

By email

Equality and Human Rights Commission
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Secretary of State for Housing, Communities and
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YOUR REF:

OUR REF: RGA/00204825/11

DATED: 28 July 2026

URGENT LETTER BEFORE CLAIM

Dear Equality and Human Rights Commission and Secretary of State for Housing, Communities and Local Government,

Proposed Claim for Judicial Review – EHRC Code of Practice for Services, Public Functions and Associations

1. This letter is sent in accordance with the judicial review pre-action protocol.
2. If we do not receive a satisfactory response to this Letter Before Claim within 14 days (i.e. by 11 August 2026), we reserve the right to commence proceedings without further notice.

A. The Defendants

3. The proposed defendants are the Equality and Human Rights Commission and the Secretary of State for Housing, Communities and Local Government, who is the sponsoring Secretary of State for the Equalities portfolio.

B. The Claimants

4. We represent:

- [REDACTED]
- [REDACTED]
- [REDACTED]

Together, the Proposed Claimants.

5. Should it be necessary for proceedings to follow this letter, it is anticipated that [REDACTED]
[REDACTED]
[REDACTED]

C. The details of the matter being challenged

6. The Claimants challenge sections of the proposed updated Code of Practice for services, public functions and associations as amounting to unlawful misstatements of the law. In particular, the Claimants challenge the guidance in §§13.130–13.133 which discuss the possibility of including trans men in services for men and trans women in services for women, and provide as follows. We have underlined the particular passages that we propose to challenge:

“13.130 If a service provider (or a person providing a service in the exercise of public functions) admits trans people to a service intended for the opposite sex, then it can no longer rely on the exceptions set out at paragraphs 13.99 to 13.111. This means that if a service is provided only to women and trans women or only to men and trans men, it is not a separate-sex or single-sex service under the Equality Act 2010.

13.131 A service like this is very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it. A service which is provided to women and trans women could also be unlawful sex discrimination or lead to unlawful harassment against women who use the service. Similar considerations would apply to a service provided for men and trans men.

It is possible to offer a mixed-sex service alongside a single-sex service. A mixed-sex service must be open to all service users.

...

13.133 If a service provider (including a person providing a service in the exercise of public functions) decides only to provide a service on a mixed-sex basis, without any separate or single-sex option, this could be direct or indirect sex discrimination against women who use the service or lead to unlawful harassment against them. This is most likely in contexts like those referred to in paragraph 13.116.”

7. §13.144 provides similar guidance, and is challenged on the same basis:

“If a service provider (including a person providing a service in the exercise of public functions) decides to have a separate or single-sex service and allows trans people to use the service intended for the opposite sex, the service will no longer be a separate or single-sex service under the Equality Act 2010 (the Act). It is also very likely to amount to unlawful discrimination against others (read paragraph 13.131). It is possible to offer a mixed-sex service alongside a single-sex service. A mixed-sex service must be open to all service users.”

8. Together, these sentences are referred to below as “the **Challenged Guidance**”.
9. The Claimants consider that these sentences fundamentally misstate the law. The correct position in law is that when a service provider decides on what basis to provide

access to their services, all their choices are governed by fact-specific proportionality and reasonableness questions. In all scenarios, the Equality Act 2010 (“**EA 2010**”) requires service providers to balance the rights of those accessing services:

- a. It may be justifiable to provide a single-sex or separate-sex service on the basis of “biological sex” under Schedule 3 paras 26-28, but this will be subject to objective justification, taking into account the rights of others.
 - b. It may be justifiable to provide a service for men or for women based on the gender in accordance which a person lives. We refer to such services as a “trans-inclusive gendered services”. Such a service would not be based on “biological sex” and would fall outside the exemptions in Schedule 3 paras 26-28. To the extent that the admission rules of such a service created a particular disadvantage for a protected group, it would be subject to the test of objective justification under section 19(2)(d).
 - c. In each case, the conduct will be capable of justification and permissible if it can be shown to be a proportionate means of achieving a legitimate aim. There are no absolute rights in play, only qualified rights, which must be balanced under the law, with no priority given to any one group.
 - d. Different factual scenarios will yield different results. It is therefore incorrect to say that any mixed sex service “must be open to all”.
10. The Claimants accordingly will seek to challenge the Code, which is due to come into force on 5 August 2026, assuming it does indeed come into force on that date.

