IN THE HIGH COURT OF JUSTICE **Claim no: AC-2025-LON-001953**

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE KING ON THE APPLICATION OF
(1) GOOD LAW PROJECT LIMITED
(2) BOT
(3) BNW
(4) BBS

Claimants

-and-

EQUALITY AND HUMAN RIGHTS COMMISSION

Defendant

-and-

(1) HEALTH AND SAFETY EXECUTIVE

(2) SECRETARY OF STATE FOR WORK AND PENSIONS

(3) MINISTER FOR WOMEN AND EQUALITIES

(4) WELSH MINISTERS

(5) SCOTTISH MINISTERS

Interested Parties

SKELETON ARGUMENT OF THE MINISTER FOR WOMEN AND EQUALITIES

I. INTRODUCTION

1. This is the skeleton argument of the Third Interested Party, the Minister for Women and Equalities ("**the Minister**"). It addresses:

    a. The Minister's statutory functions and background facts.
    b. Relevant equality legislation.
    c. The *For Women Scotland* judgment and the impugned publication.
    d. Whether the claim is academic.
    e. Ground 1 – misstatement of law (service provision).
    f. Ground 1 – misstatement of law (work).

g. Grounds 2 and 3.

2. The Minister's interest in this claim is ensuring that, insofar as the Court addresses the meaning of the Equality Act (**"EA 2010"**), it does so with the benefit of full argument. The Minister does not advance a case as to how the claim should finally be determined. This document does not represent a statement of policy by the Government or a statement of the Minister's position in respect of the draft code of practice (explained below). Rather the Minister intends to adopt a role akin to that of Advocate to the Court in relation to issues of interpretation of the EA 2010.

II. THE MINISTER'S STATUTORY FUNCTIONS & BACKGROUND FACTS

General functions

3. The Minister has responsibility for (i) promoting equality of opportunity for everyone and reducing negative disparities; (ii) strategic oversight of the government's equality policy, for women, ethnicity, disability and LGBT+; (iii) overall sponsorship of the Equality & Human Rights Commission (**"the Defendant"**), as well as the Social Mobility Commission; and (iv) oversight of the overall legislative framework on equalities.

4. The Defendant is an independent body established by s.1 Equality Act 2006 (**"EA 2006"**). Among other statutory functions, the Minister provides the funding for the Defendant and appoints its members, known as the Commissioners (Schedule 1, paras 1 and 38 EA 2006). The Defendant has various reporting duties to the Minister, including for example to send the Minister its plans for its proposed activities (s.4 EA 2006).

The Defendant's powers to publish information and give guidance; and the impugned decision

5. The Defendant has a power to publish information or to give advice or guidance under s.13 EA 2006, in connection with its statutory duties under ss 8 (equalities) and 9 (human rights). The Minister does not have a specific function in relation to that power.

6. On 25 April 2025, the Defendant published on its website material relating to the implications of the Supreme Court's judgment in *For Women Scotland* [2025] UKSC

16 (***"FWS"***). The characterisation of this material is in dispute between the Claimants and the Defendant; the Claimants call it 'guidance', the Defendant calls it an 'interim update'. For the purposes of this claim, the Minister will call it the "**Publication**." The Publication was subsequently amended by the Defendant. It is addressed in more detail below.

7. The Minister did not receive advance sight or notice of the Publication.

Codes of practice

8. Under ss 14 and 15 EA 2006, the Defendant may issue a code of practice in connection with any matter addressed by the EA 2010 or it may revise any such code.

9. There are presently three such codes, and they relate to (a) employment, (b) equal pay, and (c) services, public functions and associations. The latter code of practice (at (c)) (the **"Code"**) was published in 2011. The codes are lengthy and detailed; for example, the Code is 238 pages long. Among other things, codes of practice are designed to ensure or facilitate compliance with the EA 2010 (s.14(2) EA 2006) including by acting as guidance; in addition, courts and tribunals are required to take it into account in any case in which it appears to be relevant (s.15(4) EA 2006).

10. Any proposed code or revision must be submitted by the Defendant as a draft to the Minister; upon receipt, the Minister may approve the draft, notify the Defendant and lay it before Parliament, or the Minister may give the Defendant written reasons why she does not approve the draft (s.14(7) EA 2006). If a draft code is laid before Parliament, it must be laid for at least 40 days. If in that time neither House passes a resolution disapproving the draft, the Defendant may issue the code in the draft form. Such an issued code may only come into force in accordance with provision made by the Minister by order (s.14(8) EA 2006).

