Inclusive toilets can be lawfully provided on at least two different potential bases:

    a. Firstly, inclusive toilets could be provided under section 158 EqA 2010. A service provider may positively discriminate if it reasonably thinks that trans people have different needs or suffer a disadvantage connected to their protected characteristic. The provision of inclusive toilets would need to be a proportionate means of achieving a legitimate aim of providing adequate facilities that met the needs of trans people.

    b. Alternatively, the toilets' access policy could be set on a neutral basis, such as welcoming those who "lived as a woman". This would not exclude anybody on the basis of their "*biological sex*". It therefore could not be challenged as direct discrimination. If challenged as indirect discrimination, it could also be defended as a proportionate means of achieving a legitimate aim of providing adequate facilities that met the needs of all.

(c) Errors in the Guidance

97. Applying the above, it can be seen that the elements of the Guidance pertaining to the provision of toilets by employers and in services open to the public are an inaccurate and misleading statement of the law, and authorise and approve, and indeed have been read by a number of large employers and service-providers as directing, unlawful conduct by those to whom the Guidance is directed:

    a. As to workplaces, it is wrong to say – without clear caveat – that *"it is compulsory to provide sufficient single-sex toilets."*

    b. Further, as to workplaces, 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". The proper interpretation of the legislation is set out above.

    c. As to services that are open to the public, 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*". There are at least two lawful bases for providing trans inclusive toilets open to the public: this can be justified using section 158 EqA 2010 positive discrimination or as an objectively justified provision, criterion or practice. The Commission has wrongly informed service providers that they cannot lawfully provide trans-inclusive toilets, when they can.

    d. Having wrongly advised employers and service-providers that they must exclude trans people from their men's and women's toilets, no advice is then given as to the obligations under the EqA 2010 and the GRA 2004, nor as to the implications of the HRA 1998 on employers and service providers to ensure that trans people's rights are protected. The furthest that the Guidance goes is to say that "*trans people should not be put in a position where there are no facilities for them to use*" and "*where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*". This advice has no regard for the dignity or rights of trans people. The premise of this advice is that, in law, it does not matter where trans people go to the toilet as long as they can go somewhere. However, the Guidance prefers "*where possible*" for trans people to have to out themselves by

going to a separately marked unisex toilet, forcing them into a signposted, physical embodiment of what the ECtHR (in finding the UK legal position to be in violation of Article 8) called in *Goodwin* (at para 90) "*an intermediate zone as not quite one gender or another*".

e. Then, no warning is given as to the risk to employers or service-providers of subsequent gender reassignment discrimination claims or human rights claims brought by trans people. The Guidance fails to identify the obvious risks of EqA 2010 and HRA 1998 challenges if employers and service-providers were to follow this advice. In the case of both workplace toilets and toilets open to the public, the Guidance wrongly gives the impression that little or no legal risk arises from providing biological single sex toilets that exclude trans people, or from forcing trans people to use marked unisex toilets as the only alternative. In addition, it fails to highlight the real risk that organisations (including employers and certain service-providers) following its advice may commit criminal offences contrary to section 22 of the GRA 2004.

f. Finally, it is bizarre and worrying that the Guidance went out of its way to note that "*it could be indirect sex discrimination against women if the only provision is mixed-sex*." To the extent that this may be the case, it is *a fortiori* true that it could be gender reassignment discrimination against trans people if organisations adopt blanket policies which exclude trans people from using the toilets which align with their gender identity. The Guidance is silent on this point. This asymmetry in the Guidance is a striking betrayal of the Commission's duty to maintain neutrality on this most sensitive of issues and ensure that service providers were equally conscious of their obligations to avoid discrimination on the basis of <u>all</u> protected characteristics.