D. Details of any Interested Parties

11. We do not consider there to be any Interested Parties to the claim. If you disagree, please provide the names and addresses of the proposed Interested Parties by return, alongside your reasons for doing so.

E. The issue

i. The Commission’s power to issue the Code

12. The Commission has the power to issue codes of practice in connection with any matter addressed by the EA 2010 under section 14 of the Equality Act 2006 (“**EA 2006**”).
13. The Commission first issued a Code of Practice on Services, Public Functions and Associations in April 2011, shortly after the passage of the EA 2010. That Code was premised on an interpretation of EA 2010 to the effect that, if a service-provider provides single-sex or separate-sex services for women and men, they should treat trans people according to the gender in which they present, unless the service-provider can establish that the exclusion is a proportionate means of achieving a legitimate aim (former code, §§13.57). This was not dependent on the legal sex of the trans person i.e. whether or not they had obtained a Gender Recognition Certificate (“**GRC**”) under the Gender Recognition Act 2004 (“**GRA 2004**”).
14. This interpretation was defended by the Commission and upheld by Henshaw J in ***Authentic Equity Alliance v Equality and Human Rights Commission* [2021] EWHC 1623 (Admin)**. Henshaw J held, in particular, that the guidance accurately reflected the

obligations under the EA 2010 to avoid direct and indirect discrimination on grounds of gender reassignment, and was correct in applying the same test to trans people with or without a Gender Recognition Certificate (per paras 8 and 13–18).

Factual background: Updating the Code of Practice and the Interim Guidance

15. The Commission ran a consultation on an updated Code of Practice for services, public functions and associations between 2 October 2024 and 3 January 2025.
16. On 16 April 2025, judgment was handed down in ***For Women Scotland v Scottish Ministers* [2025] UKSC 16; [2026] AC 315**. In that case, the Supreme Court held that the EA 2010 impliedly rebutted the rule in section 9(1) of the GRA 2004 that when a GRC is issued a trans person's gender becomes for all purposes their acquired gender, and that accordingly, references in the EA 2010 to "sex", "man" and "woman" meant "biological sex", "biological man" and "biological woman" respectively.
17. On 25 April 2025, the Commission published interim guidance advising service providers *inter alia* that where single-sex facilities are provided, trans women should not be permitted to use the women's facilities and trans men 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 Interim Guidance itself was subject to a number of revisions, before being removed in its entirety from the Commission's website on 15 October 2025.
18. This guidance was subject to judicial review by the Good Law Project and three individual trans and intersex claimants in ***R (Good Law Project and others) v EHRC* [2026] EWHC 279; [2026] 4 WLR 36**. Swift J granted permission to the individual claimants, but dismissed their claim. However, in his judgment, he disagreed with the Commission's analysis of the underlying legal principles. The Commission had sought to justify its conclusion on the basis that the exclusion of trans people from facilities appropriate to their lived gender was necessary for service-providers to avoid claims of direct sex discrimination from other members of the opposite sex who were excluded. At §61, Swift J held:

"Whether different treatment is also less favourable treatment is, therefore, a qualitative question. In a case where the provision of separate lavatories labelled male and female was materially similar in terms of the extent of the provision, location, and so on, I consider there would, in principle, be scope for a strong argument that a rule or practice that permitted trans women to use the "female" lavatory but required other biological men to use the male lavatory would comprise different but not less favourable treatment on grounds of sex. However, the circumstances of the case would be decisive. (For the purposes of the EA 2010 the lavatory would be mixed-sex, but for the purposes of the Claimants' submission in this case it would still be labelled "women".)"
19. Swift J dismissed the claim on the basis that it was a point that "may turn on the facts of a situation".
20. The individual Claimants in that case, also represented by Leigh Day, have sought permission to appeal to the Court of Appeal and are awaiting a permission decision.
21. From 20 May to 30 June 2025 the Commission undertook a further consultation on its draft Code of Practice, this time on further revisions it proposed in response to the Supreme Court's judgment in ***For Women Scotland***.