11. The Defendant has recently been engaged in a process of revising the Code. The revisions concern a number of different matters which include, but are not limited to, the implications of the *FWS* judgment. The Defendant's most recent consultation exercise [ref] closed on 30 June 2025. On 4 September 2025, the Defendant submitted a draft revised code (the **"Draft Code"**) to the Minister (running to 316 pages) which

is under consideration by the Minister, who is currently consulting on it with the devolved administrations.

Withdrawal of the Publication

12. On 15 October 2025, the Defendant withdrew the Publication and called on the Minister to approve the Draft Code and to revoke the existing Code [ref]. The Defendant did not give reasons at the time for withdrawing the Publication.

III. RELEVANT EQUALITY LEGISLATION

13. Claims of alleged breaches of the EA 2010 typically require identification of the following elements: (a) the protected characteristic; (b) the prohibited conduct; (c) the relevant relationship and detrimental treatment; and (d) the application of any exceptions. The structure of the EA 2010 is described in *FWS* at [114ff].

Protected characteristics

14. The protected characteristics are listed in s.4 EA 2010. They include *"sex"* and *"gender reassignment"*.

15. The protected characteristic of sex is described in s.11, but is not expressly defined. The Supreme Court in *FWS* has held that sex under s.11 of the EA 2010 means biological sex. This is addressed further below.

16. The protected characteristic of gender reassignment is defined in s.7(1) EA 2010. It applies to a person who: *"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."*

17. Where a person is referred to as "trans" in this skeleton argument, that is a reference to a person with the protected characteristic of gender reassignment. A person can be trans regardless of whether or not they have a gender recognition certificate (addressed further below).

Prohibited conduct

18. The prohibited conduct provisions are in ss 13 to 27 EA 2010. They include discrimination, harassment and victimisation. The prohibited conduct most relevant to this claim is (a) direct discrimination and (b) indirect discrimination.

19. Section 13 EA 2010, concerning direct discrimination, provides as relevant:

> ***"Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

20. Section 19 EA 2010, concerning indirect discrimination, provides as relevant:

> ***"Indirect discrimination***
>
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

21. Section 19A EA 2010 concerns 'same disadvantage' indirect discrimination, which is of limited relevance to this claim.

Relevant relationship and detrimental treatment

22. The prohibited conduct only relates to certain duty-bearers and to certain detriments. The provisions relating to this are contained in Parts 3 to 7, specifically: services and public functions (Part 3), premises (Part 4), work (Part 5), education (Part 6), and associations (Part 7). Of most relevance to this claim are the provisions relating to services and public functions (Part 3) and work (Part 5).

23. Section 29 EA 2010 prohibits service providers and those who otherwise exercise a public function from, among other things, discriminating against (a) persons who require the service or (b) those to whom the service is provided. As relevant, it states:

> ***"Provision of services, etc.***
>
> *(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.*
>
> *(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—*
>
> *(a) as to the terms on which A provides the service to B;*
>
> *(b) by terminating the provision of the service to B;*
>
> *(c) by subjecting B to any other detriment.*
>
> *…*
>
> *(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."*

24. Section 39 EA prohibits employers from, among other things, discriminating against employees and applicants. As relevant, it states:

> *"… (2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment."

25. Sections 41 to 59 EA 2010 contain similar provisions relating to other types of work-related matters (e.g. duties of qualifications bodies).

26. The references in ss 29 and 39 to *"discrimination"* include references to direct discrimination (s.13) and indirect discrimination (ss 19 and 19A).

Exceptions

27. The provisions above are all subject to various exceptions in the EA 2010, many of which are contained within the schedules to the Act.

28. Some of the exceptions are absolute. For example, pursuant to s.28(1) EA 2010, marriage and civil partnership is not an applicable protected characteristic for the purposes of s.29 EA 2010.

29. Some of the exceptions are conditional. They typically require the duty-bearer to meet a justification test, i.e. to show that the treatment in question is a proportionate means of achieving a legitimate aim.

30. The conditional exceptions are more relevant to direct discrimination than to indirect discrimination. That is because direct discrimination is incapable of justification (unless the protected characteristic is age or unless the duty-bearer can rely on a relevant exception). In contrast, the test for indirect discrimination already includes within it a justification test, and so a duty-bearer is already provided the opportunity to justify its conduct by way of that test.

