Scottish Trans and Equality Network response to the EHRC's consultation on their Code of Practice for services, public functions and associations

You can find the Code consulted on here: https://www.equalityhumanrights.com/equality/equality-act-2010/codes-practice/code-practice-services-public-functions-and-associations

Purple text below shows text from the consultation explaining the updates and changes proposed and the questions asked.

Black text shows our response.

Updated legal definition of sex

We have updated the legal definition of sex throughout the code of practice. Our previous definition explained that: 'Legal sex is the sex that was recorded at your birth or the sex you have acquired by obtaining a Gender Recognition Certificate (GRC).'

Following the UK Supreme Court ruling in For Women Scotland, this definition is no longer accurate, because a GRC does not change your legal sex for the purposes of the Equality Act 2010. We have therefore updated this definition throughout the code to be:

'Legal sex is the sex that was recorded at your birth.'

To what extent do you agree or disagree with the following statement: The explanation of the updated legal definition of sex is clear – **strongly disagree**

Being clear on the scope of the ruling for the definition of sex

We agree that the definition provided for the meaning of 'sex' in the Equality Act 2010 is consistent with the Supreme Court ruling. However, the Code should be clearer about the limited scope of the Supreme Court ruling in regulating the meaning and use of the terms 'sex' 'man' and 'woman'.

We do not think that this section is clear enough that this definition only applies to the Equality Act 2010, and that a Gender Recognition Certificate (GRC) still changes a person's sex in all other UK legislation, for example in marriage and civil partnership law, unless there is an exception provided in the Gender Recognition Act 2004.

We also do not think that this section is clear enough that the Supreme Court ruling does not have any effect on the use of these terms in everyday language. The Code should be clear that due to the limited scope of the ruling, its use of these terms will differ from how many people use them in daily interactions. For example, people can still refer to trans women as women and trans men as men, use correct pronouns and respect people's identities, even in situations that are governed by the Equality Act 2010. There may indeed be times where not doing so would amount to unlawful gender reassignment discrimination or harassment or result in public bodies failing to uphold their human rights obligations and their additional requirements under the Public Sector Equality Duty.

The Commission's failure to uphold its duties

One result of the ruling is that it removes legal recognition of a person's gender identity from those trans men and trans women who hold GRCs.

This fundamentally undermines the purpose of the Gender Recognition Act 2004, and we believe the UK Parliament's clear intentions at the time of passing it that a trans person with a GRC would be recognised in their acquired gender for the purpose of sex discrimination.

While trans women, for example, may still be able to access remedy where they face sex discrimination, they will have to do so within a legal framework that says they are not women – but have only been 'perceived' as a woman or 'associated' with women. This is the very opposite of recognition. It also stands in direct contradiction to what the ECtHR found in Goodwin at paragraph 74:

'It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.'

As well as removing recognition before the law, the decision will additionally fundamentally undermine the aspects of the Goodwin decision that were about upholding trans people's privacy regarding their trans status. This is likely to occur at times where trans women and trans men with GRCs need to navigate areas of life regulated by the Equality Act 2010, and where their legal status is at odds with their gender identity.

One example of this is where equal pay cases may arise. A trans woman who is approached by a female colleague to join an equal pay case because she, alongside other women workers, is paid less than men in her place of work will likely have to disclose that she is unable to join the case because in law for the purposes of equal pay claims she is not considered a woman. The judgment has the effect of removing the trans woman's ability to be recognised as a woman for the purpose of making an equal pay claim, as well as potentially forcing her to disclose her trans status to others in her place of work. In this way, the decision has had the dual effect of reducing both the right to recognition in law and the right to privacy that the UK is obliged to meet as part of its membership of the European Convention on Human Rights.

The EHRC has statutory duties under the Equality Act 2006 to monitor the effectiveness of equality and human rights enactments in the UK. We fail to see how this ruling has not significantly diminished the effectiveness of the Gender Recognition Act 2004, and believe that the Commission will be failing to uphold its statutory duties if it does not highlight to the UK Government, as a matter of urgency, that the UK is now falling far short of its human rights obligations to provide meaningful legal gender recognition to trans people.

Wider impacts of the change to the meaning of "sex"

We are concerned that the change in definition to the meaning of "sex" in the Equality Act 2010 will have wider impacts on the protections provided to trans people under the Act. We discuss some of these in further detail in response to later questions. In summary, a key issue is the assumption that because protection from sex discrimination remains, as a result of the protection on the basis of "perception" or "same disadvantage", that trans people will retain the full range of protections from discrimination that they face.

In our view, many trans people will lack the confidence to take claims where they have experienced sex discrimination on the basis of their gender identity, due to concern that they are no longer afforded such protection. This will be exacerbated by the fact that in many of the parts of daily life that are regulated by the Act which people will have more direct experience and understanding of, they are now expected to be treated as their "biological sex" in almost all circumstances.

In addition, we think that many trans people will be discouraged from taking claims due to concerns that they will have to disclose their trans status as part of the legal process.

This will likely mean in practice that trans people have significantly less access to justice when experiencing discrimination.

Change 2.1: New content on Gender Recognition Certificates

This content explains that the Supreme Court in For Women Scotland has ruled that a Gender Recognition Certificate (GRC) does not change a person's legal sex for the purposes of the Equality Act 2010 (the Act). It also outlines what protections trans people have under the Act whether or not they have a GRC.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new content on Gender Recognition Certificates is clear – **strongly disagree**

Definitions used in this section

We agree that the information provided in this section about a GRC not changing a person's sex for the purposes of the Equality Act 2010 is consistent with the Supreme Court ruling.

It is unclear what definition of "biological sex" is being used in this section. Many things make up a person's "biological sex", such as chromosomes, sex characteristics (which can be changed) and hormones (which can be changed). The term "biological sex" is inherently unclear and should not be used in the code (we say more about this in response to the question on defining sex at birth).