22. On 4 September 2025 the Commission submitted a draft of the proposed Updated Code of Practice to the Minister for Equalities. This draft was not published and it is not known whether any amendments were made as a result of the consultation exercise. Nor is it known whether any further amendments were made as a result of Swift J's judgment in the **GLP** case, which was handed down on 13 February 2026.
23. On 21 May 2026, the Minister laid the proposed Updated Code of Practice before Parliament in accordance with section 14(7)(a) EA 2006. At this point, it became apparent that the revisions contained similarly flawed statements of legal principles to those contained in the Interim Update.
24. On 9 July 2026, the statutory 40-day period for Parliamentary consideration expired.
25. On 14 July 2026, the Commission issued the Code pursuant to section 14(8)(a) EA 2006.
26. On the same date, the Minister made the Equality Act 2010 (Code of Practice on Services, Public Functions and Associations) (Commencement) Order 2026 pursuant to section 14(8)(b) EA 2006.
27. The Order provided for a commencement date for the Code of 5 August 2026.

ii. Grounds of challenge

28. The Claimants seek to challenge the Code on two grounds. First, that the relevant passages are unlawful misstatements of the underlying law. In the alternative, that if the proposed statements reflect a correct interpretation of the EA 2010, then the statutory framework is not compatible with Articles 8 and 11 ECHR, read alone or with Article 14 ECHR, and in the alternative they seek a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998 ("**the HRA**").

Proposed ground 1: misstatements of law

29. The Commission's power to issue a statutory code of practice is contained within section 14 EA 2006. Section 14(2) provides that:

"A code of practice under subsection (1) shall contain provision designed–
(a) to ensure or facilitate compliance with the Equality Act 2010 or an enactment made under that Act or
(b) to promote equality of opportunity"
30. The power under section 14 is one of the Commission's functions under Part 1 of the EA 2006. In exercising the power, the Commission is bound by its duties under sections 8(1) and 9(1) EA 2006 inter alia to "encourage good practice in relation to equality and diversity", to "promote equality of opportunity", to "promote awareness and understanding of rights under the Equality Act 2010" and to "promote awareness, understanding and protection of human rights".
31. In the circumstances, the Commission is under a duty to provide accurate advice in its codes of practice. Accordingly, the Commission's codes of practice falls within category (ii) of the policies considered by the Supreme Court at §46 of **R (A) v SSHD [2021] UKSC 37; [2021] 1 WLR 3931**, and the Code will be unlawful if it contains a material misstatement of law or if there is a material omission: see **R (GLP and others)**

v EHRC at §21 (there in relation to the Commission's powers under section 13 EA 2006).

32. The Challenged Guidance contains the following misstatements of the law and/or material omissions.

Error 1: A trans-inclusive gendered service is “very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it” (§13.131 and §13.144)

33. §§13.130-131 of the Code, read together, provide that a service for women that includes trans women or a service for men that includes trans men: (i) falls out of the scope of the single-sex and separate-sex exceptions contained in Schedule 3 to EA 2010; and (ii) is “*very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it*”. The Code then sets out a categorical instruction that “*A mixed-sex service must be open to all service users.*”
34. This Challenged Guidance does not specify whether the Code is advising that trans-inclusive gendered services are “very likely” to amount to direct or indirect discrimination against those of the opposite sex who are excluded. The imperative conclusion that follows that “mixed sex services must be open to all” suggests that the EHRC considers that such services give rise to direct discrimination, as the conclusion admits of no exceptions, nor for the possibility of justification. It is noted that this aligns with the Commission’s position in the *R (GLP) v EHRC* case (at §57). In reality, for reasons set out below, on a proper analysis neither direct nor unlawful indirect discrimination against those excluded is “very likely”.
- a. *Exclusion from a trans-inclusive gendered service could never amount to direct sex discrimination, because the difference in treatment is because of gender, not because of sex*
35. A trans-inclusive gendered service is offered on the basis of a person’s gender identity. For example, a service could be provided to “those who live as women” or “those who live as men”.
36. A trans-inclusive gendered “women’s” service would admit both “biological” men and women, and exclude both “biological” men and women. People would be excluded on the basis of their gender. No one would be excluded by reason of their sex.
37. For treatment to be “because of” sex (for the purposes of direct discrimination under s.13 of the 2010 Act), it must fall within one of the two limbs in *R (Coll) v SSJ* [2017] 1 WLR 2093 at §28-30 per Lady Hale:
- a. Either the reason for the treatment must be the person’s sex;
- b. or there must be an exact correspondence between the disadvantaged class and the protected characteristic, such that the criterion is in reality a proxy for the protected characteristic.
38. A trans-inclusive gendered service falls within neither of these limbs. The reason for the treatment is not sex, but lived gender – a distinct concept from “biological sex”. Nor is there an exact correspondence between lived gender and “biological sex”.