31. Schedule 3 to the EA 2010 sets out various exceptions that are specific to services and public functions.

32. Schedule 3, para 26 relates to services that are provided to the sexes differently or separately (**"DSSs"**). It provides:

> ***"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."*

33. Schedule 3, para 27 relates to single-sex services (**"SSSs"**). It provides:

> ***"27 Single-sex services***
>
> *(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—*
>
> *(a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and*
>
> *(b) the limited provision is a proportionate means of achieving a legitimate aim.*
>
> *(2) The condition is that only persons of that sex have need of the service.*

(3) The condition is that

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

(8) 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."

34. Where both DSSs and SSSs are referred to cumulatively in this skeleton argument, they are referred to as cumulative services or the **"CSSs"**. References to the **"CSS Exceptions"** are to both exceptions in Schedule 3, paras 26 and 27 EA 2010.

35. Schedule 3, para 28 EA 2010 provides an additional exception to gender reassignment discrimination in relation to CSSs.

36. Schedule 9 to the EA 2010 sets out various exceptions that are specific to the work provisions (e.g. s.39 EA 2010). There are no equivalent exceptions to the CSS Exceptions in Schedule 3.

Gender recognition

37. The Gender Recognition Act 2004 (**"GRA 2004"**) provides a means by which trans people can apply for a gender recognition certificate (**"GRC"**).

38. Among other things, a GRC has the effect described in s.9(1), subject as relevant to s.9(3):

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

IV. THE JUDGMENT IN *FWS* AND THE PUBLICATION

FWS judgment

39. The judgment in *FWS* was handed down on 16 April 2025. It directly concerned two matters. First, the meaning of *"sex"* in the EA 2010: the two competing meanings of sex were (a) *"biological sex"*, i.e. a person's biological sex regardless of their possession of a GRC; or (b) *"certificated sex"*, namely the sex recorded on a GRC or, in the absence of a GRC, biological sex (at [7]). Second, whether the Scottish Government's particular guidance was therefore unlawful in its reliance on a certificated sex interpretation.

40. The Court concluded that the meaning of sex in the EA 2010 was biological sex. It did so principally by reference to provisions related to maternity rights (at [177ff]). All those provisions are described in the EA 2010 as being for a *"woman"*. As only biological women can become pregnant, the Court concluded that this necessitated a biological definition of the word sex. It also reached this conclusion when having regard to the meaning of sex in what it called the "core provisions", namely the definitions of the protected characteristics of sex, gender reassignment, and sexual orientation (at [209]).

41. The Court also had regard to various other provisions of the EA 2010 relating to sex, including the CSS Exceptions, concluding that those provisions supported a biological sex interpretation (or did not undermine it) (at [210ff]).

The Publication

42. The Defendant published the Publication on 25 April 2025. As above, the Minister had no involvement in this decision.

43. Before its withdrawal, the Publication most recently provided as follows (the text in square brackets being language that was added after its original publication) [ref]:

> *"In workplaces and services that are open to the public [where separate single-sex facilities are lawfully provided]:*
>
> > • *trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex …"*
>
> (the **"impugned passage"**)

44. This is a statement of law which the Claimants impugn as incorrect. Their Ground 1 is that this alleged misstatement of law has rendered the Publication unlawful [ref SFG §36a].

V. WHETHER THE CLAIM IS ACADEMIC

45. The Defendant has asserted in correspondence that, in light of its recent withdrawal of the Publication, the claim has become academic. It has not to date made any application in reliance on this assertion. The assertion is contested by the Claimants.

46. The reasons for the withdrawal of the Publication are not entirely clear. In the Defendant's recent evidence dated 24 October 2025, there is a suggestion that one consideration was the *"continued utility"* of the Publication, although the outcome of that consideration is not clearly stated **[ref - JK2 §15]**. More particularly, the Defendant has said the reason for withdrawing the Publication was *"to encourage the Minister to urgently progress publication of the draft Code"* **[ref - JK2 §14]**. It is also said that the existence of the Publication was being used *"as a reason to delay approving the Code"* **[ref - JK2 §14]**; the meaning of this sentence (and in particular by whom any delay or reason for such was being asserted) is not clear**.**

47. The Defendant's intention in withdrawing the Publication insofar as it relates to workplace advice is unclear. The Draft Code does not address work-related issues and the Defendant has not yet made any public statement about the status of its advice in the Publication regarding workplaces.