We are unclear as to why the Code uses the term 'acquired gender', given that this is a legal term from the Gender Recognition Act that applies only to those that have a GRC.

This section is about how trans people are treated the same by the Equality Act 2010 (whether they have a GRC or not). For that reason, it is imperative that the CoP uses a more accurate and suitable term. We would suggest 'gender identity'.

Wider impacts on the effectiveness on gender reassignment protections and the Commission's statutory duties

The Code states that trans people will still have full protections under the gender reassignment protected characteristic. However, it is hard to see how this would remain the case in practice if all service providers and associations were to operate in the way described by the Code going forward.

Being a trans person is all about your gender identity not matching your sex recorded at birth. Trans people often face discrimination, inequality and harassment as a result of this. It is difficult to know what protection from gender reassignment discrimination and harassment will mean in practice if trans people are now supposed to be treated as their "biological sex" in almost all situations.

We think this is a further example of a result of the ruling that has significantly diminished equality protections for trans people, and one that the Commission has a statutory duty to highlight as part of its role in monitoring the effectiveness of equality and human rights enactments.

Change 2.2: New content on asking about sex at birth

This section gives information on how requests about sex at birth should be made. It outlines the circumstances in which making such requests, with or without evidential proof of birth sex, may be unlawful.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new content on asking about sex at birth is clear – **strongly disagree**

We think that this proposed content significantly undermines the Commission's statutory duties to encourage and support respect for and protection of each individual's human rights, that there is respect for the dignity and worth of each individual, and to promote understanding of the importance of equality and diversity.

The consultation acknowledges that asking about 'sex at birth' is likely to place service providers at risk of unlawful discrimination and harassment. In addition, it is likely to place those public bodies with duties under the Human Rights Act at risk of breaching people's human right to privacy. Yet the advice provided does nothing to mitigate these potential outcomes and would be entirely unworkable in practice.

We do not believe that it is possible to provide advice to service providers on how to ask about 'sex at birth' that would not result in the potential for unlawful discrimination or harassment, or breaches to people's human rights. This is a further clear example where a result of the ruling is the creation of an unworkable legislative framework and in our view the Commission should be highlighting this as a matter of urgency as part of its statutory duties.

Risk of unlawful discrimination and harassment

The draft Code states at 2.2.5 that: 'it is likely to be best to adopt the same approach with everyone, rather than only asking some people for information, because this approach is less likely to be discriminatory against any one group.'

Yet in the example at 2.2.7 it states: 'A trans woman goes to the office of a local support group and makes enquiries with the receptionist about the group counselling sessions they offer...The receptionist reasonably thinks that the trans woman is a biological male and, as there are some other people waiting in the

office, asks her to come into a side room to get more details about the support she is looking for.'

These sections appear wholly contradictory, and it is unclear whether the EHRC is suggesting that there are certain characteristics that would justify 'reasonable' profiling. A result may be people being subjected to this based on stereotyped perceptions about masculinity and femininity based on society's narrow expectations (e.g. with regard to hair length, build, facial hair).

We are deeply concerned about what impact this might have on those with other protected characteristics, as well as trans people – for example those who are gender non-conforming, those with health conditions such as PCOS, and women of colour. We think this approach would place organisations at significant risk of unlawful discrimination and harassment.

Section 2.2.8 states: 'If there is genuine concern about the accuracy of the response to a question about birth sex, then a birth certificate could be requested.'

No information is provided about what would reasonably constitute a 'genuine concern' and who or how such a decision could be made. This is likely to introduce additional risk around unlawful discrimination and harassment.

Section 2.2.8 further states: 'In the unlikely event that it is decided that further enquiries are needed, such as confirmation as to whether a person has a GRC, then any additional requests should be made in a proportionate way which is discreet and sensitive.'

We think service providers will be at particular risk of unlawful sex discrimination or harassment related to sex if this advice were followed. In particular, we think this is likely to occur where a person is not trans, but a service provider has decided (based on a subjective decision about a person's appearance) firstly that there was a "genuine concern" about their answer to a question about their birth sex, and secondly that "further enquiries are needed" after being provided with their birth certificate. In practice, what is the EHRC advising service providers do in this circumstance?

In addition, we do not believe that this is compatible with paragraph 202 of the Supreme Court ruling which states:

'Possessing a GRC is confidential to the person who has it and subject to stringent restrictions on disclosure [and] the duty-bearer cannot ask whether it has been obtained'

Risk of breaching human rights

While this section acknowledges that enquiries about a person's 'sex at birth' may result in 'unjustifiably interfering with their human rights under Article 8 of the European Convention on Human Rights' we do not think that the information provided mitigates this potential risk.

We think that attempting to regulate and check the 'sex at birth' of individuals by service providers and public bodies will inevitably lead to violations of trans people's, and others, article 8 rights.

Unworkable

The alternative approach to profiling individual people based on their appearance, which is the alternative the Commission states is the only way to confidently avoid direct or indirect discrimination, would be to check the 'sex at birth' of everyone. This is unworkable and unrealistic. It would require an untenable level of staff capacity and resource. It is unclear when the EHRC is recommending that such checks are undertaken and how this could be balanced with the needs of a person to access emergency or crisis services – such as hospital admissions.

Furthermore, the Code seeks to rely on birth certificates as evidence of 'sex at birth.' We are concerned that this would suggest that people should now be required to carry their birth certificates with them whenever they might need to use single- or separate-sex public services (including toilets). While the Code acknowledges that some trans people may have updated the sex recorded on their birth certificate with a GRC, there are further significant issues with this approach that are likely to impact far more people than those trans people with GRCs:

- A birth certificate is not proof of identity

- A birth certificate might not reflect the person's current name, for example if this has been changed through marriage or deed poll

- People born outside of the UK, including tourists and refugees, may struggle to provide a birth certificate

- Many people don't know where their birth certificate is.

