Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Equality and Human Rights Commission
Correspondence Unit, Arndale House,
The Arndale Centre, Manchester, M4 3AQ

Minister for Women and Equalities
Government Legal Department,
102 Petty France, Westminster, London, SW1H 9GL

Secretary of State for Work and Pensions
Government Legal Department
102 Petty France, Westminster, London, SW1H 9GL

Health and Safety Executive
Redgrave Court, Merton Road,
Bootle, Merseyside, L20 7HS

Welsh Ministers
Welsh Government, 5th Floor, Tŷ Hywel, Cardiff Bay, CF99 1SN

Scottish Ministers
St Andrew's House, Regent Road, Edinburgh, EH1 3DG

And by email to: complaints@equalityhumanrights.com; complaints@hse.gov.uk; thetreasurysolicitor@governmentlegal.gov.uk; newproceedings@governmentlegal.gov.uk; ceu@gov.scot; GLSSenquiries@gov.scot; contact@senedd.wales; NewProceedings.WG.Legal@gov.wales

16 May 2025

To whom it may concern,

Urgent – Judicial Review pre-action letter
Proposed Claim for Judicial Review – EHRC Interim Update

This letter is sent in accordance with the judicial review pre-action protocol. We represent:

- [redacted]
- [redacted] and

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

- [redacted]
- as well as writing on behalf of ourselves, Good Law Project Limited of 3 East Point High Street, Seal, Sevenoaks, Kent, United Kingdom, TN15 0EG,

together, the proposed Claimants.

Should it be necessary for proceedings to follow this letter, it is anticipated that the three individual claimants will seek anonymity orders. As a result, recipients of this correspondence should take all steps to ensure that the privacy of the three individual claimants is protected. Should recipients of this correspondence be in any doubt as to what information the claimants consider to be their private information, they are referred to the copy of this letter that Good Law Project will be publishing on its website which will be redacted to remove the information the individual claimants consider to be their private information.

The details of the Claimants' legal advisers

The proposed Claimants have instructed Good Law Project in relation to this letter.

The Parties

The below are the proposed Claimants. It is possible that further individuals will be claimants to the claim but we are sending this letter now given the urgency issues raised by this litigation.

The First Claimant: [redacted] She is a trans woman. [redacted]

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

The Second Claimant: [redacted] She is intersex [redacted]

[redacted]

[redacted]

The Third Claimant: [redacted] He is a trans man. [redacted]

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

[redacted]

The Fourth Claimant: Good Law Project Limited. The Fourth Claimant is perhaps the largest advocate for transgender rights in the United Kingdom. It has litigated or supported almost all of the leading public law cases on trans rights since 2020. Its crowdfunders to address the consequences of the *For Women Scotland* decision attracted contributions from over 17,000 individuals from the trans community and its supporters and it has a mailing list of supporters, whose interest is in trans rights, of 42,000. It is also extremely well placed to litigate, relative to its peers, because it has demonstrated organisational resilience in the face of toxic media coverage of litigation by and for the trans community: unlike many others it is both willing and able to litigate.

The First Defendant is the Equality and Human Rights Commission ("**the Commission**").

The Second Defendant is the Minister for Women and Equalities ("**the Minister**"). Each party has an interest in the matter against the other party.

This letter has also been served upon the Health and Safety Executive and the Secretary of State for Work and Pensions, given the impact upon employers and the fact that the Interim Update appears to have been based on an interpretation of the Workplace (Health, Safety and Welfare) Regulations 1992. In addition, the letter has been served on the Welsh Ministers and the Scottish Ministers. This issue has cross-nation impacts for devolved policy areas such as health and education. The Claimants take a broad view of the parties who may be potentially interested at this pre-action stage, but do not regard their involvement as required. Their views are sought.

Please state if you consider any other party should be joined to the proposed claim.

The details of the matter being challenged

1. The Commission's interim update published on 25 April 2025 (available at https://www.equalityhumanrights.com/media-centre/interim-update-practical-implications-uk-supreme-court-judgment) ("**the Interim Update**") and associated

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

notice of a proposed consultation on its statutory code of practice for services, public functions and associations ("**the Notice**"). The Administrative Court will be asked to make appropriate declarations in respect of the Interim Update (ground 1), as to the compliance of the Commission with its statutory duties (ground 2), and as to the lawfulness of the consultation proposed in the Notice (ground 4).

2. If the Claimants are not correct as to their asserted interpretation of the law, and if (on the contrary) the Commission's Interim Update is correct in its statement of the law, then it is submitted that the legal provisions which lead to the position in the Commission's Interim Update and Notice are incompatible with articles 8 and/or article 14 (read with article 8) of the European Convention of Human Rights (hereafter, the "Convention"). The Court will be asked to read the statutory provisions upon which the Commission has based its Interim Update (which are currently believed to be section 9 of the Gender Recognition Act 2004; paragraphs 26-28 of Schedule 3 to the Equality Act 2010 and regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992) compatibly with section 3 of the Human Rights Act 1998 and/or in the alternative to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 (ground 3).

What the Commission is asked to do

The Interim Update and the Notice contain serious misstatements of the law. They have already led employers and service providers into error. They are likely to continue to have this effect for as long as they remain published. Further, the Interim Update has been published in breach of the Commission's duties under sections 3, 8 and 9 of the Equality Act 2006. The scope of consultation is unlawful.

We therefore invite the Commission to withdraw the Interim Update and the Notice urgently pending further consideration. For as long as the Interim Update remains publicly available, employers and service providers will continue to act in reliance upon it.

The Commission is further asked to extend the scope of the consultation on the statutory code of practice for services, public functions and associations.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

What the Minister is asked to do pursuant to ground 3

The Minister is asked to indicate by response to this letter whether she agrees or not that the Interim Update represents a proper explanation of the legal position pursuant to the Equality Act 2010 (hereafter the "EqA 2010"), section 9 of the Gender Recognition Act 2004 (hereafter the "GRA 2004") and the Workplace (Health, Safety and Welfare) Regulations 1992 (hereafter the "Workplace Regulations 1992").