39. Further, in such a case, applying section 23 EA 2010, the relevant comparator in a direct sex discrimination claim for e.g. a cis man who was excluded from a service provided to those who live as woman would be a trans man who was also excluded. The trans man would be of a different “biological sex” to the claimant, but there would otherwise be no material difference between them as both would be living as men. Under such a policy, both the claimant and the comparator would be excluded and there would be no less favourable treatment of the cis man.

40. It follows that a trans-inclusive gendered service will not, by virtue of its trans-inclusivity, be directly discriminatory against those of the opposite sex whom it excludes.

b. Further or in the alternative, exclusion would rarely amount to direct sex discrimination, because there would be no less favourable treatment

41. Further, in order for a person who is not permitted to use the service to establish that they have a direct sex discrimination claim, they must show that they have been subjected to less favourable treatment because of sex within the meaning of section 13 EA 2010.

42. In many cases, identical services will be offered to both women and men. By far and away the most common example of such a service provided across the country consists of toilet facilities, where the nature of the provision is usually broadly equivalent in nature.

43. As Swift J accepted in the **GLP** case, where two identical gendered services are offered, there would be no less favourable treatment in denying access to a man who wanted to access the women’s service but had access to an identical service appropriate to his gender, even if that denial was on grounds of sex (which it is not). The man would have access to just as good a service, and so would not have been subject to less favourable treatment.

c. Further or in the alternative, if direct sex discrimination could arise (which is denied), it would usually be capable of justification as positive action under section 158 EqA 2010

44. The Code omits to refer to the important point that service-providers may be able to rely on the positive action provision under section 158 EqA 2010 to include trans women in a women’s service or trans men in a men’s service. This is a material omission.

45. Section 158 provides in material part that:

“(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.”

46. Trans people plainly suffer disadvantages connected to the characteristic of gender reassignment and have needs that are different from the needs of people who are not trans: those include the need to live authentically and fully in their acquired gender. As Baroness Hale held in ***R (C) v Secretary of State for Work Pensions [2017] UKSC 72; [2017] 1 WLR 4127*** at §1:

“ ... it does not take much imagination to understand that this is a deeply personal and private matter; that 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 this 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.”

47. It is therefore wrong to suggest that any unlawful sex discrimination would be “very likely”, in light of the ability of service providers to rely on the applicable positive action provisions. In the alternative, failure to refer to these provisions in these paragraphs was a material omission.

d. Further or in the alternative, if direct sex discrimination could arise (which is denied), a service provider may be able to rely on paragraph 30 of Schedule 3.

48. The Challenged Guidance additionally omits to refer to the important point that service-providers may be able to rely on the exception in paragraph 30 of Schedule 3 EA 2010 to include trans women in a women's service or trans men in a men's service without discriminating unlawfully. This is a material omission.

49. Paragraph 30 provides that:

“If a service is generally provided only for persons who share a protected characteristic, a person (A) who normally provides the service for persons who share that characteristic does not contravene section 29(1) or (2) –

(a) by insisting on providing the service in the way A normally provides it, or

(b) if A reasonably thinks it is impracticable to provide the service to persons who do not share that characteristic, by refusing to provide the service.”

50. For an organisation like [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] this exception would enable them to operate in a trans-inclusive fashion.
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

51. For this further reason, it is wrong to suggest that any unlawful sex discrimination would be “very likely”, in light of the ability of service providers to rely on the paragraph 30 exception. In the alternative, failure to refer to this provision in the Challenged Guidance was a material omission.