Change 2.3: New content on defining sex at birth

This content defines 'sex', 'man' and 'woman', and explains how a GRC does not change a person's legal sex for the purposes of the Equality Act 2010.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new content on defining sex at birth is clear – **strongly disagree**

There is a complete lack of clarity around what the definition of "biological sex" that is being used is – both in the Supreme Court ruling itself and subsequently in the draft Code. Many things make up a person's biological sex, such as chromosomes, sex characteristics (which can be changed) and hormones (which can be changed). Sex characteristics, both primary and secondary, are vastly diverse. Sex is bimodal but not binary, and this is extensively evidenced across scientific literature.

The Code attempts to provide clarity to the definition by stating that biological sex should be understood to mean 'the sex of a person at birth'. Is this the 'sex' as observed? In which case does this refer only to the presentation of external genitalia, or does it refer only to what is written on a birth certificate at recording of birth? What is recorded at birth is the assigned sex based on perception and social understandings of genitalia as observed. It does not take in to account other primary sex characteristics (e.g. chromosomes, internal reproductive organs) or secondary sex characteristics (e.g. hormones). Without an accurate definition of "biological sex" or "sex at birth" this section is unhelpful, inaccurate, and unclear.

In addition, section 2.3.5 would seem to indicate that there is now significant uncertainty following the ruling on whether trans women who are able to breastfeed can access pregnancy and maternity protection if they experience discrimination because of this. We think that if they are unable to access these protections as a result of the ruling, that this is a further significant impact on

trans people's equality and protection from discrimination, that the Commission has a statutory duty to highlight.

Change 2.4: Updated description of the protected characteristic of sexual orientation

We updated our description of sexual orientation. Our description now specifies that a person who is attracted to people of the same sex is either a lesbian woman or a gay man. The full description is as follows.

Sexual orientation is a protected characteristic (s.12(1)). It means a person's sexual orientation towards:

- persons of the same sex (the person is a lesbian woman or a gay man)
- persons of the opposite sex (the person is heterosexual), or
- persons of either sex (the person is bisexual)

To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated description of the protected characteristic of sexual orientation is clear – **strongly disagree**

We do not agree that all of the changes included in this section of the draft Code are required as a result of the Supreme Court ruling.

Inappropriate changes that are beyond the scope of the Supreme Court ruling

We acknowledge that, following the Supreme Court judgment, the word 'sex' in the definition of sexual orientation in Equality Act s.12 needs to be interpreted as "biological sex". However, that means that the three legs of the definition do not correspond with the definitions of gay or lesbian, heterosexual and bisexual that are used by the large majority of people, or by other parts of the law.

So, the words in parentheses in the bullet points of 2.4.1 need to be removed – they are at least confusing, and for many people, offensive. The words 'lesbian', 'gay', 'bisexual' and 'heterosexual' appear nowhere in the Equality Act and it is not for the Code of Practice to seek to impose definitions of them.

For example, a cis woman who is in a relationship with a trans woman is most likely to consider that to be a lesbian relationship. Legally speaking, her relationship falls under the second leg of the definition, but it is not a "heterosexual" relationship, and the couple are unlikely to define as heterosexual.

Furthermore, in other areas of the law, for example marriage law, it is clear that the terms 'sex', 'man' and 'woman' have meanings that are modified by section 9(1) of the Gender Recognition Act – that was one of the key purposes of that Act. So, a marriage between a cis man and a trans woman with a gender recognition certificate, is, in terms of marriage law, a mixed-sex marriage. It may have been solemnised between 2005 and 2014, when only mixed-sex marriages could be solemnised. It would be absurd for the EHRC's code of practice to define that marriage as a gay male marriage.

Finally, paragraph 2.4.6 seems to go beyond clarifying the difference between two protected characteristics, and instead into a statement about the nature of the LGBTQIA+ community as inherently divided between those with the protected characteristic of sexual orientation and those with the protected characteristic of gender reassignment, which is highly inappropriate and inaccurate. It does not reflect the lived realities of many within the LGBTQIA+ community.

<u>Wider impacts of the ruling on sexual orientation discrimination protections, human rights and interaction with marriage and civil partnership law</u>

Homophobic discrimination against a gay or lesbian couple that includes a trans person would now only count as sexual orientation discrimination "by perception" against that couple. This suggests that the discrimination only took place because the perpetrator "mistook" them for a gay or lesbian couple, rather than recognising that gay and lesbian trans people and their partners can face the same discrimination as cis gay and lesbian people on account of their sexual orientation.

For example, if a gay couple where one of the partners was a cis man, and the other was a trans man with a GRC, were to experience discrimination when trying to stay in a bed and breakfast, they would now be required to take a sexual orientation discrimination claim that was on the basis of 'perception' rather than direct discrimination on grounds of their own sexual orientations.

This is a further example of an area where trans people's legal gender recognition has been significantly undermined as a result of the ruling, and indeed where there have been wider impacts for the recognition in law of all people's sexual orientation. We also expect that this will result in a chilling effect, on all people who are in gay or lesbian relationships that include a trans person, reporting discrimination under the Equality Act 2010, out of fear and concern that they will face differential treatment by a Court, or that the trans partner will have to disclose their trans status as part of the legal process.

