

Date | 7 July 2025

Our ref | [REDACTED]

Your ref |

By First Class Post and By Hand

Equality Commission for Northern Ireland
Equality House
7-9 Shaftesbury Square
Belfast
BT2 7DP

CONFIDENTIAL, SUBJECT TO AN ANONYMITY APPLICATION

Our Client: [REDACTED]

**Proposed judicial review regarding advice provided by the Equality Commission for Northern Ireland to [REDACTED]
[REDACTED] employer, [REDACTED]**

Dear Colleague

We act on behalf of the Applicant, [REDACTED] in relation to the above proposed proceedings and write this Pre-Action Protocol letter in accordance with the Judicial Review Practice Direction No. 03/2018.

Please note, details contained within this Pre-Action Protocol Letter should remain confidential, pending an anonymity application.

1 To:

1.1 The Equality Commission for Northern Ireland (ECNI), Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP.

2 The Applicants:

2.1 [REDACTED]

2.2 Good Law Project Limited, 3 East Point, High Street, Seal, Sevenoaks, Kent, United Kingdom, TN15 0EG, as interested party.

3 Reference Details:

3.1 Applicant's Solicitor's Reference: [REDACTED]

3.2 Proposed Respondent's Reference: Unknown

4 The Details of the Matter being challenged:

- 4.1 This letter is intended to set out the factual and legal basis upon which our client intends to challenge the advice and guidance issued by ECNI to our client's employer regarding the use of toilet facilities by transgender persons who do not hold a Gender Recognition Certificate (**GRC**).
- 4.2 Our client seeks to resolve this matter without recourse to litigation if possible. However, in the absence of a satisfactory response, our client will have no alternative but to issue proceedings for judicial review in the High Court of Justice in Northern Ireland.

Background

- 4.3 [REDACTED]
[REDACTED]
[REDACTED]
- 4.4 Our client has been directly affected by the ECNI's advice given to her employer, as her employer has relied upon it to restrict her access to female toilet facilities, causing her distress, humiliation and detriment.
- 4.5 The ECNI's advice has been communicated to our client's employer verbally on 14 April 2025. Our client has sought clarification and reconsideration from the ECNI, but ECNI has maintained its position, via email correspondence to our client on 30 April 2025.
- 4.6 The impugned act is the advice and guidance to employers issued and/or maintained by the ECNI, including but not limited to, verbal advice and email correspondence to the effect that:
- (a) Transgender persons who do not possess a GRC must be excluded from using toilet facilities corresponding to their gender identity,
 - (b) Where an employer provides separate male and female toilet facilities, these must exclude trans women from the female toilets save unless they hold a GRC. Other trans women must be excluded from using facilities corresponding to their acquired gender, and
 - (c) The ECNI is reconsidering whether trans women holding a GRC should also be excluded from female toilet facilities in light of the recent United Kingdom (**UK**) Supreme Court case of *For Women Scotland Limited v The Scottish Ministers* [2025] UKSC 16 (**FWS Judgment**).
- 4.7 This advice is exemplified below from ECNI officers.
- 4.7.1 On 14 April 2025, ECNI provided [REDACTED] with incorrect advice that "a trans woman was not legally allowed to use a female toilet until a Gender Recognition Certificate was issued".
- 4.7.2 On 30 April 2025, [REDACTED], conveyed the following via email to [REDACTED] that ECNI's policy, even prior to the FWS Judgment was that:
- "An employer must provide toilets and facilities separately for the use of women and for which men, including a trans woman without gender recognition certificates (GRCs) must be excluded."*
- 4.8 It appears that the ECNI is relying upon Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 (the **Workplace Regulations**) to advise that employers must provide separate facilities for "men" and "women", save where a unisex facility is provided for use by a single person. Regulation 20(1) imposes a requirement upon employers that "[s]uitable and sufficient sanitary conveniences shall be provided at readily accessible places". Regulation 20(2)(c) provides that sanitary conveniences shall

not be suitable unless “*separate rooms containing conveniences are provided for men and women, except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside*”.