52. The effect of the paragraph 30 exception in respect of services which are generally provided for women or men is acknowledged elsewhere in the Code, at §13.152. Yet, in this key section of the Code, the significance of para 30 exception is not only ignored, but contradicted by the Challenged Guidance. §13.152 and the Challenged Guidance cannot be reconciled, and the Challenged Guidance is wrong.

a. *Exclusion from a trans-inclusive gendered service is not “very likely” to amount to unlawful indirect sex discrimination either*

53. While direct sex discrimination claims will never arise, an indirect sex discrimination might arise, but such a claim would not be “very likely” to succeed.

54. There is an obvious correlation between lived gender and “biological sex”. People born as male are more likely to identify with the male gender and to live as men, and vice versa with those born as female; trans people are a small minority of the population. Depending on the circumstances, a man who was excluded from a trans-inclusive women’s service may be able to argue that the service’s admissions policy put men at a particular disadvantage when compared with women.

55. However, any such alleged indirect discrimination would be capable of justification pursuant to section 19(2)(d) EA 2010. There is no basis for any suggestion that this justification would be “very likely to fail”. A trans-inclusive gendered service could have any number of good reasons for operating as a service for the benefit of people who live as women. Many gendered services have been successfully provided on a trans-inclusive basis (in accordance with the Commission’s previous Code). Such services have long played an important positive role in our communities, helping to provide people with the particular services they need, with access rules that supported them. By contrast, on a given set of facts, there may well be no good reason why a man wants or needs to access a service for women. Indeed, it is (if anything) *prima facie* unlikely that a cisgender man would wish to access a service for women, or benefit from doing so.

Error 2: “If a service provider (including a person providing a service in the exercise of public functions) decides only to provide a service on a mixed-sex basis, without any separate or single-sex option, this could be direct... sex discrimination against women who use the service.” (§13.133).

56. This guidance is erroneous as a statement of the law.
57. A fully mixed service would have an access rule that was applied equally to all, regardless of their “biological sex”. Men and women using the service would be treated the same. For the reasons out above, it follows that such a service would not provide any basis for a direct discrimination claim.
58. Where a provision, criterion or practice (PCP) is applied both to those who share and who do not share a protected characteristic, and this is said to have a particular disadvantage on a protected group, this may in principle give rise instead to a claim of indirect discrimination, rather than direct discrimination. Whether an indirect discrimination claim was made out would turn on two highly fact dependent questions: whether claimant could demonstrate that the PCP placed women at a particular disadvantage; and whether the PCP was objectively justified.
59. Accordingly, this part of the Challenged Guidance is erroneous.

Error 3: “A mixed-sex service must be open to all service users” (§13.131 and §13.144)

60. This categorical and imperative statement in the Code misstates the law for the reasons set out above. It appears to rest on the flawed foundations of Errors 1 and 2 as follows:
- a. Error 1: Trans-inclusive gendered services are very likely to cause unlawful discrimination against people of the opposite sex who are excluded.
 - b. Error 2: Trans-inclusive gendered services could give rise to direct – and therefore unjustifiable – sex discrimination against women who use the service.
 - c. Therefore, Error 3: If a service is not a Schedule 3 biologically-segregated single-sex service, it is a mixed-sex service, and “must be open to all service users” in order to avoid the putative discrimination identified under Errors 1 and 2.
61. As set out above, the correct position in law is that when a service provider decides on what basis to provide access to their services, all their choices are governed by fact-specific proportionality and reasonableness tests. In all scenarios, the EA 2010 supports service providers to balance the rights of those accessing services carefully:
- a. It may be justifiable to provide a single-sex or separate-sex service on the basis of “biological sex” under Schedule 3 paras 26-28, but this will be subject to a requirement of objective justification, taking into account the rights of others.
 - b. It may be justifiable to provide a service for men or for women based on the gender in accordance with which a person lives. We refer to such services as a “trans-inclusive gendered services”. Such a service would not be based on “biological sex” and would fall outside the exemptions in Schedule 3 paras 26-28. To the extent that the admission rules of such a service created a particular disadvantage for a protected group, it would be subject to the test of objective justification under section 19(2)(d).

- c. In each case, the conduct will in principle be capable of justification and permissible if it can be shown to be a proportionate means of achieving a legitimate aim. There are no absolute rights in this context, only qualified rights, which must be balanced under the law, with no priority given to any one group.
- d. In the circumstances, it is a clear error to state categorically that any mixed-sex service “must be open to all”.