Defining sexual orientation in such a restrictive way could be contrary to Article 8 of the European Convention on Human Rights (ECHR), breaching both cis and trans people's human rights. The European Court of Human Rights (ECtHR), through long established case law, has maintained that regulation of relationships falls within Article 8 of the ECHR. The concept of 'private life' within Article 8 is broad and encompasses aspects of an individual's physical and social identity (*Mikulić v. Croatia* 2002, paragraph 53) and that 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees' (*Pretty v UK* 2002, paragraph 61). This includes sexual orientation (*Dudgeon v. the United Kingdom* 1981) and gender identity (*B v France* 1992). Prohibiting gay and lesbian couples – where one partner (or both) is trans – from defining their relationships in line with their lived reality is an affront to their personal autonomy and respect to private and family life under the ECHR. This can only be justified if it meets the criteria in Article 8(2) ECHR, which we believe it does not.

Change 4.1: New example on sex discrimination by perception

This example explains how discrimination can occur based on a perceived protected characteristic, in the context of sex and gender reassignment.

To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination by perception are clear – **strongly disagree**

4.1.3 is a clear example of the way that trans people are often treated as their gender identity (even when this includes facing sex discrimination). If everyone in a person's life, including both people who know them well and total strangers, perceive them to be, and treat them as, their gender identity, then it can be neither proportionate nor justifiable for them to always be treated as their "biological sex". If a genuine result of the Supreme Court ruling is that trans people must always be treated as their "biological sex" in the huge range of situations regulated by the Equality Act 2010 then this is a clear failure of our equality legislative framework that does not reflect the reality of trans people's lives. We think that the Commission has a statutory duty to highlight this failure.

While this example makes it clear that trans people do have recourse to challenge direct sex discrimination that is in line with the sex they are perceived as, many trans people will not find it reassuring that they can only do so based on a technicality, that implies that the person discriminating against them has made a mistake, rather than in a way that recognises the nature of the sex discrimination they face being directly related to their gender identity. We think that this will discourage trans people from taking sex discrimination claims, particularly if there is a need to disclose their trans status a part of the legal process. This is likely to make trans people more vulnerable to sex discrimination than they were previously.

It may also complicate discrimination claims if for example a service provider subjects a trans woman to unlawful sex discrimination in line with her gender identity but then claims that they "knew that she was trans" so didn't really commit sex discrimination. It could also result in situations where a service provider has subjected both cis women and trans women to the same unlawful sex discrimination, relying on the trans woman (who is male in law) as the comparator to defend against the sex discrimination claim taken by the cis woman. Both scenarios could result in a wholly unacceptable outcome where clear instances of sex discrimination can be defended by a service provider.

Change 4.2: Removed reference to superseded caselaw

We removed content that explained that, for trans men holding a gender recognition certificate (GRC), the protection from pregnancy and maternity discrimination under the Equality Act 2010 (the Act) arose from case law. This case law set out that trans men were still protected irrespective of them having a GRC that stated that their legal sex was male. Following the For Women Scotland ruling, their legal sex is now female for the purposes of the Act, and they therefore have protection on that basis.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in Change 4.2 is clear – **strongly disagree**

We do not agree with this proposed change. We think that the Code should use inclusive, gender additive language that is clear that trans men and non-binary people are also protected from pregnancy and maternity discrimination.

It is not clear from the consultation exactly what the full content of the section on pregnancy and maternity will be once the Code is updated, as only two updated paragraphs are included. One of these paragraphs, 4.2.2, states 'When explaining these provisions, we use the same language as the Act, which refers to discrimination against women on the grounds of pregnancy and maternity. The pregnancy and maternity provisions in the Act apply on the basis of biological sex and so trans men are included in the protections against discrimination provided by these provisions.'

At a minimum, we think that this should be changed to say 'trans men and non-binary people'. Additionally, depending on the overall balance of language throughout this section in the final code, we have concerns that trans men and non-binary people will be more likely to face pregnancy and maternity discrimination and be less aware of their rights under the Equality Act. If the language in the Code refers almost exclusively to women, a service provider is unlikely to create a policy aimed at preventing pregnancy and maternity discrimination that accounts for the specific challenges that may be faced by, or needs of, pregnant trans men or non-binary people that would not be experienced by women.

We also have significant concerns around unlawful gender reassignment discrimination or harassment being more likely as a result of this update,

particularly in pregnancy healthcare settings. If the Code is not sufficiently clear by using inclusive, gender additive language then we think this increases the risk that service providers will not treat pregnant trans men and non-binary people in respectful and supportive ways. We think it is likely to increase instances of misgendering and lack of appropriate care. This may prevent trans men and non-binary people from accessing necessary pregnancy healthcare in the first place, presenting considerable risk to health and life.

Furthermore, we have real concerns around how the changes to the Code around single and separate-sex services may have even more significant impacts on pregnant trans men and non-binary people. Pregnancy services are likely to be designated as single-sex under the Act, and there is no clarity provided in later sections of the code about when it is proportionate to exclude a trans person from a single-sex service of their "biological sex". We have significant concerns that this could lead to trans men and non-binary people being excluded from pregnancy services, in a situation where there would be no alternative provision.

This is a further example of where an effect of the ruling is likely to be that fewer trans people take discrimination claims under the Equality Act. Suffering discrimination as a result of being pregnant is likely to give rise to emotional distress to anyone in any circumstances, but that will be compounded for trans men and non-binary people if they must suffer the additional stressor of being treated as women during the process of a discrimination claim. This is likely to trigger feelings of dysphoria and contribute to feelings of invalidation of their identity.

In addition, there is now significant uncertainty, following the Supreme Court ruling, on whether trans women who are able to breastfeed can access protection under section 13(6)(a) of the Equality Act if they experience discrimination because of this. We think that if they are unable to, as a result of the ruling, that this is a further significant negative impact on trans people's equality and protection from discrimination, that the Commission has a statutory duty to highlight.

Change 5.1: New example on sex discrimination - same disadvantage

This example explains how indirect sex discrimination can occur when people experience the same disadvantage, even if they do not share the same protected characteristic. The example is in the context of sex and gender reassignment.

