



House of Commons

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CC: Rt Hon Bridget Phillipson, Secretary of State for Education and Minister for Women and Equalities; Liv Bailey MP, Minister for Equalities

10th June 2026

Dear Dr Stephenson,

Thank you for the continued constructive engagement of yourself and the EHRC team on the draft Code of Practice for services, public functions and associations.

We start from the position that the Supreme Court judgment made clear that for the purposes of the Equality Act “sex” refers to biological sex, and that unless the Equality Act is amended through a legislative process, this is the basis of the code within law. In addition, we acknowledge the need to provide a Code of Practice that provides certainty for duty-bearers, and importantly for individuals.

In your briefing session for parliamentarians last week, the EHRC made clear that there is scope to clarify and amend the code while it remains in draft form; this was also made clear by the Minister at the Despatch Box on Monday 1st June. We welcome this opportunity, given parliamentarians and others have seen the draft guidance only since its publication on 21st May, and due to the way in which the guidance has to be introduced via a negative procedure in the House of Commons.

On the basis of providing certainty, clarity, and fairness for everyone, and in particular for our Trans communities who are most actively affected by the judgement and by the Code, we are writing now to raise some areas of concern with the drafting of the guidance, and pose some questions with a request that these areas are reflected upon and amended before the Code becomes operational.

1. Asking about someone’s sex

13.179 – *“Where there remains a genuine concern about the accuracy of the response... it is unlikely to be proportionate or practical to ask for further evidence of a person’s sex.”* Providers should therefore *“weigh up the relevant factors to decide whether to exclude the individual from the service or association”*.



House of Commons

Staff at providers risk discrimination, harassment and/or breach of legal data protection requirements. Meanwhile, trans people are forced to out themselves in public settings and non-gender conforming people, including women, may be excluded from services.

Questions:

- a) How will staff within relevant organisations be trained to ‘weigh up’ factors? Who shoulders the risk in these circumstances? How is “genuine concern” measured or evidenced? How can providers be sure to avoid harassment claims given the potential of *‘violating an individual’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment’* [8.7]?
- b) Section [13.168] states that it may be legitimate to ask people to *‘provide confirmation’* of their sex, but [13.179] states that there is no document in the UK which provides ‘reliable evidence of sex’, therefore what does confirmation of sex practically mean? How should providers determine this?
- c) Further to the above, asking a question about sex that inherently reveals or allows an organisation to infer your medical history, health status, or medical treatment, this becomes special category data, over the ICO’s official position. Is the Code of Conduct’s position aligned to the ICO’s position, and to GDPR regulations?
- d) Furthermore, under Section 22 of the Gender Recognition Act 2004, information related to your status as a GRC holder is strictly defined as “protected information”, and nobody has a right to question your gender. Anyone questioning this or someone’s gender identity would violate the Equality Act 2010 on the basis of discrimination. How does the wording of the Code align with the Equality Act?

2. ‘Double exclusion’

13.147 – *“A legitimate aim for excluding a trans person from a separate or single-sex service for their own sex might be to prevent discomfort or distress for other service users. Service providers should consider whether other service users could reasonably object because they are worried about sharing... with someone who appears to be of the opposite sex.”* This should be done *“on a case-by-case basis”*.

Providers risk unlawful discrimination and some trans people have no facilities to use. This conflicts with the following section of the Code [13.148] which states that: *“In the case of services which are necessary for everybody, such as toilets, it is very unlikely to be proportionate to put a trans person in a position where there is no service that they are allowed to use.”*



House of Commons

Questions:

- a) For services that are not '*necessary for everybody*', but vital for those that do need them and have a higher likelihood of exclusion, such as domestic violence services [as in 13.150], what should excluded trans people do? How does the EHRC intend to measure the impact of exclusion on trans people's safety, i.e. through rates of violence?
- b) How should providers determine whether someone could '*reasonably object*'? What does this mean in practice? Does this ambiguity open up providers to legal risk of unlawful discrimination?

3. Associations vs services, and contradiction with Swift J in GLP v EHRC

In our briefing session we explored the differing approach of the Code to associations and services. We welcome the clarity the Code brings to associations – the explicit advice that associations can organise themselves as they wish based on more than one protected characteristic is helpful, so long as they are transparent about this. You explained that this is not the case for services.

13.130-1 – *"If a service provider admits trans people to a service intended for the opposite sex... this is very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it'.*

Swift J said: *"in a case where the provision of separate lavatories labelled male and female was materially similar... 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."*

Questions:

- a) Why does the Code departing from the ruling of Swift J in GLP v EHRC by stating that trans inclusion is 'very likely' to amount to direct discrimination against excluded cis men, where men's and women's services are provided in a materially similar way?
- b) What is the basis for the differentiation in the code between the ability to organise an association of people of two protected characteristics, but not a service?



House of Commons

- c) If a constituent wants to organise a coffee morning or a book club for women and trans-women, why is this not currently not allowed? The response in our meeting – that they should organise into an association, with a membership – does not offer a reasonable way around this issue.
- d) Would the above examples be lawful under “positive discrimination” measures, given both sex and gender transition are protected characteristics?

4. Safeguarding risks

The OEO additional impact assessment explicitly cites concern that *“excluding trans women from female services could mean they have to use male services, where they could face a disproportionate risk of violence and sexual assault”*.

Questions:

- a) Given the OEO has highlighted this significant risk, how does the EHRC justify the guidance? How will it measure the ongoing impact on rates of violence and sexual assault?

5. ‘Third-spaces’

The OEO additional impact assessment states both that a) a concern with the Code is that *‘providers may lack the funding or space to offer ‘third-space’ or gender-neutral alternatives’* and b) a mitigating factor for the negative impacts is *‘the ability of service providers to create ‘third-space’ provision for trans people’*.

Section [13.141] makes clear that offering alternative arrangements may not be *‘reasonably possible’*. Amongst the potential reasons for this are *‘the physical constraints of the building, or because of disproportionate financial costs’*.

Questions:

- a) How can the negative effects of the Code on trans people be mitigated by ‘third-spaces’ - that the Government recognises service-providers may not be able to provide?
- b) If services cannot provide alternative facilities, what can they do other than wait for litigation? Does the EHRC recognise the precarious nature of this situation for businesses; particularly considering the financial risk?



House of Commons

- c) The Equality Impact Assessment makes clear that there are concerns over the increased use of “third spaces” in this context, given the potential negative effect on people who rely on disabled facilities, and who currently already campaign for better access and availability. To what extent does the EHRC view this potential “tension” between people with one of two protected characteristics as acceptable?

We would welcome your comments and clarifications regarding these areas of concern, and particularly whether you will be amending the drafting of the code. Ensuring clarity for everyone is incredibly important for our constituents and for duty-bearers before this Code can be operationalised.

With best wishes,

Steve Race MP