Relevance of human rights to these errors

- 62. The legal analysis set out above follows from an ordinary interpretation of the EA 2010.
- 63. However, if there was an any ambiguity in the law (which there is not), the interpretive duty under section 3 of the HRA would be engaged.
- 64. That is because the ability of trans people to access services in accordance with their gender identity engages their rights under Article 8, either read alone or with Article 14.
- 65. Strasbourg case law has established the right of trans people to personal development and to physical and moral security in the full sense enjoyed by others in society under Article 8 of the Convention:
 - a. In ***Goodwin v UK* (2002) 35 EHRR 18**, the ECtHR said at §90:

“ ... 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 ... 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 ... 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.”
 - b. Further, the Court emphasised the importance of recognising trans people’s change of gender:

“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.”
 - c. The treatment of trans people in service provision in the UK was also considered in the case of ***I v UK* (2003) 36 EHRR 53**. In that case, the

applicant's complaints included that, in the context of medical care, the hospital practice might require her to be admitted onto a male ward, the matter being at the hospital's discretion (at §44). The UK defended the case on the basis that, whilst there may be a breach of Article 8 where a trans person suffers practical and actual detriment and humiliation on a daily basis, the applicant did not in fact face any such disadvantages because she was "able to live a female social role, free from State interference". If she had to be hospitalised, it would be for hospital staff to determine where she should be accommodated. The Government noted that, on the basis of her appearance and identity, she would be likely to be placed on a female hospital ward (at §§47-48). Accordingly, the UK submitted a fair balance had been struck. As in **Goodwin**, the Grand Chamber rejected the UK's arguments. It again noted the "conflict between social reality and law" giving rise to "feelings of vulnerability, humiliation and anxiety" (at §58) and found the UK to be in breach of Article 8 (§§69-73).

- d. While **Goodwin** and **I** refer to trans people who had undergone gender reassignment surgery, 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 §§94–95 and **TH v The Czech Republic** (supra) at §48.
- e. Preventing trans people from using the services which align with their acquired gender therefore engages their Article 8 rights: it places them in an "intermediate zone", contrary to **Goodwin**, and threatens their ability to maintain privacy over their gender history.

66. These rights are protected by a framework of positive obligations:

- a. Article 8 may "impose on a state certain positive obligations to ensure effective respect for the rights protected by art 8": see **Hamalainen v Finland** (app no. 37359/09, 16 July 2014) at [62]. This is how the ECtHR has analysed complaints concerning gender identity: see, e.g. **Hamalainen** at [64]; **AP, Garçon and Nicot v France** (app no. 79885/12, 6 April 2017) at [99]-[100]; **X v Former Yugoslav Republic of Macedonia** (app no. 29683/16, 17 January 2019) at [63]-[65]. When considering such cases, a court must identify whether the importance of the interest at stake requires the imposition of the positive obligation sought. It undertakes a weighing-up exercise to identify a fair balance between the interests of the individual and the interests of the community as a whole: **Hamalainen** at [65].
- b. The margin of appreciation afforded to the State is "commensurately narrow" where fundamental rights such as sex/gender are at stake: **R (Steinfeld) v Secretary of State for International Development [2018] 3 WLR 415** a [28]-[29], [32], [38]; **YY v Turkey** (app no. 14793/09, 10 March 2015) at [101]-[102]; **AP, Garçon and Nicot** at [121]-[123]. Further, "since the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8, and the right to gender identity and personal development is a fundamental aspect of the right to respect for private life, the State has only a narrow margin of appreciation in that area": see **TH v Czech Republic** at [53].