To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination - same disadvantage is clear – **strongly disagree**

5.1.3 is an example of the ways in which trans women experience many of the same barriers and issues as cis women, including indirect discrimination and concerns around safety, and many trans women are perceived and treated as woman across all areas of their lives.

This is a further example of our view that, if a genuine result of the Supreme Court ruling is that trans people must always be treated as their "biological sex" in the huge range of situations regulated by the Equality Act 2010 then this is a clear failure of our equality legislative framework that does not reflect the reality of trans people's lives. We think that the Commission has a statutory duty to highlight this failure.

As we have highlighted in other sections, we think that requiring trans people to take a claim relating to indirect sex discrimination like the one provided in the example, on the basis of 'same disadvantage', will discourage trans people from taking such claims, particularly if there is a need to disclose their trans status as part of the legal process. This is likely to make trans people more vulnerable to sex discrimination than they were previously.

Change 8.1: Updated example on harassment related to sex

We produced a new example to explain how harassment can occur based on a perceived protected characteristic, in the context of sex and gender reassignment.

We have included additional information to provide context for this example. We are only looking for feedback on the example in paragraph 8.1.6b.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the updated example on harassment related to sex is clear – **strongly disagree**

As with change 4.1, it is helpful that example 8.1.6b makes it clear that trans women can still make claims for harassment related to sex in line with their gender identity. As with the example in 4.1.3, this example clearly shows that trans women can face the same kinds of harassment based on sex as cis women, and is yet a further example of the significant gap that has been left by the Supreme Court ruling between the reality of trans people's lives and experiences, and the interpretation of 'sex' for the purposes of the Equality Act 2010 as never including trans people in line with their gender identity.

As we have highlighted in other sections, we think that trans people may be significantly less likely to take a claim of harassment relating to sex like the one provided in the example if they have fears or concerns that they will need to disclose their trans status as part of the legal process. This is likely to make trans people more vulnerable to harassment relating to sex than they were previously.

Change 12.1: New example on women-only associations

The example in this section explains when applications to an association can be lawfully refused based on a protected characteristic, in the context of sex and gender reassignment.

We have included additional information to provide context for this example. We are only looking for feedback on the example in paragraph 12.1.3.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new example on women-only associations is clear – **strongly disagree**

We are unclear how this update to the regulation of associations will be compliant with human rights law, especially Article 11 ECHR, the right to freedom of assembly and association.

The changes outlined in section 12.1, particularly the example provided at 12.1.3, state that a single-sex association of 25 members or more should not include trans people in line with their gender identity. This implies that there is no longer a lawful way for an association to be limited to membership of cis and trans women only (but not cis men or trans men) or cis men and trans men only (but not cis women or trans women). We note that many organisations operate on that basis and continue to wish to do so.

This gives rise to an interference in Article 11 ECHR which exists for both trans people who wish to join an association in line with their gender identity and for cis people who wish to include trans people in their association in line with their gender identity. The latter is particularly true for groups for gay and bi men, and lesbian and bi women, the vast majority of whom are highly accepting, supportive and welcoming to trans people and wish to include them in a way that aligns with their gender identity. This is a reality for the majority of lesbian, gay or bisexual associations who wish to be inclusive of trans people. (https://yougov.co.uk/society/articles/45983-what-do-lesbian-gay-bisexual-and-transgender-brito)

Furthermore, it raises concerns around Article 8 ECHR and the rights of privacy of trans people, and increased risks of unlawful gender reassignment discrimination or harassment, if associations will be required to determine people's "biological sex" in order to admit or exclude them from an association. How should associations obtain this information in a way that upholds human rights, respects diversity and does not create offensive and humiliating situations for a wide range of people? We do not believe that this is possible and covered these issues in further detail in response to change 2.2 on asking about sex at birth.

Finally, this proposed change is likely to have a detrimental effect on the general public and society more broadly being able to welcome, support and include trans people in public life. Many associations are run on a single-sex basis, and

trans people are very unlikely to join associations for their "biological sex" as this will contradict with their deeply held gender identity. This will significantly reduce the opportunities that trans people have to associate with others and all of the resultant benefits from participating in such associations.

Change 13.1: Updated section on competitive sport

This section has been updated to explain the circumstances in which it may be lawful to exclude participation in competitive sporting events in relation to the protected characteristics of sex and gender reassignment. It also sets out considerations that should factor into policy decisions regarding the exclusion of trans people from competitive sporting events.

To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated section on competitive sport is clear – **strongly disagree**

This section is extremely unclear and does not provide practical guidance for organisations running sporting competitions. We do not think the changes reflect the Supreme Court ruling or are required by it.

We think that the Code does not provide adequate guidance on how people or providers who run sports competitions are expected to identify trans participants 'in a sensitive way which does not cause discrimination or harassment', and which does not breach people's Article 8 rights to privacy. We do not believe that it is possible to do so. We covered these issues in more detail in response to change 2.2 on asking about sex at birth.

The examples provided throughout this section focus on the exclusion of trans people from sporting competitions, but do not provide any examples of how they can be lawfully included in such competitions. This is an incomplete explanation of the law and may result in organisations running sporting competitions subjecting trans people to unlawful gender reassignment discrimination as the Code does not give them examples of when this would occur.

It is also unclear how this aligns with trans people's Article 15 ICESCR rights and the most recent Concluding Observations from the ICESCR Committee's 7th

periodic review of the UK. At paragraph 59, the Committee states that the UK must: *'Ensure non-discrimination in cultural participation and sports, particularly based on sexual orientation and gender identity, and guarantee that all individuals, including transgender persons, are supported in sports participation, in line with the principles of reasonableness, proportionality and equality'*.

