BAGIS

Further information for members and their organisations following the Draft EHRC Code of Practice

In May 2026 the draft EHRC's Code of Practice for Services, Public Functions and Associations ("CoP") was published and laid before Parliament following the 2025 Supreme Court Ruling on the definition of "sex" in the Equality Act 2010. It was not debated in Parliament although over 157 MPs signed an Early Day Motion (EDM240) calling for its rejection. The 40-day parliamentary scrutiny period ended on 9 July and the CoP came into force on 5 August 2026. A legal challenge to the CoP is expected to be issued by TransLucent CIC.

BAGIS remain committed to supporting gender diverse people and acting as LGBTQIA+ allies.

We wish to provide early guidance to our members interpreting the CoP now that it has come into effect. This is because members will be considered to be "service providers" organisations for the purpose of the Equality Act when delivering healthcare services. Members may be asked to review or advise on local policies.

This note does not constitute legal advice which should be sought independently.

Frequently Asked Questions

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1. What did the Supreme Court ruling mean?

The decision in the case of *For Women Scotland v The Scottish Ministers* was handed down by the UK Supreme Court in April 2025. The Supreme Court ruled how the protected characteristic 'sex' should be interpreted for the purposes of the Equality Act 2010 (EA10). Specifically, whether a person with a full gender recognition certificate (GRC) which recognises her gender as female, a "woman" for the purposes of the EA10.

No legislation has changed. The ruling states that where the EA refers to the protected characteristic of 'sex', this is considered to be a person's sex registered at birth (defined as "biological" sex in the ruling) regardless of their gender identity or possession of a GRC.

At paragraph 2, the ruling states:

"It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy. The principal question which the court addresses on this appeal is the meaning of the words which Parliament has used in the EA 2010 in legislating to protect women and members of the trans community against discrimination."

The ruling did not make a legal judgment on the definition of a woman, or more widely on the definition of sex or gender, other than for the purposes of the EA10.

Trans and non-binary people who satisfy the definition of 'gender reassignment' under s.7 of the EA10 are still protected against unlawful discrimination on the basis of being trans. The definition under s.7 allows an individual to define their own gender identity: "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex." (s.7(1) EA10)

2. What does the Code of Practice do?

Even now the CoP has become effective, it is not "the law", it provides an interpretation of the EA10 for services, public functions and associations. Its purpose is to help these organisations to act in compliance with the EA10 which includes example scenarios of

what the EHRC considers to constitute/not constitute unlawful discrimination under the Act.

The Code can be used in evidence in legal proceedings brought under the Equality Act and courts and tribunals must consider the Code (if relevant) in such proceedings.

3. What does the Code of Practice say about single-sex services and facilities?

The CoP states that trans people are treated as the sex they were assigned at birth for the purposes of the interpretation of the EA10. It states that if trans people use a single-sex service in line with their affirmed gender, that service will "no longer be a separate or single-sex service" under the EA10. It also states that that a service which is provided to women and trans women could also be unlawful sex discrimination against the people "of the opposite sex who are not allowed to use it." (see para 13.131).

The CoP states that service providers do not have to provide single-sex services and need to conduct a "balancing act" of whether to provide single-sex in addition to mixed-sex services. This is laid out in section 13 of the CoP (Exceptions).

It states that: "It will usually be helpful 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 (para 13.134).

The CoP suggests organisations should weigh-up the needs of women (as defined in the EA10) for a single-sex facilities with the potential impact on the trans person and ability of the provider to provide alternative services (paras 13.137 – 13.148) when considering whether it is justified to have a single sex or separate sex service. The CoP provides particular examples of factors when considering if a single sex service for women might be justified, such as "if they are likely to be in a state of undress" and "whether the service is provided a result of, or connected with, male violence against women" (para 13.116)). That paragraph ends by saying: "Where factors like these are present, the benefits of offering a separate or single-sex service will be likely to outweigh other considerations in the balancing exercise."

Crucially, paragraph 13.148 states that for 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." Paragraph 13.149 then states that "If the service provider does not act proportionately, this is very likely to amount to direct or indirect discrimination because of gender reassignment."

The CoP identifies that flexibility is possible, as paragraph 13.135 states that "However, individual circumstances may, exceptionally, require a different approach to that set out in a [separate/single-sex] 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 [legitimate] aim."

The Supreme Court judgment did not mandate a service provider to provide a single-sex service, nor did it rule that a service provider could never offer an inclusive service or space to people who live as women (or men) or on another similar inclusive basis. If trans inclusive service providers wish to provide a service for a particular gender, they can do and they should be clear and transparent about that and what that means for those accessing it. A service provider should carefully consider why its approach is necessary and be ready to justify it. Whether the approach is lawful will come down to various factors, such as the nature of the service or facility in question.

Transgender people already suffer from inequities in healthcare and experience healthcare mistrust. Therefore, service providers may wish to consider whether positive action to include trans people in a service is lawful and proportionate in the particular circumstances. Any such assessment must take into account of the rights and interests of other protected groups, including where the EA10 permits single/separate-sex services. It's recommended that service providers document their decision-making processes and discussions when balancing the needs of different groups of service users. Service providers who wish to consider doing this should consult Section 10 "Positive Action" in detail and may wish to seek legal advice.