If she does not agree with the statement of the law presented in the Interim Update, she is asked to:

(i) indicate what she considers to be the correct legal position, and

(ii) whether she would oppose a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 (hereafter the "HRA 2004") that paragraphs 26-28 of Schedule 3 to the EqA 2010, and/or section 9 of the GRA 2004 and/or regulation 20 of the Workplace Regulations 1992 are incompatible with article 8 and/or article 14 of the Convention.

The issue

This claim is concerned firstly with guidance given by the Commission purporting to set out (inter alia) that employers and providers of services which are open to the public are legally required to prohibit trans people from using the toilets in their acquired gender. The Commission's guidance is wrong in law and indeed authorises and approves unlawful discrimination. The Claimants propose to bring a claim against the Commission challenging the Interim Update and the Notice unless this matter can be resolved swiftly.

If however, the Interim Update represents an accurate picture of the law, then the law is incompatible with articles 8 and/or articles 14 and 8 of the Convention and the Claimants will seek a declaration of incompatibility against the Minister.

Background

(a) The Human Rights of Trans People

The right of trans people to personal development and to physical and moral security in the full sense enjoyed by others in society has long been recognised by article 8 to the Convention. In *Goodwin v The United Kingdom* (2002) 35 EHRR 18 the Court's general

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

approach was stated at paragraph 90:

> "Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia, Pretty v the United Kingdom*, no. 2346/02, judgment 29 April 2002, section 62, and *Mikclic v Croatia*, no. 53176/99, judgment of 7 February 2002, section 53, ...). In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

The Court of Appeal in *Croft v Royal Mail* [2003] EWCA Civ 1045, [2003] ICR 1425 was concerned (see paragraph 34) with the use of workplace toilets in the context of the Workplace Regulations 1992, regulation 20. It held that past a certain point in transition, trans employees would have the right under the Sex Discrimination Act 1975 to use toilets at work which aligned with their gender identity. Pill LJ giving the judgment of the Court held at [46]:

> “Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks. I would accept, applying the statement of Lord Nicholls in *Bellinger*, paragraph 41, and *Goodwin* paragraph 90, that a permanent refusal to refuse that choice to someone presenting to the world as a woman could be an act of discrimination even if the person had not undergone the final surgical intervention.”

Parliament sought to respond to at least some of the “unsatisfactory situation” of the “intermediate zone” through section 9 of the GRA 2004.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Despite the recognition of the right of trans people to realisation of their identity in *Goodwin, Bellinger* and subsequent case law, and despite the Court of Appeal already having given a decision on the requirements of the Workplace Regulations 1992 in relation to toilets in *Croft*, the Interim Update now, at odds with these authorities, mandates that employers *must* undertake the very act of discrimination identified in *Croft*. The legal basis of the Commission's guidance is not obvious (despite its assertions that the law is "clear"). We expect an explanation in response to this letter. Our inference is that the Commission considers that the words "men" and "women" in the Workplace Regulations 1992 must be read as connoting so-called 'biological' sex even though the EqA 2010 has no bearing on the meaning of those terms; and without consideration given to section 3 HRA 1998.

(b) EHRC and UK Government statutory and non-statutory guidance

The Interim Update represents a striking departure from the guidance previously provided by the Commission and the Government to employers and service providers about trans people's ability to use toilets which align with their gender identity.

In the context of service provision, the Commission's statutory code of practice (laid before Parliament in October 2010 and issued in April 2011) states the following at para 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 transsexual 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]." (emphasis added)

In the workplace context, the Government Equalities Office ("**GEO**") had published guidance for employers as early as November 2015 which stated at p 14[1]:

[1] "Recruiting and retaining transgender staff: a guide for employers", Government Equalities Office, 26 November 2015.
https://www.gov.uk/government/publications/recruiting-and-retaining-transgender-staff-a-guide-for-employers

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

> "Use of facilities – a trans person should be free to select the facilities appropriate to the gender in which they present. For example, when a trans person starts to live in their acquired gender role on a full time basis they should be afforded the right to use the facilities appropriate to the acquired gender role. Employers should avoid discriminating against anyone with the protected characteristic of 'gender reassignment'. Where employers already offer gender-neutral toilets and changing facilities, the risk of creating a barrier for transgender people is alleviated."

The GEO guidance was only removed in April 2024 with the Government stating it was "out of date". It is not clear which parts of the guidance were considered out of date and why.

(c) The judgment in *For Women Scotland*

The Supreme Court's decision in the case of *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 *("**For Women Scotland**")* was handed down on 16 April 2025. The decision concerned a challenge to the Scottish Government's statutory guidance on the Gender Representation on Public Boards (Scotland) Act 2018. The issue for determination was whether trans women who had obtained a GRC under the GRA 2004 fell within the definition of "women" for the purposes of statutory guidance which the Scottish Ministers promulgated under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018. This concerned the improvement of women's representation on Scottish public boards. This in turn raised the question of the definition of "woman" under the EqA 2010 because "Equal Opportunities" are a reserved matter, outside the legislative competence of the Scottish Parliament.

Allowing For Women Scotland's appeal, the Supreme Court held that the statutory guidance was erroneous in stating that the term "*woman*" within the meaning of the EqA 2010 included trans women with a GRC. The Supreme Court held that the terms *"sex"*, *"man"* and *"woman"* within the EqA refer to *"biological sex"*, *"biological man"* and *"biological woman"*. By *"biological"*, the Court appears to have been referring to a person's "sex at birth" (see paragraph 6).

The Supreme Court's judgment contains no reference to the provision of toilet facilities, whether in workplaces or elsewhere.