Section 13.1.14 acknowledges that there is uncertainty on how the law applies in this area, and we are unaware of any case law relating to Section 195 of the Act. Yet sections 13.1.14 - 13.1.16 appear to be inaccurate descriptions of the law, that speculate on future potential interpretations and are not required changes based on the Supreme Court ruling. We think that their inclusion place organisations running sporting competitions at significant risk of committing unlawful gender reassignment discrimination.

13.1.14 states 'Section 195(1) provides organisers of separate sporting events for men and women with an exception for sex discrimination when providing separate men's and women's events.'

Yet Section 195 does not mention 'separate sporting events for men and women' at any point but instead refers to 'gender-affected activity'. There is no explanation provided in this section of the Code for why the Commission has chosen to use different language to the language used in the Act in section 13.1.14, particularly where it significantly changes the meaning of the test for when sex discrimination may or may not be permissible.

Similarly, there is no justification provided for why at section 13.1.15 it states 'Section 195(1) is likely to only apply where a person has decided to organise the gender-affected activity as a single-sex or separate-sex event.' and at 13.1.16 states 'Where an organiser chooses to offer a mixed-sex gender-affected activity, then this activity is not protected by the exception in section 195(1)'.

These two sections are contradictory (13.1.15 says 'likely to only apply' to separate sex events but 13.1.16 says 'not protected by the exception' when running mixed sex events) and neither is justified – either by the text of the Act at section 195, or as far as we are aware, in any case law.

Change 13.2: Updated section on separate and single-sex services for men and women

This section has been updated to provide guidance on how separate or single-sex services can be provided for men and women. It also sets out when providing these services is likely to be lawful.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the updated section on separate and single-sex services for men and women is clear – **strongly disagree**

Change 13.2 does not address the ways that, if service providers must now treat all people as their “biological sex”, they may need to reconsider if providing 'a joint service for women and men would be less effective', and if doing so is still a proportionate means of achieving a legitimate aim.

It seems that this will place service providers in an extremely difficult situation where they may wish to continue to provide services in a trans inclusive way because they judge that not doing so would be unjustified indirect gender reassignment discrimination, but also may wish to continue to exclude cis men or women from their service because they judge that not doing so would be unjustified indirect sex discrimination. No practical guidance is provided on how these decisions can be taken in a way that genuinely preserves the dignity and privacy of all service users, meets everyone’s needs, and avoids indirect sex or gender reassignment discrimination. We do not believe that it is possible to do so, and that this is a further example of, if a genuine result of the Supreme Court ruling is that trans people must always be treated as their “biological sex” in the huge range of situations regulated by the Equality Act 2010, then this is a clear failure of our equality legislative framework that does not reflect the reality of trans people’s lives.

The example at paragraph 13.2.11 that one justification for a single-sex service is 'only people of that sex need the service' may be more complicated for providers to determine if sex now always means “biological sex”. For example, trans women who take cross-sex hormones are at an increased risk of breast cancer and may benefit from breast cancer support services, but their access to these services may be limited if it is determined that these should be single-sex services for women. No advice is given on how services should anticipate the small number of cases when a trans person of a different “biological sex” may

reasonably need to access their single-sex service, and how failing to do so may result in unlawful indirect gender reassignment discrimination.

Change 13.3: New section on justification for separate and single-sex services

This section sets out the considerations that should be given to all potential service users when deciding whether separate and single-sex services are a proportionate means of achieving a legitimate aim. It also sets out circumstances in which mixed-sex services may be necessary, and the potential legal implications of providing only mixed-sex services.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new section on justification for separate and single-sex services is clear – **strongly disagree**

This section focuses exclusively on the impact the ruling has on making the provision of trans inclusive services more difficult. It provides no information about how services can continue to be inclusive.

If the Code of Practice is intended to provide practical guidance for service providers, then it is incomplete and unhelpful for it to not include information about both.

13.3.19 says '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 biological sex, then it can no longer rely on the exceptions set out at paragraphs 13.2.3 to 13.2.22. 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 Act. 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.' This contradicts the information provided at 13.4.8 where it says that 'The service provider may take account of the fact that if it admits the individual it *may* [our emphasis] cease to be a separate or single-sex service'.

This section does not engage at all with trans people's rights under the European Convention on Human Rights when discussing how organisations should decide whether a separate or single-sex service can be justified. For those Public

Authorities who have duties under the Human Rights Act 1998, this will be an additional consideration that they are required to make as part of any balancing exercise on whether providing separate or single-sex services are a proportionate means of achieving a legitimate aim. This is particularly true because the Commission is proposing to include content that states that separate and single-sex services can never include trans people in line with their gender identity, without the service needing to be operated on a completely mixed-sex basis.

The Code also provides no guidance on how organisations should conduct a proportionality analysis or take account of previous ECtHR case law. For example, the judgment in *Goodwin v UK* in 2002 states at paragraph 91 that 'society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'.

A range of human rights experts at the UN, including the Independent Expert on Protection Against Violence and Discrimination on the Basis of Sexual Orientation and Gender Identity, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the Special Rapporteur on Minority Issues, and others, have warned that the Supreme Court judgment:

'may be used to justify exclusionary policies that further stigmatise and marginalise an already vulnerable population, as well as human rights defenders working to protect and promote transgender rights. We are deeply concerned that the application of this judgment may lead to increased discrimination and exclusion of transgender women in various sectors, including the workplace, at a critical time when employers should be striving to foster and maintain inclusive environments for all employees.'

We think that the draft Code as it currently stands would have precisely this effect, causing trans people to experience reduced privacy and safety when navigating services and day-to-day life, and significantly increasing the discrimination that they experience.

Change 13.4: New content on policies and exceptions for separate and single-sex services

This new content explains that service providers may need to develop policies regarding the provision of separate or single-sex services. It also covers specific circumstances that may require a different approach to that set out in policy, and examples of those circumstances.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the new content on policies and exceptions for separate and single-sex services is clear – **strongly disagree**

This section provides contradictory information to the section on the justification for separate and single-sex services (13.3). It describes a range of situations where it may be permissible to adapt or be more flexible with inclusion in a separate or single-sex service in exceptional circumstances, and for the service to remain lawful.