48. Notwithstanding the withdrawal of the Publication, the Defendant maintains its accuracy **[ref - JK2 §23]**.

49. The Minister observes that if the Court proceeds to determine the core legal issue raised in this claim – whether the Publication accurately reflects the EA 2010 provisions relating to CSSs – this is likely to be material to, and of assistance in, the exercise of the Minister's functions in respect of the Defendant's Draft Code.

VI. GROUND 1 – MISSTATEMENT OF LAW (SERVICE PROVISION)

50. By Ground 1, the Claimants allege that the Publication (a) misstates the law; and (b) is therefore unlawful. The Minister makes no submissions on the latter issue.

51. As to alleged misstatements of law, the Claimants firstly allege that the impugned passage in the Publication misstates the law in relation to the workplace. This is addressed below.

52. The Claimants secondly allege that the impugned passage misstates the law in relation to service provision, in particular the provision of CSSs. The issue raised by the Claimants is whether a CSS provider is, in some cases, able to adopt an approach by which some or all trans people are admitted to a CSS in accordance with their gender identity (a **"trans-inclusive"** approach), or whether a CSS is prohibited from permitting this (a **"trans-exclusive"** approach). The impugned passage apparently adopts a trans-exclusive interpretation of the EA 2010, which the Defendant accepts [ref – EHRC DGs §88].

53. In this section, the Minister addresses (a) whether a CSS is likely to amount to direct sex discrimination absent reliance on the CSS Exceptions, and (b) if so, whether reliance can be placed on the CSS Exceptions if a CSS is trans-inclusive.

Direct discrimination: whether the treatment is "less favourable"

54. The premise of the trans-exclusive interpretation of the EA 2010 appears to be that, absent lawful reliance on the CSS Exceptions, a CSS will amount to direct sex discrimination of men and/or women. Neither party has addressed whether that premise is correct in their pleadings; it has been addressed briefly in the Claimants' skeleton argument [ref Cskel §58.1].[1]

55. The first question in law must logically be whether a CSS amounts to direct sex discrimination. If it does not, then there is no need to consider the CSS Exceptions.

56. Under s.13 EA 2010, treating people with different protected characteristics differently is not sufficient to establish direct discrimination. Those people must be treated less favourably. See *Smith v Safeway plc* [1996] ICR 868, CA at [876H]: *"[i]f discrimination is to be established, it is necessary to show not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other"*.

[1] Note that the Claimants' skeleton argument wrongly suggests that the Minister's position is that a trans-inclusive approach amounts to direct discrimination (§58.1).

57. This reflects a general principle. The EA 2010 does not impose duties of equal treatment in the abstract. In order for any of the forms of discrimination under the EA to be made out (with the exception of a reasonable adjustments claim), a person must have been subject to some form of negative treatment, whether by comparison with others or not.

58. For example, in *R (Dowsett) v Secretary of State for Justice* [2013] EWHC 687 (Admin), Silber J held that there was no direct sex discrimination under a prison policy whereby women prisoners could always object to a rub down search by an officer of the opposite sex, but male prisoners could only object to a rub down search by a female officer in more limited circumstances based on cultural or religious grounds. The Court held that less favourable treatment was not made out for two reasons (at [57]-[70]).

    a. First, there was a difference between less favourable treatment and merely different treatment (citing *Smith v Safeway*), and there was a good reason for the differential treatment on the facts of the case (at [57]-[64]).

    b. The second reason was that, although *"it should be applied with caution and it should not be used to undermine the basic principles of sex discrimination",* a principle of *de minimis non curat lex* applied (at [65]-[70]).

59. Whether a particular CSS gives rise to direct sex discrimination is likely to be a fact-sensitive question rather than something that can be stated in the abstract. Realistically, there must be some cases that <u>do</u> amount to direct discrimination; these may be disproportionately SSSs. In contrast, there must be some cases that do <u>not</u> amount to direct discrimination; these may be disproportionately DSSs.

60. If a CSS does not amount to direct discrimination, then there need be no consideration of the CSS Exceptions at all. Of course, the way in which a service is provided may amount to indirect discrimination on its facts, but that is provided for in s.19 EA 2010 and includes within it a justification test.

