

FAQs in Response to the Draft EHRC Code of Practice and Supreme Court Ruling

We are calling for the EHRC’s “bathroom ban” to be scrapped, and the Code re-written to allow for trans inclusion in single sex services according to lived gender. Below are some common questions that might be raised by MPs (or others), and possible responses you can give to explain why this is needed.

QUESTION

“The Supreme Court ruling only affects those few thousand trans people who have Gender Recognition Certificates (GRCs). Otherwise, trans people retain all the rights and protections they have always had under the Equality Act 2010.”

RESPONSE

The Supreme Court ruling disapplies the effect of a GRC to the entirety of the Equality Act 2010. This means that there no longer exists any mechanism whatsoever for trans people to be legally recognised in their acquired gender under the UK’s most significant piece of equalities legislation. This not only affects those trans people who currently hold a GRC, but also the potentially hundreds of thousands of trans people who would wish to obtain a GRC in the future.

For this reason, ILGA-Europe removed all legal gender recognition points from the UK this year, meaning that the UK now sits at an all-time low on the ILGA-Europe Rainbow map.

There are many reasons why trans people do not apply, or have not yet applied for a GRC. Many report that the UK’s medicalised process for legal gender recognition remains humiliating, invasive and inaccessible for many. In this, the UK is out of step with international best practice, which recommends a model based on self-determination.

RESPONSE

The Supreme Court ruling, as interpreted by the Equalities and Human Rights Commission (EHRC), does **not** just affect those with a GRC, but all those with the protected characteristic of gender reassignment.

Prior to the Supreme Court ruling, trans people were legally able to access single-sex services of the gender in which they present (with no requirement for a GRC), unless a specific exception applied (see pp 197-198). Now trans people are being told that they are all automatically banned from gendered services that align with their gender, even where they have safely used them for decades, and that this is no longer an optional exception, but mandatory.

This is a significant loss of rights and protections for UK trans people.

QUESTION

“Following the Supreme Court ruling, trans people can be excluded from the single-sex service of their lived gender if this is a ‘proportionate means to a legitimate aim’. This rightly allows providers to operate services on the basis of “biological sex’ where needed, for example in a rape counselling group or domestic violence shelter. This balances the rights of everyone.”

RESPONSE.

No. This is the situation we had **prior** to the Supreme Court ruling.

The Code of Practice 2011 stated:

13.57 If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat [trans] people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim.

This meant services could be **mixed sex** (open to both men and women); “**single sex**” and **trans inclusive** (i.e. for cis women and trans women together, or for cis men and trans men together); or (where justified) single sex and trans **exclusive**.

Under the EHRC’s updated Code, trans-inclusive men’s and women’s services are no longer an option. Exclusion is mandated.

According to the EHRC, it will not be possible for a women’s service or association (such as the Women’s Institute) to lawfully include trans women, or a men’s service or association (such as a men’s-only walking group) to lawfully include trans men. Providers can no longer include trans people in a way that aligns with and respects their gender identity, even if they want to.

QUESTION

“Many women need services that specifically exclude trans women. It’s a good thing that the Supreme Court clarified that ‘sex’ means the sex that you were assigned at birth to ensure that services can be provided in this way.”

RESPONSE

The Equality Act 2010 *already* had an exception allowing this. Single-sex service providers could exclude trans people from the service of their presenting gender, so long as this was justified as a proportionate means to a legitimate aim.

This meant that service providers had to carefully consider why trans men would need to be excluded from men's spaces, or trans women for women's spaces, rather than this being the default. We know that the overwhelming majority of women-only spaces welcomed the inclusion of trans women. Equally, for many services, providers would not wish to demand all users reveal their trans status as a condition of access, recognising this would be intrusive and violate their privacy.

Now, according to the EHRC interim guidance and draft Code of Practice, such exclusion is no longer optional, but mandatory. Single-sex services **must** exclude trans people of that gender, whether the provider – or their clients and customers – wishes to or not.