The Supreme Court stressed that obligations remained under the EqA 2010 for

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

employers and service providers to protect trans people's rights. Of particular relevance to this Commission's guidance, the Court relied on the fact that if service providers or employers place trans people at a particular disadvantage, then they will subject them to indirect discrimination on the basis of the protected characteristic of gender reassignment, unless their act is a proportionate means of achieving a legitimate aim[2]. Indeed, the Court relied on these enduring protections as an important factor justifying its conclusion in favour of a "biological sex" interpretation of the EqA 2010, arguing this interpretation "*would not have the effect of disadvantaging or removing important protection under the EqA from trans people (whether with or without a GRC)*" (paragraph 248).

(d) Reaction to the judgment in the public domain

Although the judgment was limited to the meaning of "woman" within the definition of the EqA 2010, the implications of the judgment have not been well understood. Since the judgment, commentators in the media and on social media have repeatedly stated that trans women are not women and trans men are not men at all. Trans women are seeing their faces posted online with the caption, "this is not a woman".[3] Trans men are being informed that they have lost all rights to access the men's services and spaces upon which they rely, and trans women are being informed that they have lost all rights to access the women's services and spaces upon which they rely.[4]

---

[2] Paragraphs 258-261.

[3] https://x.com/RosieDuffield1/status/1912145947368227018
https://x.com/truthaboutrans/status/1912483780884840466
https://x.com/UkandNireland/status/1913673358111133868
https://x.com/mypetjawa/status/1912494575475700095
https://x.com/conrad_leo21225/status/1912764626128810006
https://x.com/AnnetteMckay15/status/1914775953924075974

[4] "Trans people banned from toilets of gender they identify with, says UK minister", The Guardian, 27 April 2025,
https://www.theguardian.com/society/2025/apr/27/trans-people-banned-from-toilets-of-gender-they-identify-with-says-uk-minister?CMP=share_btn_url
"Government will ban trans employees from toilets that reflect their gender, minister says", The Independent, 27 April 2025,
https://www.independent.co.uk/news/uk/politics/trans-supreme-court-ruling-gender-pat-mcfadden-b2740252.html
"Trans women 'set to be barred from female bathrooms and sports and could be asked to use disabled toilets at work' after new landmark ruling links gender to biological sex", The Daily Mail, 17 April 2025,
https://www.dailymail.co.uk/news/article-14622617/Trans-women-barred-female-bathrooms-sports.html
"Civil servants threaten to strike over trans ban in women's lavatories", The Telegraph, 16 May 2025,
https://www.telegraph.co.uk/politics/2025/05/16/civil-servants-threaten-strike-action-trans-toilets/

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

In response to this confusion and misinformation, reports soon emerged that employers and service providers were beginning to adopt policies that wholly disregarded the rights and needs of trans people, despite the Supreme Court's statement that this conduct would lead to indirect discrimination on the basis of gender reassignment. For example, the British Transport Police amended its strip-searching policy to state that searches in custody would be conducted "in accordance with the biological sex of the detainee". This was announced as an "interim position" whilst the judgment was considered.[5]

On 22 April 2025, in an interview on BBC Radio 4's today programme, the Minister stated that "The ruling was clear that provisions and services should be accessed on the basis of biological sex" and that the law about trans people's ability to access single-sex spaces would apply "right across the board".[6]

(e) The Commission's Interim Update

In this context, nine days later, on 25 April 2025, the Commission published what it called its Interim Update which was also accompanied by what we have termed "the Notice" about the consultation which together form the subject of the proposed challenge.

The Interim Update states:

> *"We know that many people have questions about the judgment and what it means for them. Our updated guidance will provide further clarity. While this work is ongoing, this update is intended to highlight the main consequences of the judgment. Employers and other duty-bearers must follow the law and should take appropriate specialist legal advice where necessary.*
>
> *<u>Key information</u>*
>
> *The Supreme Court ruled that in the Equality Act 2010 (the Act), 'sex' means biological sex.*

[5] "British Transport Police amends strip-searching policy after supreme court gender ruling", The Guardian, 17 April 2025, https://www.theguardian.com/uk-news/2025/apr/17/trans-women-uk-railways-strip-searched-male-officers
[6] "Toilet use based on biological sex, says minister", BBC News, 22 April 2025, https://www.bbc.co.uk/news/articles/c5y42zzwylvo

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

This means that, under the Act:

- *A 'woman' is a biological woman or girl (a person born female)*
- *A 'man' is a biological man or boy (a person born male)*

If somebody identifies as trans, they do not change sex for the purposes of the Act, even if they have a Gender Recognition Certificate (GRC).

- *A trans woman is a biological man*
- *A trans man is a biological woman*

This judgment has implications for many organisations, including:

- *workplaces*
- *services that are open to the public, such as hospitals, shops, restaurants, leisure facilities, refuges and counselling services*
- *sporting bodies*
- *schools*
- *associations (groups or clubs of more than 25 people which have rules of membership)*

*In **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.*

*It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.*

In workplaces and services that are open to the public:

- *trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex*

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

- *in some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman* [sic]*) not to be permitted to use the women's facilities*
- *however where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use*
- *where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*
- *where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men*

*There are rules about when **competitive sports** can be single-sex, which we intend to address separately in due course.*

***Schools** in England and Wales must provide separate single-sex toilets for boys and girls over the age of 8. It is also compulsory for them to provide single-sex changing facilities for boys and girls over the age of 11. The law in Scotland requires schools, irrespective of pupils' age, to provide separate toilet facilities for boys and for girls. Toilet cubicles are required to be partitioned and have lockable doors.*

Pupils who identify as trans girls (biological boys) should not be permitted to use the girls' toilet or changing facilities, and pupils who identify as trans boys (biological girls) should not be permitted to use the boys' toilet or changing facilities. Suitable alternative provisions may be required.