98. In its pre-action response, the Commission has denied each of these errors in the Guidance as follows:

a. The Commission concedes that there is no obligation to provide single sex toilets in the workplace if separate lockable rooms are provided. It points to the fact that the Guidance states elsewhere 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"* (para 3.7). Nothing in the Guidance

signals to the reader that this separate statement is as a caveat to the primary advice that, nonetheless, sufficient single sex toilets must be provided. Since the Commission accepts that this primary advice is wrong, it is unsustainable for the Commission to argue that the Guidance is lawful.

b. The Commission holds firm in its view 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"* in workplaces (paras 3.8-3.10) It insists that the definition of "men" and "women" in the Workplace Regulations must be "biological sex", on a direct application of *For Women Scotland*. This is wrong, for the reasons set out above.

c. The Commission seeks to place a gloss on its statement "*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*". It seeks to suggest that this only applies where service providers wish to provide a single sex facility within the meaning of schedule 3 EqA (para 3.12). However, there is nothing in the Guidance to signal to the reader that this advice should be read subject to this vital limitation. A natural reading of the Guidance is that, although service providers can opt to provide full mixed facilities, service providers can never provide services for women that are open to trans women, or for men that are open to trans men. This is wrong, for the reasons set out above. The Commission has not responded at all to the Claimants' explanation of two ways in which service providers could lawfully provide inclusive services for women and men separately, that are inclusive to trans people.

d. The Commission denies that there is any need to advise employers and service providers of their obligations to avoid gender reassignment discrimination under EqA 2010 or HRA (para 3.10, para 3.14). The risk of breaches of s.22 GRA is ignored altogether. The Commission says that EqA 2010 and HRA risks are fully mitigated as long as the employers and service providers also provide mixed sex facilities *"where possible"*, in addition to "biological" single sex facilities. Without explanation, the Commission denies any risk of trans people being forced to out

themselves by using mixed sex toilets when single sex services are available (para 3.17(a)). Further, the Commission completely ignores the position that trans people will be placed in, in the common scenario in which it is not possible for three sets of toilets to be offered. The Commission claims that the human rights analysis adds nothing, but fails to engage with the clear injunctions against placing trans people in an *"intermediate zone"*. All of this analysis is wrong for the reasons set out above.

e. On the same basis, the Commission wrongly denies that there is any need to advise employers and service providers of the risk of successful gender reassignment discrimination claims being brought against employers and service providers under EqA 2010 or HRA (para 3.10, para 3.14).

f. Finally, the Commission offers no excuse for why it went out of its way to note that "*it could be indirect sex discrimination against women if the only provision is mixed-sex*", while declining to warn of the risks of indirect discrimination claims by trans people if organisations adopt blanket policies which exclude trans people from using the toilets which align with their gender identity. That is because this statement was inexcusable.

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

99. For the reasons above, in publishing the Guidance, the Commission has acted in breach of its duties under section 3, 8 and 9 of the EqA 2006. The Guidance was published nine days after the handing down of judgment in *For Women Scotland*. The Guidance was rushed, poorly considered and inaccurate and has, in reality, undermined the human rights of trans people and the respect for their dignity and worth, and seems to have had no regard to the substantial impact that would be wrought on trans people's right to privacy and their ability to participate fully and equally at work and in wider public life.

100. In the circumstances, the Claimants aver that in drafting and publishing the Guidance, in breach of the requirement under section 3 of the EqA 2006, the Commission did not act with a view to encouraging and supporting the development of a society in which:

a. Trans people's ability to achieve their potential is not limited by prejudice or discrimination;
b. There is respect for and protection of each individual's human rights, including trans people;
c. There is respect for the dignity and worth of each individual, including trans people;
d. Each individual has an equal opportunity to participate in society, including trans people, and
e. There is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

101. Further, the Commission acted in breach of its duty under sections 8(1) and 9(1) of the EqA 2006, because of the same errors and omissions identified under Ground 1.

102. Finally, the Commission acted in breach of its duty under section 9(4) of the EqA 2006, by failing to take into account the human rights of trans people in the drafting of the Guidance. The absence of human rights considerations from the Guidance reveals either that the Commission undertook no human rights analysis of its draft Guidance, or that it undertook a deficient human rights analysis.

103. The Commission has declined to offer any proper defence to this ground or to disclose any documents or information relevant to it, despite having had four weeks to do so.