QUESTION

“Of course trans people can still use single-sex services. They just need to use the service of their sex assigned at birth, like everyone else.”

RESPONSE

The EHRC has stated that trans people can *also* be excluded from the services that align with their sex assigned at birth.

This highlights the complete absurdity of the EHRC's position. Including trans people according to their lived gender (as we have done for decades) is now apparently unlawful.

But if trans people 'follow the rules' and use the service of their sex assigned at birth, the EHRC says this may cause 'alarm or distress' to other users, such that it's apparently lawful to ban trans people from there, too.

RESPONSE

To force trans people into services of their sex assigned at birth means that trans people would have to 'out' themselves every time they needed to use a public toilet, try on clothes in a shop, or use any other gendered service. Forcing people into the services of their birth sex therefore puts trans people at risk of humiliation, harassment, and abuse. This fundamentally undermines trans people's right to privacy, and protection from discrimination and harassment.

RESPONSE

Segregating services according to sex assigned at birth has implications for people who are not trans too, especially those who are gender non-conforming. The EHRC has already suggested that we will all need to carry our birth certificates around with us to prove our sex assigned at birth when accessing services. The alternative is policing of gendered services based on 'appearance'. This creates a risk of abuse and harassment for everyone.

QUESTION

“Can’t trans people just use gender neutral facilities?”

RESPONSE

Some trans people find gender neutral facilities helpful, including non-binary people or those part-way through transition. However, to expect all trans people to suddenly start using ‘third spaces’ is likely completely unworkable.

1. Often such facilities simply do not exist. Sometimes, they might only exist in the form of disabled facilities that are not accessible to trans people (e.g. those requiring a radar key). When trying to go about their daily lives, trans people would have to constantly check whether appropriate facilities are available for them. This is what is known as a ‘urinary leash’, preventing people from confidently and freely leaving their home and engaging in public life.

2. Expecting trans people to suddenly start using ‘third spaces’ risks them being constantly ‘outed’. How does a trans woman or trans man explain to their work colleagues why they have suddenly stopped using the changing rooms they always have done? This is a significant invasion of privacy, and an unreasonable situation to put trans people in who are just trying to go about their day-to-day lives.

3. For many providers, this idea of ‘third spaces’ is impractical and unworkable. If they do not already have gender-neutral facilities, they may now be legally required to add them (on top of maintaining separate male and female facilities), so that trans people can continue to access their services. For many businesses the financial implications of this change would be ruinous.

QUESTION

“Can’t we just make everything mixed sex?”

RESPONSE

No, because the EHRC have said that is likely to be unlawful too.

Currently, under the EHRC’s proposals, the only way services can avoid risk of discrimination is to provide a women-only facility, a men-only facility and a mixed-sex facility **in every single public UK venue**. This is an impossible undertaking for service and business owners, to fix a problem that need not even exist. The solution is to enable services to lawfully remain trans inclusive, if they wish to.

QUESTION

“If we allow trans women in women’s services, men will pretend to be women to access these services and harm women.”

RESPONSE

UK law has allowed trans women to use women’s services for decades. This is how thousands of UK services have operated for millions of people for years. Many other progressive countries do exactly the same.

Research shows that trans people have been safely accessing gendered spaces according to their lived gender for decades, with no evidence of harm.

QUESTION

“Aren’t the EHRC ‘just following the law’?”

RESPONSE

The Supreme Court ruling overturned 15 years of legal understanding on the definition of ‘sex’ in the Equality Act. The ruling’s effect on the operation of single-sex services remains highly unclear.

The EHRC’s interpretation is currently subject to judicial review and multiple international human rights experts have warned that the EHRC’s position of mandatory exclusion and segregation will likely put the UK in breach of its international human rights obligations.

The EHRC has a duty to ensure that the UK upholds its international human rights obligations and to translate this obligation into actual enjoyment of human rights on the ground. The EHRC is therefore currently at risk of failing in one of its most fundamental duties.