*Membership of an **association** of 25 or more people can be limited to men only or women only and can be limited to people who each have two protected characteristics. It can be, for example, for gay men only or lesbian women only. A women-only or lesian-only [sic] association should not admit trans women (biological men) and a men-only or gay men only association should not admit trans men (biological women).*"

Immediately thereafter, what we will call "the Notice" about the consultation states:

"Our work to update our guidance

Our updated guidance will be available in due course. We are working at pace to

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

incorporate the implications of the Supreme Court's judgment.

We aim to provide the updated Code of Practice to the UK Government by the end of June for ministerial approval.

The Code will support service providers, public bodies and associations to understand their duties under the Equality Act and put them into practice.

We are currently reviewing sections of the draft Code of Practice which need updating. We will shortly undertake a public consultation to understand how the practical implications of this judgment may be best reflected in the updated guidance. The Supreme Court made the legal position clear, so we will not be seeking views on those legal aspects.

The consultation will be launched in mid-May and last for two weeks. We will be seeking views from affected stakeholders.

In the meantime, we will continue to regulate and enforce the Equality Act 2010, ensuring protection for all protected characteristics including those of sex, gender reassignment and sexual orientation."

Although it is styled as an "interim" update, the Interim Update evidently represents what the Commission regards as the indisputable legal consequences of the Supreme Court's judgment. What the Commission regards as "clear", is spelt out in "the Notice", namely that it will not be consulting on "legal aspects" of the judgment. In addition, the statements about workplaces will not fall within the scope of the consultation on the statutory code of practice, which is limited to services, public functions and associations. The purpose of the Interim Update is said to be that *"While this work is ongoing, this update is intended to highlight the main consequences of the judgment."* Thus, this proposed challenge is not to an "interim" position, but guidance on an interpretation of the law which the Commission has made clear is not up for discussion in the forthcoming consultation. The notion that the judgment puts beyond debate that trans women must be excluded from women's toilets in workplaces and services open to the public and trans men must be excluded from men's toilets is an extraordinary – and legally erroneous – position to have taken. The Claimants will be challenging that guidance on the basis that it is irrational and/or wrong in law.

The impact of the Interim Update should not be underestimated. Every day since the

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Interim Update was issued employers and service providers have updated their policies, citing the Interim Update.[7]

(f) The extension to the consultation period

On 14 May 2025, the Commission announced:

> *"On 25 April, we announced that we would undertake a public consultation on updates made to our statutory Code of Practice for services, public functions and associations, following the Supreme Court's judgment in For Women Scotland v Scottish Ministers.*
>
> *In light of the level of public interest, as well as representations from stakeholders in Parliament and civil society, the consultation period has been extended.*
>
> *The following arrangements have now been confirmed:*
>
> - *The consultation will aim to launch 19 May and close on 30 June 2025.*
> - *The consultation will focus on sections of the Code of Practice that required updating following the Supreme Court's judgment. A draft of the full Code of Practice was consulted on between October 2024 and January 2025.*
> - *The consultation will seek views on whether these updates clearly articulate the practical implications of the judgment and enable those who will use the Code to understand, and comply with, the Equality Act 2010. The Supreme Court made the legal position on the definition of sex clear, so we are not seeking views on those legal aspects.*
> - *While the consultation is running, we will hold Q&A sessions with stakeholders representing affected protected characteristic groups. These meetings aim to answer questions on our understanding of the Supreme Court's judgment, the consultation process, where views are being sought and what can and cannot*

[7] Examples include the Financial Conduct Authority, Kew Gardens, and the Scottish Parliamentary Corporate Body, impacting Holyrood,
"Trans women banned from female toilets in Holyrood", BBC News, 9 May 2025,
https://www.bbc.co.uk/news/articles/cpw78jv2gk5o
"Update on Facilities and Services at Holyrood", Scottish Parliamentary Corporate Body, 8 May 2025,
https://www.parliament.scot/-/media/files/spcb/spcb-papers/spcb-papers-2025/6-may/spcb-2025-paper-26.pdf

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

be changed in the draft Code of Practice. Participants will still need to submit a consultation response. We will also meet with governments from across Britain and hold informative briefings for Parliamentarians.

- *We will review responses received as part of the consultation and make necessary amendments to the Code of Practice. It will then be submitted to the Minister for Women and Equalities for approval and laying in Parliament.*

Further information on the consultation and how it can be completed will follow when it launches."

Proposed ground 1 (challenging the Commission's Interim Update and Notice)

The passages in the Interim Update regarding toilets, read as a whole, encourage employers and service providers to adopt blanket policies which exclude trans men from men's toilets and trans women from women's toilets in the workplace and in services open to the public. In doing so, they provide an inaccurate and misleading statement of the law, and they encourage and approve unlawful conduct by those to whom the Interim Update is directed. The Interim Update is thereby an unlawful statement of policy or guidance applying the principles in *R (on the application of A) v Secretary of State for the Home Department)* [2021] UKSC 37, [2021] 1 WLR 3931 and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. The Claimants will seek a declaration to that effect.

The correct position in law regarding workplace toilets

The only obligation regarding single sex toilets in workplaces is regulation 20 of the Workplace Regulations 1992.

Regulation 20 of the Workplace Regulations 1992 provides that:

"20. (1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless

…

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

> *(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside…"*

The Workplace Regulations 1992 were issued under section 15 of the Health and Safety at Work Act 1974 ("**HSWA 1974**").

The Workplace Regulations 1992 were intended to transpose the Workplace Directive 89/654/EEC which the UK was required to implement as a Member State of the EEC. Regulation 20 transposes Annex I, Division 18.3 and Annex II, Division 13.2.3 of the Workplace Directive, which provides that:

> *"Provision must be made for separate lavatories or separate use of lavatories for men and women."*

We do not understand the legal basis for the Interim Update: it seems plainly wrong in law for the following reasons.