13.4.2 says that it is likely to be permissible to allow people of the opposite sex to use a separate or single-sex service in some limited circumstances. This directly contradicts the previous section that says that including trans people in line with their gender identity in a separate or single-sex service will immediately mean that the service is no longer single-sex.

There is no legal explanation provided for why the inclusion of trans people whose sex for the purposes of the Equality Act 2010 is the opposite of a lawfully justified single-sex service would mean the service is no longer single-sex, but the inclusion of people of the opposite sex (in a potential range of circumstances) who are not trans would not mean the service is no longer single-sex.

13.4.5 states that a separate or single-sex service provider could adapt their service provision if it was requested by someone of the opposite sex. Following the judgment, this would include all trans women who requested access to a single-sex service for women, as they would be considered male for the purposes of the Act. The section explains that the single-sex service could 'offer a separate service to that individual and others in similar circumstances'.

That would seem to indicate that some services could be operated in a way where their provision was a mixture of single-sex services, as well as services provided to people of the opposite sex 'in similar circumstances'. Trans people would seem to be a very clear example of a group of people 'in similar circumstances' who a single-sex service provider may choose to provide some services to, alongside their single-sex provision. Doing so may often be a positive way of a public body meeting its public sector equality duties.

In contrast to the information provided in Section 13.3.19, this means in practice a service could limit the people it provided services to to only cis women and trans women. We think that this should be much more clearly explained in the Code.

Change 13.5: Updated section on separate or single-sex services in relation to gender reassignment

This section explains that service providers should consider their approach to trans people's use of their services when deciding whether to provide a separate or single-sex service. It includes examples of relevant considerations when deciding whether the exclusion of trans people from a separate or single-sex service is a proportionate means of achieving a legitimate aim.

To what extent do you agree or disagree with the following statement: The explanation of the legal rights and responsibilities set out in the updated section on separate or single-sex services in relation to gender reassignment is clear – **strongly disagree**

This section introduces the possibility that trans people will sometimes be unable to access any separate or single-sex services and clearly highlights the breaches of human rights that they will face if the draft Code of Practice were to become the norm for how services are provided across the UK.

13.5.3 states that if trans people are allowed to use a service that matches their gender identity, it will no longer be a separate or single-sex service, and 'is very likely' to amount to unlawful indirect discrimination. We don't understand why this advice is so contradictory to the advice in 13.4.2 and 13.4.8.

“Alarm or distress”

13.5.6 states 'A legitimate aim for excluding a trans person from a separate or single-sex service for their own biological sex might be to prevent alarm or distress for other service users. Whether it is reasonable to think that the presence in that service of the trans person will cause alarm or distress will depend on all the circumstances, including the extent to which the trans person presents as the opposite sex.'

This is the only example provided in this section for what a 'legitimate aim' might be for excluding a trans person from a separate or single-sex service that aligns with the sex they are considered to be under the Act.

There is no information provided about how a service provider should decide whether a trans person will cause “alarm or distress” to others – and whether the other people that a trans person may cause “alarm or distress” to is limited to the specific individuals who will be service users at the same time, or if it is a test about whether the trans person’s appearance is alarming and/or distressing in general.

We think that this advice will increase the likelihood that service providers subject trans people to unlawful gender reassignment harassment. We fail to see how recommending that service providers have a policy that relies on a subjective test about a person’s appearance will not result in trans people facing humiliating and offensive situations, where their inclusion in services is determined by discussions about whether they will cause “alarm or distress” to others. We do not think that there is any way to make a subjective test of the “alarm or distress” that a trans person may cause to others practical, workable or humane.

Additionally, this section does not engage at all with the fact that a trans woman is likely to experience “alarm or distress” if forced to access services with men. There is no explanation about why the “alarm or distress” of people who are not trans is a basis on which to make decisions about single-sex service provision, but the “alarm or distress” of trans people is not.

Exclusion or segregation

This section tells service providers that they can exclude trans people from separate or single-sex services or spaces, and therefore where such provision is only made on a separate sex basis segregate them from others. If there is not adequate additional provision to provide this on a segregated basis, there is no clear information on exactly when this would be unlawful, although the current content suggests there are times where it would be acceptable for trans people to have no service provision at all.

In 13.5.7 there is no further explanation of what the test is for 'services which are necessary for everybody'. Toilets are provided as an example but given the scope of the services regulated by the Act, it is extremely concerning that further examples are not provided. A large number of critical services are often provided on an exclusively separate or single-sex basis – such as hospital wards and services for survivors of gender-based violence.

The latter of these is frequently provided as an example in previous sections of the draft Code in which a separate or single-sex service is likely to be justified, and an example provided in this section explains how a trans man could be excluded from a service provided for women if his appearance would cause 'alarm or distress to others'. Previous sections of the draft Code also state that a separate or single-sex service cannot include trans people in line with their gender identity, as this will likely amount to unlawful sex discrimination towards people who are considered the same sex as trans people permitted to use the service in line with their gender identity under the Act.

Evidence shows that trans people experience gender-based violence at higher rates than cis women and men, with a 2020 systematic review of global evidence finding that they were 2.5 times as likely to experience sexual intimate partner violence than the general population. The Code will create a situation in which trans survivors are extremely unlikely to be able to access services, and where their inability to do so is explained by the Commission as being a result of the “alarm and distress” they cause to others. This will impact enormously on trans people’s safety and wellbeing and remove vital support that they need to recover from the trauma of experiencing sexual violence. This is abhorrent and wrong.