The Unlawful Act

- 4.9 The position adopted by the ECNI is incorrect and does not align with the applicable legislation. Northern Ireland legislation, prior to the FWS Judgment, does not impose a requirement for a GRC for a transgender woman to access and use separate facilities designated for women. The legal framework in Northern Ireland, consistent with both domestic and EU law, recognises the right of a transgender person to live in accordance with their gender identity. As such, a GRC is not a prerequisite for our client to access the toilet facilities in her workplace which correspond to her gender identity.
- 4.10 Additionally, the FWS Judgment, does not establish or determine the meaning of the terms “men” and “women” in the relevant legislation in Northern Ireland. This distinction between law in Great Britain and Northern Ireland has been appropriately acknowledged by the ECNI in your most recent publication “*The meanings of “sex”, “men”, “women” and “gender reassignment” in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities*”. In this publication, the ECNI expressly recognises the complexity of this area of law and confirms your intention to seek a declaratory ruling from the High Court of Northern Ireland to clarify the matter. On any view, the FWS Judgment does not purport to determine the meaning of “men” and “women” in the Workplace Regulations.
- 4.11 Therefore, it is extremely concerning that the ECNI, given the complexity and unsettled position in Northern Ireland, has provided such prejudicial advice to our client’s employer. Our client’s employer has relied upon this advice, to the detriment of our client.
- 4.12 In this context, it is important to emphasise that the Workplace Regulations give effect to the EU Workplace Health and Safety Directive (the **Directive**) and, as such, must be interpreted consistently with the requirements and principles of EU law. Any alternative interpretation that deviates from this position and the intention of the Directive, is incompatible with the UK and Northern Ireland’s obligations under retained EU legislation, including under Article 2 of the Windsor Framework.
- 4.13 EU legislation requires the recognition of an individual’s acquired gender, and such recognition is not contingent upon the individual having obtained a GRC. This recognition falls within the scope of the Article 7 of the EU Charter of Fundamental Rights (**CFR**) and Article 8 of the European Convention of Human Rights (**ECHR**) right to respect for private life.
- 4.14 The meaning of the term “women” within the scope of the Directive should be interpreted to include all individuals who identify as being of the female gender. This interpretation is necessary to protect the private life of transgender women, in particular when it comes to the provision and use of toilet facilities which falls squarely within the private sphere. Further, it is discriminatory on grounds of gender reassignment to require transgender women who have not acquired a GRC to use what are for them manifestly unsuitable (male) toilet facilities.
- 4.15 In Northern Ireland, transgender people are legally protected against discrimination in employment, goods facilities, services and premises by the Sex Discrimination (Northern Ireland) Order 1976 (as *amended*) (the **1976 Order**). This prohibits discrimination based on gender reassignment or against an individual because they are planning to undergo, are undergoing or have undergone gender reassignment.
- 4.16 Transgender staff must be treated with fairness and dignity and afforded the rights to which they are entitled under law, free from any form of harassment or inappropriate behaviour. Transgender staff should be free to

use the restrooms and facilities belonging to the gender with which they identify, and certainly from the point at which the individual begins to present permanently in the gender with which they identify.

- 4.17 ECNI has a duty to promote equality of opportunity between “*men and women generally*” and “*for persons who intend to undergo, are undergoing or have undergone gender reassignment*”. It is extremely concerning that, notwithstanding these responsibilities, ECNI has now advised [REDACTED] employers that she must be excluded from women’s toilet facilities on the basis that she does not have a GRC.

5 The Parties

5.1 [REDACTED]

- 5.2 Good Law Project Limited, 3 East Point, High Street, Seal, Sevenoaks, Kent, United Kingdom, TN15 0EG, as interested party. Good Law Project is a non-profit campaign organisation with a mission to achieve change through the law.

- 5.3 The Equality Commission for Northern Ireland, Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP, being an independent statutory body established with the primary function of promoting equality of opportunity and challenging discrimination in Northern Ireland.

6 Notice Party

- 6.1 In the event that this matter proceeds to judicial review, it may become apparent that the Executive Office for Northern Ireland, SD03 Stormont Castle, Stormont Estate, Belfast, BT4 3TT may be a Notice Party.

7 Decision under challenge

- 7.1 The decision under challenge pertains to the advice provided and maintained to our client’s employers, that transgender women who do not possess a GRC should be excluded from accessing toilets corresponding to the gender with which they identify. This is particularly oppressive for our client given that no separate, universal facilities could at the time be provided by our client’s employers, preventing her from returning to work.

8 Grounds of Challenge

- 8.1 The position adopted by the ECNI is legally incorrect and incompatible with Northern Ireland legislation and retained EU law as set out in detail at Section 4 above. If ECNI continue to maintain this position, our client will be left with no choice but to issue judicial review proceedings on the grounds of illegality.

9 The details of the action that the Respondent is expected to take

- 9.1 Given the clear legal inconsistencies, we respectfully request that the ECNI’s position is reviewed and withdrawn as a matter of urgency, pending clarification from the High Court of Northern Ireland. We trust that the ECNI will take the necessary steps to ensure compliance with domestic and EU legislation, and promptly provide a revised position to our client’s employers in accordance with the correct legal interpretation.

10 The details of the legal advisers dealing with this claim

[REDACTED]

11 The details of information sought

N/A

12 The details of any documents that are considered relevant and necessary

- 12.1 Confirmation of a revised position in accordance with correct legal interpretations, pending clarifications from the High Court.

13 The address for reply and service of court documents,

[REDACTED]

14 Proposed reply date

- 14.1 4pm on Thursday 10 July 2025. We look forward to hearing from you as a matter of urgency. In the event that we do not receive a response from you by 4pm on Thursday 10 July 2025, our client will have no choice but to issue judicial review proceedings to protect her position.

Yours sincerely

[REDACTED]

A&L Goodbody Northern Ireland LLP

Copy to:
The Executive Office
SD03 Stormont Castle
Stormont Estate
Belfast
BT4 3TT