First, the statement in the Interim Update that "*In workplaces, it is compulsory to provide sufficient single-sex toilets*" is incorrect on any reading of regulation 20 (indeed even one adopting the EqA 2010 definitions of men and women). Regulation 20(2)(c) provides that sanitary conveniences are not suitable unless "separate rooms containing conveniences are provided for men and women *except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside*" (emphasis added). Therefore, where each convenience is in a separate securable room, that meets the requirement of the regulations. We do not understand the legal basis for the Commission's advice otherwise. Alternatively, given at the very least such a reading is available, pursuant to section 3 HRA 1998 it must be read that way (see below).

Second, the specific and contextual reading of the EqA 2010 in the *For Women Scotland* judgment does not address toilets or the Workplace Regulations 1992. The Commission's statement that one of "the main consequences" of the judgment is that it is compulsory to provide sufficient single-sex toilets is not stated in the judgment to be an express consequence of the interpretation advanced, let alone a "main consequence". Neither the Workplace Regulations 1992, nor the HSWA 1974, nor the Workplace Directive define men or women. By contrast, as noted below, as a matter of EU law, terms such as "man" and "woman" are to be given a trans-inclusive meaning. We do not understand the Commission's assumption that a reading of those terms as

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

meaning "biological sex" in the EqA 2010 is to be read across to different language in other separate legislation. Regulation 20 on its face does not give any indication that "men" and "women" refer to natal sex and there is no obvious mandate that employers must exclude trans people from the sanitary conveniences that correspond to their lived gender. The absence of an express meaning of that kind is notable given that a breach of the regulation would entail criminal liability pursuant to s.33(1)(c) of the HSWA 1974, and so engages the rule of interpretation that the criminal law should be clear and give fair notice to an individual of the boundaries of what they may do without attracting criminal liability (see *R v Copeland* [2020] UKSC 8, para 28).

Third, EU law as a body of law includes the Equal Treatment Directive which seeks to protect trans people against discrimination on grounds of gender reassignment (*P v S and Cornwall County Council (Case C-13/94)* [1996] ICR 795, [1996] ECR I-2143) and required Member States within the context of sex discrimination law to treat trans people not as a "*third sex*" but rather as men or as women in accordance with their reassigned gender (*Chief Constable of West Yorkshire Police v A* [2004] UKHL 21, [2005] 1 AC 51 at para 56). This forms the historical context in which the Workplace Regulations 1992 were enacted. In addition, the Workplace Regulations 1992 are assimilated law within the meaning of the European Union (Withdrawal) Act 2018, and accordingly have to be interpreted in accordance with the assimilated case law cited above pursuant to section 6(3) of the same Act. We do not understand how a reading of regulation 20 which mandates discrimination is consonant with that body of law.

Fourth, in the absence of any statutory definition of men and women, the GRA 2004, section 9(1) will ordinarily apply to people who have a full GRC. Section 9(1) provides that:

> *"(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*
>
> *(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).*

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

Contrary to the Commission's guidance in the Interim Update, the meaning of "men" and "women" in the Workplace Regulations 1992 must at least encompass men and women with a GRC by virtue of section 9(1) GRA 2004:

(a) The Supreme Court in *For Women Scotland* did not consider toilets, still less the specialist statutory regime governing workplace toilets: the Workplace Regulations 1992, the HSWA 1974, and the Workplace Directive.

(b) *For Women Scotland* concerned the operation of the EqA 2010, and whether a definition of sex as "*certificated sex*" (which would mean that sex of a trans person with a GRC was their acquired sex for the purposes of the EqA 2010) impeded the operation of discrimination law within the EqA 2010, such that that definition rendered the Act "*incoherent or unworkable*". Nothing follows from the ratio of *For Women Scotland* that would displace the normal operation of section 9(1) in respect of the Workplace Regulations 1992.

(c) The Workplace Regulations 1992 are in a different position than the EqA 2010 vis à vis the GRA 2004. They are secondary legislation, which preceded the GRA 2004. This being the case, it would be surprising if Parliament had not intended section 9(1) GRA 2004 to apply to the definition of men and women under the Workplace Regulations 1992.

This conclusion becomes clear beyond doubt when one considers the human rights underpinnings of the GRA 2004 and its implications, which were not subject to analysis in the judgment in *For Women Scotland*:

(a) The GRA 2004 was enacted in response to the Grand Chamber's adverse decision in *Goodwin v The United Kingdom* (2002) 35 EHRR 18 (and thereafter the declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467). In *Goodwin v UK* (2002) 35 EHRR 18, the ECtHR held that the UK had breached its obligations under Article 8 ECHR by relegating post-operative trans people to life in *"an intermediate zone as not quite one gender or another*".

(b) It was already established in the case law of the European Court of Human Rights

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

("**ECtHR**") that the *"very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of trans [persons] to personal development and to physical and moral security"*.[8]

(c) While the case law at the time concerned post-operative trans people, the GRA 2004 went further. In that respect, the GRA 2004 anticipated the decision of the ECtHR in *AP, Garçon and Nicot v France* (Applications Nos 79885/12, 52471/13 and 52596/13, judgment of 6 April 2017).

(d) Since then, human rights jurisprudence has repeatedly confirmed that in order to respect a trans person's article 8 rights, it is necessary to respect their right to live fully as a man or a woman in their acquired sex. For example, having reviewed the *Goodwin* case in the case of *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, Lady Hale held at para 29:

> *"This puts it beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their right, to live, not as a member of a 'third sex', but as the person they have become, as fully a man or fully a woman as the case may be."*

(e) Access to the toilets of one's lived sex is a paradigm example of a matter essential to one's *"physical and moral security"*[9] and living *"fully a man or fully a woman"*. It is therefore difficult to think of legislation more inherently likely to fall within the scope of s.9(1) GRA 2004 than the Workplace Regulations 1992.