<u>Direct discrimination: whether the treatment is "because of" sex</u>

61. The Claimants have alleged that a trans-inclusive CSS would not contravene s.13 EA 2010 for a different reason. They say that a CSS could be provided by way of the service provider providing the service to (for example) those who *"lived [sic] as a woman"* [ref - SFGs §96(b)]. The Claimants apparently allege that such a rule would be *"neutral"* in that it would not exclude people on the basis of biological sex; would therefore not amount to treatment *"because of"* sex; would therefore not amount to direct sex discrimination; and would therefore not require consideration of the CSS Exceptions. They allege that such a rule (the requirement to live as a woman) would be considered exclusively under the indirect discrimination provisions instead on the basis that biological men would be disproportionately affected by it. It is not clear if this argument is maintained in the Claimants' skeleton argument.

62. Whilst 'living as a woman' is a rule that may not exclude all biological men, it must necessarily exclude some (indeed most) biological men. The rule expressly includes a protected characteristic, namely sex, within it. To that extent, it arguably does engage direct sex discrimination (subject to the separate 'less favourable treatment' issue above), rather than indirect sex discrimination. It is well established that, in order for direct discrimination to be made out, a protected characteristic does not need to be the only reason for the treatment in question; see *Nagarajan v London Regional Transport* [2000] 1 A.C. 501, HL at [512H].

CSS Exceptions

63. As set out above, if discrimination under s.29 EA 2010 is otherwise made out, then a CSS provider would need to rely on an exception, two of which are the CSS Exceptions in Schedule 3, paras 26 and 27 EA 2010. As set out above, these permit different/separate services (para 26) or single-sex services (para 27) under certain conditions.

64. It is clear that the CSS Exceptions require consideration of at least two tests:

    a. First, are any of the statutory gateway conditions met (the **"Conditions Test"**). These are set out in para 26(1)(a), 2(a) and 2(b), and para 27(2) to (7).

b. Second, is the limited provision a proportionate means of achieving a legitimate aim (the **"Justification Test"**): para 26(1)(b) and 2(c), and para 27(1)(a).

65. What is less clear is: (a) whether there is an additional test that the service in question is, for example in relation to the SSS Exception, a *"single-sex service"* a (**"Service Test"**); and (b) what that test would be. The Defendant's trans-exclusive interpretation apparently operates on the basis that there is such a Service Test and that the admission of any trans person to a CSS in accordance with their gender identity would result in that test being failed.

66. There are many entirely plausible exceptions a CSS provider might make to a sex-based rule. To avoid confusion in the use of the term exception, this skeleton argument uses the language of *"derogations"* in describing these exceptions to a sex-based rule. Not only are derogations plausible, but some will be well known and commonplace. Such derogations could include the following scenarios:

a. A swimming pool permits mothers to take their infant sons into the women's swimming pool changing rooms with them.

b. A theatre attendant permits a pregnant woman who faces a queue for the women's lavatory in the interval to use the men's lavatory.

c. A peripatetic female massage therapist who only provides massages to women makes an exception for a man with whom she has a pre-existing professional relationship.

67. These example derogations might all be considered to be obvious and commonsense factual scenarios that should not reasonably undermine the CSS provider's ability to rely on the CSS Exceptions generally. It would be very surprising if the fact of any derogation would immediately result in the CSS provider failing the Service Test. The *FWS* judgment is clear that the EA ought to be interpreted in such a way that makes it "*predictable, workable and capable of being consistently understood and applied"* (at [152]).

68. Even if a derogation were to result in immediate failure of the Service Test, this would raise an important temporal issue: for how long is this the case? If the CSS provider makes even a single derogation, is it prohibited thereafter from ever refusing the opposite sex from using its services? And has it opened itself up immediately to discrimination claims from people of the opposite sex who have been refused service in the past (subject to limitation issues)?