67. A statutory anti-discrimination framework that permits services with only two binary options, an entirely mixed service open to all regardless of gender, or a trans-exclusionary service operated on a “biological sex” basis, is incompatible with Article 8 and/or Article 14:

- a. Whenever a Schedule 3 service is provided, that will interfere with the rights of trans service-users. When considering the human rights justification for this, the obvious candidate for a “less intrusive measure” will be a trans-inclusive gendered service. In many circumstances, this will be able to achieve all the desired aims of a single-sex service, while also meeting the needs of trans people. This was the position promoted by the Commission in the 2011 Code of Practice.
- b. The Code of Practice now prohibits this obviously less intrusive measure, and only permits two extremes: a fully-mixed service, or a service based strictly on “biological sex”. The Code thus effectively seeks to tie the hands of providers who wish to provide services on the basis of a “middle ground” of trans-inclusive gendered services (and who in many cases have done so successfully for years, in accordance with the Commission’s previous guidance). If the Commission’s analysis in the Code truly reflected the impact of the EA 2010, it would:
 - i. fail to strike a fair balance between the rights of trans people and the rights of the wider community;
 - ii. amount to a plain case of ***Thlimennos***-type discrimination (whereby individuals with manifestly different needs or attributes are treated identically with others who do not have those needs or attributes – see ***Thlimenos v Greece Application No 34369/97***), because of the failure to treat trans people differently from others of the same sex assigned at birth, despite their manifestly different needs and their different position in society arising from the challenges they face in living in accordance with their acquired gender; and
 - iii. further, in some circumstances, restrict the ability of organisations to provide services to men or women on a trans-inclusive so as to engage rights of freedom of association under Article 11, either read alone or with Article 14. The concept of an association under Convention law is autonomous: the classification of an organisation as an “association” under national law has only relative salience and constitutes no more than a starting-point (***Chassagnou and others v France (2000) 29 EHRR 615*** at §100). Freedom of association is concerned with the right to form or be affiliated with a group or organisation pursuing particular aims (***McFeeley v United Kingdom, no 8317/78, dec. 15.5.1980***, at §114). An interpretation of the EA 2010 which prohibited women’s organisations and feminist organisations from including trans women in their services notwithstanding, their wish to include and associate with trans women, would be incompatible with their Article 11 rights. Alternatively, legislation which permitted trans-exclusionary women’s groups to organise in accordance with their beliefs as to whom they wish to include, but which prevented trans-inclusive women’s groups from doing the same, would breach Article 11 read with Article 14.

68. Accordingly, the EA 2010 must be construed to permit services for men or for women to be provided on a trans-inclusive basis.
69. Further or in the alternative, if the Code correctly interprets the relevant provisions of the EA 2010 on conventional principles of interpretation, those provisions require reading down under section 3 HRA. The Code would then, again, misstate the effect of EA 2010, once the statute was “read down” pursuant to the HRA.

Proposed ground 2: If the Code is lawful, the law itself breaches the HRA 1998

70. For the reasons set out immediately above, if the Code gives a correct account of the law on conventional interpretive principles, then the EA 2010 itself is incompatible with Articles 8 and 14 and incapable of being read down.
71. The Claimants would accordingly ask the Court to make a declaration of incompatibility pursuant to section 4(2) of the HRA in respect of the relevant provisions of the EA 2010.

A. Action the Defendants are expected to take

72. The Commission is invited to clarify publicly that it is permissible under the EA 2010 for services for men and for women to include trans men and trans women respectively, and to direct the public to disregard the Challenged Guidance in the Code of Practice.
73. The Secretary of State is invited to: (a) confirm whether she agrees with the interpretation of the EA 2010 advanced by the Commission in the Code, or whether she agrees or takes a neutral position; and (b) confirm whether she has undertaken any assessment of the compatibility of the EA 2010 with Convention rights and to disclose the same.

B. ADR proposals

74. Given that the Code is shortly to come into force, the Claimants do not consider that ADR is appropriate, but would be open to any proposals which the Defendants may have.

C. Requests for documents and information

75. The Commission and the Secretary of State are invited to disclose any assessment of the compatibility of the Code or the EA 2010 with Convention rights. They are further requested to disclose the draft copy of the Code which was first sent to the Minister for Equalities in September 2025, and any revisions made to the Challenged Guidance before the draft Code was laid before Parliament.

D. Proposed reply date

76. Please reply as soon as possible and in any event within 14 days, i.e. by 11 August 2026.

E. Address for reply and service of court documents

77. Please reply to this letter and serve any court documents by email using the email addresses in the header to the letter.

Yours faithfully

A handwritten signature in black ink that reads "Leigh Day". The signature is written in a cursive, flowing style.

Leigh Day