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

104. If, contrary to 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 or workplace toilets of their acquired 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*". In the words of the European Court of Human Rights in *Goodwin* at para 77 if the interpretation propounded in the Guidance is correct – a *"conflict between social reality and the law arises which places the trans [person] in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety"*. As the Supreme Court put it in *R(C) v Secretary of State for Work and Pensions* at para 28, the GRA 2004 *"…sought, so far as possible, to align the legal position with social and psychological reality."*

105. Further or alternatively, the Commission's reading of the law, if correct, implies a failure by the UK to fulfil positive obligations under article 8 ECHR: see *Hämäläinen v. Finland* (2014) 37 BHRC 55 at para 66 (GC).

106. If the Court reaches this point in its analysis, it would follow that regulation 20 of the Workplace Regulations 1992, and/or paras 26-28 of Schedule 3 to the EqA 2010 and/or section 9(1) GRA 2004 were incompatible with Article 8 read alone or together with Article 14.

107. Consequently, the Court is primarily then required by section 3 HRA 1998 to read those provisions not incompatibly as far as it is possible to do so.

108. If but only if, (a) the Commission's interpretation of the law is correct and (b) those provisions cannot be read compatibly, there is then an incompatibility as between the legislative framework and Convention rights. The Court has a number of remedial options which depend in part on whether the incompatibility lies in the primary legislation (the EqA 2010 or the GRA 2004), or the subordinate legislation (i.e. in regulation 20 of the Workplace Regulations 1992), or a combination thereof.

109. The position most likely adopted by the Defendant and apparently supported by the Minister, is that regulation 20 of the Workplace Regulations 1992 as being premised on "*men*" and "*women*" referring to so-called "*biological*" sex (but neither party explained their position in pre-action correspondence).

110. The court has discretion under section 8 HRA to grant such remedy as appropriate. The following options appear most obvious (dependent on the court's findings as to the nature of

the unlawfulness and the meaning of the regulation). First, the Court could quash the Guidance and give judgment explaining that for workplaces to follow regulation 20 would involve a breach of human rights. Secondly, if the Court finds that regulation 20 is not compatible with article 8 or 14 it could through its judgment, or formally, declare that the regulation should be disapplied pursuant to section 6 HRA 1998. Thirdly, if the court considered that regulation 20 was incompatible with article 8 or 14, and the criteria are met, it could make a declaration of incompatibility pursuant to section 4(4) HRA 1998. Fourth, if the incompatibility lies in primary legislation, the Court could make a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998.

111. The remedy which the Court grants may depend on the position taken by the Minister for Women and Equalities. The Claimants note that the Minister's comments on 22 April 2025 appeared to endorse the Commission's interpretation of the effects of the judgment in *For Women Scotland*. The Minister is also under a duty to uphold the UK's obligations under the European Convention on Human Rights, both by virtue of the duty under section 6(1) HRA 1998 and the overarching duty on Ministers to comply with the law, including international law and treaty obligations (per the Ministerial Code at para 1.6). If it is the case that the UK statutory framework places the UK in breach of those obligations it would be the Minister's responsibility to remedy that breach (and potentially pursuant to section 10 of the HRA 1998). The Minister is therefore asked specifically to clarify her position as to whether the statutory framework places the UK in breach of its obligations under the ECHR to respect the private life of trans people.

Remedy

112. The Claimants seek the following remedies:

a. A quashing order, quashing the erroneous elements of the Guidance;

b. A declaration that the Guidance is unlawful because it misstates the law and authorises and/or approves unlawful conduct;

c. A declaration that in preparing and publishing the Guidance, the Commission acted in breach of its statutory duties under sections 3, 8 and/or 9 of the EqA 2006;

d. In the alternative, a declaration pursuant to section 4(2) and/or 4(4) HRA 1998 that Regulation 20 of the Workplace Regulations 1992, and/or paras 26-28 of Schedule 3 EqA 2010 and/or section 9 GRA 2004 (or all three provisions read together), are incompatible with the proposed claimants and/or trans people's right to private life under Article 8 ECHR, read alone or together with Article 14; and/or that regulation 20 of the Workplace Regulations 1992 should be disapplied due to its incompatibility;

e. Such further and other relief as the Court sees fit;

f. Costs.

6 June 2025
(Updated prior to service on 17 June 2025)