(f) Further, there is a particular risk of breach of trans people's human rights that would arise from importing the definition "biological sex" into regulation 20 that did not arise from applying that definition in the EqA 2010. The GRA 2004's purpose was to avoid any such breach, and section 9(1) and regulation 20 must be construed accordingly:

> (i) When the Supreme Court considered the position of single sex services (but not toilets) under EqA 2010, it considered Schedule 3 of the EqA 2010. Under Schedule 3 paragraph 28, a service provider (not an employer) has a defence to a claim for gender reassignment

[8] *Van Kück v Germany* (2003) 37 EHRR 51 (at para 18)
[9] *Van Kück v Germany* (2003) 37 EHRR 51 (at para 18)

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

discrimination when providing single-sex facilities separated by "biological sex" if those services can be objectively justified (see further below). This specifically allows for the consideration of trans people's rights, and may prevent a single-sex service separated by "biological sex" from being lawfully provided if it disproportionately excludes trans people. This creates a safety valve within the legislation, providing some safeguard for the rights of trans people even under a "biological sex" interpretation of the EqA 2010.

(ii) Regulation 20 would (if the Interim Update is correct) contain no equivalent safety valve. It contains a mandatory requirement for single-sex toilets at work, subject to no proportionality test or any other requirement to adequately meet the needs of trans people. In some workplaces, the employer may be able to provide practical workarounds (separate lockable rooms or additional unisex spaces), but the reality is that this will not be logistically feasible for large numbers of employers. In these circumstances, the Regulations would, on the Commission's interpretation, require these employers to provide the two single sex spaces separated by "biological sex" (one male, one female) regardless of whether the employer would be able to also make practical provision for trans people. The result would leave trans people with no access to an adequate toilet at work. A trans woman might be forced to enter the men's toilets, dealing with fear and humiliation. A trans man might be forced to enter the women's toilets, dealing with the same emotions, and risking being barred entry by biological women who perceived that he should not be there. Regulation 20 would then have caused an obvious breach of the trans person's human rights with acute practical consequences.

(iii) Further, such an interpretation would breach the privacy rights of trans people, expressly protected in the GRA 2004 and noted by the Supreme Court in *For Women Scotland*[10]. Those rights are protected expressly by the GRA 2004. Under section 22 of the GRA 2004, it is an offence for an employer to disclose protected information which it has acquired in its capacity as an employer to any other person unless an

[10] See for example, paragraphs 78 and 256.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

exception applies. Protected information includes any information about the gender history of trans employees who have obtained a GRC.[11] That information is confidential. It is not understood how the Commission believes employers can adopt the kinds of policies encouraged in the Interim Update without breaching confidence and/or committing a criminal offence contrary to section 22 of the GRA 2004. For trans persons who are not out at work, having their gender history disclosed by their employer is likely to cause great distress and may put them at risk. As noted by the Supreme Court in *R (C) v Secretary of State for Work and Pensions* at paragraph 1:

> "… a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

(iv) When Parliament enacted the GRA 2004, it cannot have intended these consequences. It intended to protect the human rights of trans people who obtained a GRC by creating a mechanism which ensured their gender would be recognised for all purposes. It would be contrary to any sensible interpretation of section 9(1) if the Workplace Regulations were read so as to breach the human rights of trans people in this way.

In our view, the correct position under the law is that any employer who adopts a blanket policy of excluding trans employees from using toilets which align with their gender identity is likely to engage in indirect gender reassignment discrimination contrary to sections 19 and 39 of the EqA 2010 (and possibly also direct gender reassignment discrimination contrary to sections 13 and 39 of the EqA 2010 in view of the Supreme Court's comments in *For Women Scotland* at para 134). Denying a trans

[11] Section 22(2) GRA 2004.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

person access to toilets at work that align with their gender identity would subject them to a detriment within the meaning of section 39(2) of the EqA 2010. The policy would amount to a provision, criterion on practice which put any trans employees at a particular disadvantage when compared with non-trans employees for the purposes of section 19(2)(c) of the EqA 2010. The employer would then be required to show that the policy was a proportionate means of meeting a legitimate aim in accordance with section 19(2)(d) of the EqA 2010. The Interim Update reads as if there is no such requirement upon employers.

In addition, employers which are public authorities remain bound by their duty under section 6(1) HRA 1998 not to breach the rights of their trans employees under the Convention. For the reasons outlined above, blanket exclusionary policies are likely to breach the rights of trans employees to respect for private life under article 8. In addition, such policies may amount to discrimination contrary to article 14 read with article 8 by treating trans people differently without justification and/or failing without justification to treat trans women differently from cis women (i.e. women who are not trans) and trans men differently from cis men (*Thlimmenos* discrimination) despite their different position.

Finally, as noted above, employers who seek to adopt blanket exclusionary policies also risk committing the criminal offence of disclosing protected information about a trans employee with a GRC in breach of section 22 of the GRA 2004. That is further indicative that parliament cannot have intended these results (and that the legislation must be read so as not to produce such results).

If, contrary to the above, the Interim Update presents an interpretation of the Workplace Regulations which is correct on ordinary principles of statutory construction, such an interpretation is incompatible with the rights under articles 8 and 14 (read with 8) of the ECHR of the Claimants, trans people and others. If a conventional reading of the Workplace Regulations is that set out in the Interim Update, those regulations are incompatible with Article 14 read with article 8 in (a) treating trans people differently without justification and/or (b) failing without justification to treat trans women differently from cis women and trans men differently from cis men (*Thlimmenos* discrimination) despite their different position. Consequently under section 3 HRA 1998, the legislation must be read compatibly so far as possible to do so; otherwise under section 4 HRA 1998 the Workplace Regulations must be declared incompatible (see below – proposed ground 2). In that case, the Interim Update is still erroneous.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Accordingly, for the reasons above the Interim Update encourages and approves unlawful conduct by employers.