The Commission's failure to uphold its duties

We fail to see how this part of the guidance is compatible with the Commission's duty to promote understanding of the importance of equality and diversity, encourage good practice in relation to them, and work towards the elimination of unlawful harassment and discrimination. We think that it will instead promote intolerance and prejudice around diversity, increase inequality, discourage good practice relating to equality and diversity, and increase the harassment and discrimination that trans people face.

We also fail to see how the Commission does not consider it its duty to urgently highlight this apparent requirement to exclude and segregate trans people from a wide range of critical services as a failure of equality law, that will significantly negatively affect trans people's human rights, and that undermines their dignity and worth as equal members of society.

Change 13.6: Updated content on communal accommodation

This content explains the application of the Act to communal accommodation in respect of the protected characteristics of sex and gender reassignment.

To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated content on communal accommodation is clear – **strongly disagree**

It is not clear which accommodation trans people will be required to use when this is only provided separately to men and women. This updated section provides no practical or useful information on how the needs of trans people can be met if there is no alternative accommodation. It also provides no information about how providers might lawfully include trans people in communal accommodation in line with their gender identity.

One area where we have particular concerns around the provision of communal accommodation is where this is provided to asylum seekers. It is not clear how policies that focus on excluding and segregating trans people from single-sex communal accommodation will meet the needs, and protect the human rights, of trans asylum seekers. In the UK, some asylum facilities and accommodations

are provided on a single-sex basis, which is recommended by the UK Government, and some on a mixed-sex basis. However, human rights abuses may arise due to the placement of trans asylum seekers in reception centres, facilities and accommodation that does not align with their gender identity. For example, placing a trans woman seeking asylum in facilities and accommodation that are for men (in line with "biological sex"), as opposed to the women's (in line with gender identity). This could put her at risk of sexual violence, assault and harassment.

The former Commissioner for Human Rights for the Council of Europe provided recommendations to Member States that they must *'ensure that trans refugees, asylum seekers and migrants have access to safe reception conditions, trans-specific healthcare services and legal gender recognition.'*

She also said, '*The placement of trans asylum seekers requires careful attention. Trans asylum seekers have been housed in gender-segregated accommodation that exposed them to physical and sexual violence, for example, the placement of trans women in accommodation for men significantly increases this risk'*

It is not clear how it would be possible to ensure trans people's human rights are upheld in communal accommodation and what action should be taken to reduce the risk of future rights violation in these settings.

Do you have any other feedback about the content of the Code of Practice that you have not already mentioned?

We understand that the Supreme Court ruling has fundamentally changed the interpretation of the interaction between the Gender Recognition Act 2004 and the Equality Act 2010 from the one held by successive UK Governments, the Commission itself, and wider civil society organisations and service providers for the past fifteen years. Indeed, we think it is highly likely that the ruling has changed the interpretation of the law from the UK Parliament's intentions (you can see examples of extracts from Hansard evidencing this in our letter to the Scottish Parliament's Equality, Human Rights and Civil Justice Committee on pages 19-20 here.

Whilst understanding that the ruling has changed the way that trans people with Gender Recognition Certificates are (not) recognised for the purpose of the

Equality Act 2010, we are extremely concerned about what life will be like for trans people across Britain if the Code of Practice became statutory, and all services, associations and other organisations operate in the way that it outlines.

In our view, the changes proposed in the Code from the 2011 version would cause trans people significant harm. They would negatively impact on trans people's emotional and physical wellbeing when trying to go about their daily lives and participate in public life, result in trans people having less privacy about their trans status, and significantly increase the inequality and discrimination that trans people face.

Trans people would frequently be segregated from others or excluded from services – particularly where these are provided on a separate or single-sex basis, as a huge range of critical services and facilities are. The changes would also create an environment of suspicion and policing of everyone's gender presentation, whether they are trans are not, and increase the risks of harassment, distress and discrimination to all.

The totality of these impacts would certainly, in our view, result in trans people's human rights being breached, and indeed sometimes the human rights of others.

It would turn back the clock decades to a time where trans people were always treated in line with their "biological sex" by services, public bodies, and when participating in public life.

That didn't work. It meant that trans people could not go to work safely, use services that met their needs, or use public spaces freely. Which is why Courts found that this approach breached trans people's human rights and caused them to face discrimination.

Urgent action is needed to ensure that Britain does not take a seismic step backwards in the way it treats trans people. Trans people need to be able to access safe, inclusive services, just like everyone else.

The previous interpretation of how the law worked in this area – that single-sex services could include trans people in line with their gender identity but could also exclude them where doing so was a proportionate means of achieving a legitimate aim – allowed for a fair balance. Services could take an inclusive or an

exclusive approach (where that exclusive approach was justified). The updated Code of Practice instead says that single-sex services can never include trans people in line with their gender identities.

We also think that outside of the confines of the Code of Practice and the areas of life regulated by the Equality Act 2010, that it is highly likely that trans people will face significantly more discrimination and harassment as a result of the ruling. In particular, the public discourse that has emerged that the ruling has a wider scope than it does – e.g. that trans women are not women and trans men are not men (and that this is not limited to the meaning of these words for the Equality Act 2010). We are concerned that this will embolden those who refuse to acknowledge or accept the way a trans person lives their life and thus lead to trans people frequently being treated without dignity or respect and increase their risk of facing abuse and violence.

If the Commission believes that the draft Code is a complete explanation of how services have to be provided across Britain following the Supreme Court ruling, then we think that the Commission would be failing to uphold its statutory duties if it did not urgently alert the UK Government that the ruling has resulted in an equality and human rights framework that will leave trans people facing discrimination, inequality and human rights violations. This would need to be rectified with primary legislation.

In our view, the draft Code is not a full, fair and necessary explanation of the requirements of the Supreme Court ruling, and we believe the Commission should urgently address the lack of information contained in the Code about how to provide safe inclusive services for trans people.