69. The Defendant appears to recognise this is an issue with the trans-exclusive interpretation of the CSS Exceptions. In its consultation process on the Draft Code, the draft text stated [ref §13.4.1 and 13.4.3]:

> *13.4.1 It will usually be helpful and often necessary for service providers (including a person providing a service in the exercise of public functions) to have a policy setting out whether, and if so how, separate or single-sex services will be provided. When developing a policy, the service provider should consider how the policy should apply in different circumstances to ensure appropriate consideration of all affected interests and provide transparency for service users.*
>
> *13.4.2 However, individual circumstances may, exceptionally, require a different approach to that set out in a policy. The law in this area is complex, and it is not certain that it is permissible to make exceptions to allow people of the opposite sex to use a separate or single-sex service. It is likely, however, that this will be permissible if doing so adds a necessary flexibility without undermining the aim of the service and or contributes towards achieving the aim.*
>
> *Example: 13.4.3 A council swimming pool has separate men's and women's changing rooms. One of the aims of having separate-sex changing rooms is to safeguard women's ability to access the facilities and use them safely. A woman is allowed to take her male child under the age of ten into the women's changing room. This does not undermine the aim, because it is unlikely that young boys pose a threat to women's safety. It also contributes towards achieving the aim,*

because fewer women would be able to use the swimming pool if they could not bring their children with them.

70. This analysis relates to the discharge of the Justification Test. It does not explain why there is a Service Test or the legal basis for allowing a derogation from the Service Test.

71. This all suggests that the CSS Exceptions ought not to have a binary or general Service Test. If so, the focus, when looking at the application of CSS Exceptions, would be on (a) whether a particular man or woman has been refused a particular service on the basis of their sex and, (b) if they have, whether the CSS provider can establish that the Conditions and Justification Tests are met. It would therefore be at the latter and not the former stage where the potential fact of a derogation may be relevant to the analysis: as explained further at §73 below.

72. As to how this interpretation sits with surrounding legal principles, the following bear consideration:

    a. The Supreme Court considered the CSS Exceptions at [211]-[218]. It is clear from that decision that the Court was considering the application of the Conditions Test, which ought to be analysed by reference to biological sex rather than certificated sex. The exact meaning of the CSS Exceptions, and the consideration of whether there is a Service Test and what it means, was not in issue before the Court.

    b. In *R (Authentic Equity Alliance) v Commission for Equality and Human Rights* [2021] EWHC 1623 (Admin) it was held to be unarguably correct that the exclusion of trans women <u>without</u> GRCs from women's CSSs required justification (with the Court thus considering that it was unarguably right that CSS providers <u>may</u> in some cases include trans women without a GRC). This was a permission decision (albeit fully argued) and one decided before *FWS*; nonetheless, the underlying point of principle has not changed post-*FWS* bearing in mind that trans women without GRCs were never treated as women for the purposes of the EA 2010.

c. The CSS Exceptions broadly align with, and formerly give effect to, the EU Sex Discrimination Directive, Council Directive 2004/11/EC (*"the Directive"*). Article 4(5) provides (emphasis added): *"This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*. Note also that the Directive does not provide for a separate gender reassignment protected characteristic; the CJEU has held that it is protected under the general protected characteristic of sex: *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, [1996] ECR I-2143. Whilst the Directive is of course not binding, the EA 2010 was enacted prior to the UK's departure from the EU and directives can remain relevant in interpreting domestic legislation post withdrawal: *E-Accounting Solutions Ltd v Global Infosys Ltd* [2023] EWHC 2038 (Ch) at [13]. It is well established that the EA 2010 was intended to give effect to the EU's equality directives: *British Airways v Rollett* [2025] ICR 242, EAT at [53].

73. Importantly, this interpretation of the CSS Exceptions would not render derogations redundant in the analysis. Plainly the fact of any or many derogations may be relevant to both the Conditions and Justifications tests. For example, as posited by the Defendant, derogations may be permitted where (a) they do not undermine the legitimate aim of the limited service; and/or (b) they contribute to it. Whether adopting a full, partial or occasionally trans-inclusive approach would meet that test would be a question of fact.

74. Further, this interpretation does not require a CSS provider to adopt a trans-inclusive approach in any given circumstance. It merely allows for it as a possibility in law, subject to the Conditions and Justifications Tests being met.

Positive action

75. Another exception provided for in the EA 2010 is positive action. The Claimants argue that the positive action provisions may also allow for a trans-inclusive approach. The Minister has only so far had sight of the Claimants' arguments on this and does not presently consider she can assist the Court further in relation to those arguments (although reserves the right to do so if appropriate at the hearing), other than to draw

the Court's attention to a leading authority on the operation of the positive action provision: *R (Z) v Hackney London Borough Council* [2020] UKSC 40.