The correct position in law regarding toilets open to the public

Toilets made available to the public by service providers (whether businesses or public bodies) are not governed by any equivalent specialist statutory regime. There is no equivalent obligation to provide single sex toilets that are open to the public.

A service provider who provides toilets that are open to the public may wish to provide men's and women's toilets. Contrary to what is said in the Interim Update, there is more than one way that a service provider could choose to do this.

A service provider could choose to provide single sex toilets based on so-called "biological sex" that excluded trans people from using toilets which align with their gender identity. If it did so, then it would risk a claim for gender reassignment discrimination under paragraph 28 of Schedule 3 to the EqA 2010 if it could not show that the single sex toilets were a service that was a proportionate means of achieving a legitimate aim. It is highly unlikely that blanket exclusionary policy would be a proportionate means of achieving a legitimate aim. Further, a public authority providing toilets in this way could also face a claim for breach of a trans person's article 8 and article 14 rights under s.6 HRA 1998.

In the assessment of proportionality, a court or tribunal would need to consider the significant impact of such a policy on trans employees in the balancing exercise. The effects will often include (i) the effective outing of trans staff who are not 'out' to their colleagues, or only partially out to their colleagues, who will now have to explain why they no longer use the cis men's or cis women's toilets and (ii) the stigmatising and humiliating suggestion that trans people offend the privacy and dignity of their colleagues merely by using single-sex toilets in line with their gender identity. Further, a relevant factor will often be the effect on disabled employers of there being an increased demand for the use of accessible toilets in the workplace which would now need to be used by trans employees with no genuine access needs.

Alternatively, a service provider could choose to provide inclusive toilets that welcomed both cis women and trans women in one toilet, and cis men and trans men in another toilet. If it did so, it might risk other kinds of discrimination claim. However, those claims could be defended, depending on the facts. Inclusive toilets can be lawfully provided on

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

at least two different potential bases:

(a) Firstly, inclusive toilets could be provided under s.158 EqA 2010. A service provider may positively discriminate if it reasonably thinks that trans people have different needs or suffer a disadvantage connected to their protected characteristic. The provision of inclusive toilets would need to be a proportionate means of achieving a legitimate aim of providing adequate facilities that met the needs of trans people.

(b) Alternatively, the toilets' access policy could be set on a neutral basis, such as welcoming those who "lived as a woman". This would not exclude anybody on the basis of their "biological sex". It therefore could not be challenged as direct discrimination. If challenged as indirect discrimination, it could also be defended as a proportionate means of achieving a legitimate aim of providing adequate facilities that met the needs of all.

Errors in the Interim Update

Applying the above, it can be seen that the elements of the Interim Update pertaining to the provision of toilets by employers and in services open to the public are an inaccurate and misleading statement of the law, and authorise and approve, and indeed have been read by a number of large employers and service providers as directing, unlawful conduct by those to whom the Interim Update is directed:

(a) As to workplaces, it is wrong to say that "trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities". We have set out the proper interpretation of the legislation above.

(b) As to services that are open to the public, it is wrong to say that "trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex". There are at least two lawful bases for providing trans inclusive toilets open to the public: this can be justified using s.158 EqA 2010 positive discrimination or as an objectively justified provision criterion or practice. The Commission has wrongly informed service providers that they cannot lawfully provide trans-inclusive toilets, when they can.

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

(c) Having wrongly advised employers and service providers that they must exclude trans people from their men's and women's toilets, no guidance is then given as to the obligations under the EqA 2010 and the GRA 2004, nor as to the implications of the HRA 1998 on employers and service providers to ensure that trans people rights are protected. The furthest that the guidance goes is to say that "*trans people should not be put in a position where there are no facilities for them to use*" and "*where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*". This advice has no regard for the dignity or rights of trans people. The premise of this advice is that, in law, it does not matter where trans people go to the toilet as long as they can go somewhere. However, the Interim Update prefers "where possible" for trans people to have to out themselves by going to a separately marked unisex toilet, forcing them into a signposted, physical embodiment of what the ECtHR (in finding the UK legal position to be in violation of article 8) called in *Goodwin "an intermediate zone as not quite one gender or another*".

(d) Then, no warning is given as to the risk to employers or service providers of subsequent gender reassignment discrimination claims or human rights claims brought by trans people. The Interim Update fails to identify the obvious risks of EqA 2010 and HRA 1998 challenges if service providers were to follow this advice. In the case of both workplace toilets and toilets open to the public, the Interim Update wrongly gives the impression that little or no legal risk arises from providing biological single sex toilets that exclude trans people, or from forcing trans people to use marked unisex toilets as the only alternative. In addition, it fails to highlight the real risk that organisations (including employers and certain service providers) following its advice may commit criminal offences contrary to section 22 of the GRA 2004.

(e) Finally, it is bizarre and worrying that the Interim Update went out of its way to note that "*it could be indirect sex discrimination against women if the only provision is mixed-sex*." To the extent that this may be the case, it is *a fortiori* true that it could be gender reassignment discrimination against trans people if organisations adopt blanket policies which exclude trans people from using the toilets which align with their gender identity. The Interim Update is silent on this point. This asymmetry in the Interim Update is the most striking betrayal of the Commission's failure to maintain neutrality on this most sensitive of issues, and

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

ensure that service providers were equally conscious of their obligations to avoid discrimination on the basis of all protected characteristics.