4. What does the Code of Practice say about toilets?

The CoP does not give specific guidance on toilets, though does reference the need for trans people to be able access them at paragraph 13.148 which states that for 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."

Paragraph 13.123 provides the following, specific toilet example: "A service provider operates a shopping centre and decides to renovate the centre. It initially intends to only provide separate-sex toilets to improve the safety and comfort of users. This disadvantages trans people because it means that a trans person cannot access a toilet catered towards their acquired gender. They also note that this option may cause safety risks and distress for trans users if required to use the toilets designated for those of the same biological sex. The service provider therefore decides to also provide toilets in individual lockable rooms with handbasins, which can be used by people of either sex."

Whether facilities are treated as single-sex, separate-sex or mixed-sex for the purposes of the EA10 depends on the nature of the service and how it is provided. A service provider may choose to permit trans people to use facilities corresponding to their gender identity, subject to the EA10 and any applicable statutory exceptions.

A service provider should consider whether its arrangements could place persons with the protected characteristic of gender reassignment at a particular disadvantage and whether any resulting treatment is justified under the EA10.

For organisations wishing to be inclusive, the following wording has been suggested (see White, 2025, below):

It is our policy that toilets remain a mixed-sex facility. Toilets marked female remain available for trans women and those marked male remain available for trans men.

*Anyone requiring or desiring additional privacy may use the accessible toilet (*located…) or the gender neutral toilet (*located…).*

*Anyone not clear on this policy or who perceives it causes them a difficulty, please refer to (*who).*

*(*Complete as relevant to the location)*

If there are no appropriate toilets or facilities for trans people this could be raised as unlawful under the Equality Act, as the CoP identifies it is unlikely to be proportionate. This could apply if they are excluded both from toilets corresponding to their gender as a result of the EA10, but also from those corresponding to the sex they were assigned at birth due to concerns by people of that sex.

Paragraph 13.140 suggests "it may be possible to offer toilets in individual lockable rooms to be used by both sexes" as a less intrusive measure to adapt services.

5. What does this mean for NHS inpatient facilities?

The CoP clearly states that sex discrimination or gender reassignment discrimination are not prohibited under the Act if they related to communal accommodation (para 13.154). If a service provider, wishes to exclude someone on the basis of sex, they must consider:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
- the relative frequency of demand or need for the accommodation by persons of each sex

Exclusion is only justifiable on the basis of someone's sex if it is a "proportionate means to achieving a legitimate aim".

Updated NHS guidance on Same-Sex Accommodation is currently under review and will be available imminently.

The NHS Constitution states a commitment that NHS patients will "not have to share sleeping accommodation with patients of the opposite sex, *except where appropriate*".

In considering where this might be appropriate, NHS organisations will need to take into account several factors including:

- Patient dignity and privacy
- Clinical needs
- Estates and room availability

6. Asking about sex

Paragraph 13.162 of the CoP states: "A request for information about sex should only be made where it is a proportionate means of achieving a legitimate aim. Furthermore, a request for information about sex which is not a proportionate means of achieving a legitimate aim could also amount to unlawful indirect gender reassignment discrimination."

Organisations can ask about a person's sex when they have a genuine and proportionate reason for needing the information, such as monitoring, operational needs or providing lawful single-sex services. However, they should only ask when

necessary, explain why the information is needed and do so in a private, respectful and sensitive manner.

7. Pragmatic Advice For Members

Under the Equality Act 2010, services do not have to be provided on a single-sex or separate-sex basis. Many services can lawfully be provided on a mixed-sex basis and may be inclusive of trans people. The most appropriate approach will depend on the nature of the service, the needs and rights of those using it, and whether any of the Equality Act exceptions apply.

In the context of Gender Identity Services, providers may consider that a mixed-sex approach is appropriate where it supports safe, respectful and accessible service delivery for all service users. Decisions should be based on the particular circumstances of the service and should take account of the rights and needs of all affected groups.

The NHS constitution includes a commitment to eliminating mixed-sex accommodation in hospitals. Hospital wards are therefore treated differently from many other settings and are subject to specific NHS requirements. Following the Supreme Court's ruling on the definition of sex in the EA10 and the CoP, further national guidance is expected imminently on the operation of hospital accommodation and should be read alongside the EA10 and CoP.

Any future national guidance may not address every operational scenario. Organisations may therefore need to develop local policies that reflect the legal framework while supporting the privacy, dignity and safety of all patients, including those who are trans.

Further guidance is also expected in relation to staff facilities. In workplace settings, organisations should consider not only equality law but also their obligations under health and safety legislation. The Workplace (Health, Safety and Welfare) Regulations 1992 require suitable and sufficient welfare facilities to be provided, including toilets and, where appropriate, changing facilities and showers. In some circumstances, individual lockable facilities may be provided for use by any employee.