Conclusion on service provision

76. The Minister's interest is in ensuring that the Court is furnished with all of the relevant legal arguments in relation to CSSs. The arguments set out above are two important ones that neither party has addressed in their own pleadings:

    a. First, it cannot necessarily be presumed in law that all CSSs need to rely on the CSS Exceptions to defend a claim of direct sex discrimination; that will depend on whether less favourable treatment is established.

    b. Second, it is not obvious that the CSS Exceptions entail the inclusion of a "Service Test" (by which no derogations can be made for the opposite biological sex); if a service provider does make derogations from a sex-based rule, that would arguably be better considered as part of the tests that are clearly included, namely the Conditions and Justification Tests.

VII. GROUND 1 – MISSTATEMENT OF LAW (WORK)

77. A significant portion of the parties' pleaded cases are concerned with the correct meaning of *"men and women"* in reg. 20 Workplace (Health, Safety and Welfare) Regulations 1992 (the **"Regulations"**) and the implication of the outcome on the work provisions of the EA 2010.

Relevance of the Regulations

78. The Regulations do not fall within the Minister's legislative remit. They are matters that fall within the remit of the Health and Safety Executive (**"HSE"**) for which the sponsoring minister is the Secretary of State for Work & Pensions.

79. In the Minister's view, the correct interpretation of the EA 2010 is not obviously answered by the meaning of reg. 20 of the Regulations. The Regulations are on their face concerned with the relevant physical facilities to be provided to staff as a matter

of health and safety; they do not purport to amount to an exhaustive test of who may use which facilities.

80. Nor is it apparent that the Regulations could apply to all the categories of work across the EA 2010. The work provisions of the EA 2010 (Part 5) apply not only to the relationship between employer and employee, but also, for example, to qualifications bodies and people to whom qualifications are conferred (s.53 EA 2010). The relationship between those groups is not one of employer and employee and is very unlikely to be affected by the Regulations.

81. In the circumstances, the Minister therefore does not propose to address the question of the meaning of sex in the Regulations. Moreover, this is not an issue which is relevant to the Minister's ongoing consideration of the Draft Code.

Application of the EA 2010

82. The work provisions of the EA 2010 do not have an equivalent to the CSS Exceptions. This would suggest that the different treatment of men and women at work is to be viewed through the lens of direct discrimination and whether the treatment of staff is *"less favourable"* (under s.13) and/or amounts to subjecting the staff to *"detriment"* (under s.39). The test for detriment has been described as whether *"a reasonable worker would or might take the view that he had thereby been disadvantaged"*: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL at [349F].

83. Arguably, if an employer were to adopt a trans-inclusive approach to facilities at work, that would not amount to direct sex discrimination for the reasons set out above as to the *"less favourable treatment"* test. That would not necessarily mean the arrangement is lawful, as there may be strong arguments that an entirely trans-inclusive approach would put women at a particular disadvantage, thus requiring justification in a claim of indirect discrimination under s.19 EA 2010. See an example in *FDJ v Secretary of State for Justice* [2021] 1 WLR 5265. Again, this is a matter likely to turn on its facts in a particular case.

84. If an employer were to adopt an entirely trans-exclusive approach, this would engage the points at issue in the case of *Croft v Royal Mail* [2003] ICR 1425, CA. This is a matter raised in the Claimants' skeleton argument and not yet addressed by the Defendant.

85. If an employer were to adopt a partially trans-inclusive approach (i.e. some trans people could not use facilities that align with their gender identity), whether that would amount to *"less favourable treatment"* of those trans people on the basis of their sex may well turn on the availability and/or quality of the alternative provision made available for the trans person.

VIII. GROUNDS 2 and 3

86. The Minister does not propose to address Ground 2. This relates to the Defendant's own statutory functions in relation to the production of the Publication. The Minister had no involvement in that.

87. Nor does the Minister propose to address Ground 3 on the present state of the arguments. The Claimants are wrong to suggest that the Minister does not seek to justify the alleged interference with Articles 8 or 14 ECHR **[ref Cskel §75]**. Ground 3 only arises if Ground 1 fails on the basis that the Publication accurately states the law. Until Ground 1 is determined, the Minister cannot sensibly address any alleged incompatibility with the European Convention on Human Rights.

[redacted]

[redacted]

[redacted]

3 November 2025