Proposed ground 2: Commission's breach of its statutory duties

The Claimants' position is that the relevant case law of the ECtHR cited above makes the serious human rights implications of the Interim Update plain. The Interim Update is wrong as an interpretation of the Workplace Regulations 1992 and equality law, and clearly flawed when a human rights analysis is applied. The fact of its publication (a mere nine days after the hand down of judgment in *For Women Scotland*) reveals either that the Commission undertook no human rights analysis of its draft Interim Update, or that it undertook a deficient human rights analysis (**disclosure of the analysis undertaken is requested**). In publishing the Interim Update, the Commission was exercising its functions under section 13(1) of the Equality Act 2006. In the circumstances, the publication of the Interim Update was reckless and in breach of the Commission's statutory duties under sections 3, 8 and 9 of the Equality Act 2006, which provides in relevant part:

> **3 General duty**
>
> The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—
>
> (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
>
> (b) there is respect for and protection of each individual's human rights,
>
> (c) there is respect for the dignity and worth of each individual,
>
> (d) each individual has an equal opportunity to participate in society, and
>
> (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.
>
> **8 Equality and diversity**
>
> (1) The Commission shall, by exercising the powers conferred by this Part—
>
> (a) promote understanding of the importance of equality and diversity,

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

(b) encourage good practice in relation to equality and diversity,

(c) promote equality of opportunity,

(d) promote awareness and understanding of rights under the Equality Act 2010,

(e) enforce that Act,

(f) work towards the elimination of unlawful discrimination, and

(g) work towards the elimination of unlawful harassment.

...

9 Human rights

(1) The Commission shall, by exercising the powers conferred by this Part—

(a) promote understanding of the importance of human rights,

(b) encourage good practice in relation to human rights,

(c) promote awareness, understanding and protection of human rights, and

(d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c. 42) (compliance with Convention rights).

(2) In this Part "human rights" means—

(a) the Convention rights within the meaning given by section 1 of the Human Rights Act 1998, and

(b) other human rights.

...

(4) In fulfilling a duty under section 8 the Commission shall take account of any relevant human rights.

In publishing the Interim Update, the Commission is in breach of the above statutory duties. It has published erroneous advice in a rushed and reckless fashion. As a result,

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

the Interim Update encourages or mandates conduct by employers which breaches their obligations under the EqA 2010, and violates the article 8 and/or article 14 rights of trans employees, in stark contradiction to the Commission's statutory duties. Further, it appears that the Interim Update was published without consideration of the human rights consequences, in particular breach of the duty under section 9(4) of the Equality Act 2006.

Proposed ground 3: Declaration of Incompatibility, directed to the Minister

By ground 3 (directed primarily at the Minister), the Claimants submit that, if contrary to ground 1, the Interim Update and Notice do reflect an accurate statement of the law, and that regulation 20 of the Workplace Regulations 1992, Schedule 3 of the EqA 2010 and/or s 9 of the GRA 2004 read together mandate the exclusion of trans people from public or workplace toilets of their acquired gender, then one or more of those provisions are incompatible with trans people's right to private life under article 8 of the Convention, read alone or together with article 14 (prohibition of discrimination). Consequently, if but only if the Commission's interpretation of the law is correct on a conventional interpretation, the court will be asked either to read those provisions compatibly with Convention rights (section 3 HRA 1998), and if that is not possible, to make a declaration of incompatibility (section 4 HRA 1998).

While we do not at this point understand the exact legal basis of the Commission's Interim Update, it appears to us that it is most likely based on a reading of regulation 20 of the Workplace Regulations as being premised on "men" and "women" referring to so-called "biological" sex. The remedy in that case would therefore be either to disapply the regulation as being *ultra vires* section 6 HRA 1998, or if necessary pursuant to section 4(4) HRA 1998 to make a declaration of incompatibility.

If contrary to the Claimants' reading of the legislation, the Court were to hold that the position expressed in the Interim Update about toilet use in workplaces or the provision of services is a correct statement of the law, the consequence is that the statutory provisions which give rise to that outcome are incompatible with article 8 of the Convention and/or article 14 read with article 8 in that they mandate circumstances in which trans people are unable to realise matters essential to their *"physical and moral security"*[12] living as *"fully a man or fully a woman"*. In the words of the European Court of Human Rights in *Goodwin* at [77] if the interpretation propounded in the Interim Update

[12] *Van Kück v Germany* (2003) 37 EHRR 51 (at para 18)

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

is correct – a *"conflict between social reality and the law arises which places the trans [person] in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety".* As the Supreme Court put it in *R(C) v Secretary of State for Work and Pensions* at paragraph 28, the GRA 2004 *"…sought, so far as possible, to align the legal position with social and psychological reality."*

Further or alternatively, the Commission's reading of the law, if correct, implies a failure by the UK to fulfil positive obligations under article 8 ECHR: see *Hämäläinen v. Finland* (2014) 37 BHRC 55 at paragraph 66 (GC).

This may be illustrated by the decision of the House of Lords in *Bellinger v Bellinger* [2003] 2 A.C. 467. In that case a trans woman had married a man and sought a declaration that the marriage was valid. The House of Lords refused to grant the declaration on the basis that "male" and "female" in the Matrimonial Causes Act 1973 referred to a person's sex as fixed at birth. However, the House of Lords held that that section 11 of the Matrimonial Causes Act 1973 was therefore incompatible with the petitioner's rights under article 12 and article 8 of the Convention as incorporated through the HRA 1998 in that it presented an obstacle to the right to marry and as such a violation of the right to Mrs Bellinger's realisation of her right to respect for her private life. The House of Lords made a declaration of incompatibility pursuant to section 4 of the HRA 1998.

If the position asserted by the Commission in its Interim Update is a correct interpretation of the law as it stands in the UK, whatever the legal provisions are upon which the Commission has drawn to lead to that result, they stand as an obstacle to the realisation by the individual Claimants and others in cognate positions, of their right to respect for their private life. Accordingly, those provisions are not compatible with article 8 and/or article 14. The Court will therefore be obliged to consider, pursuant to its duty under section 6 HRA 1998 to consider whether a section 3(1) interpretation is available. If it is not, the Court would be bound to find that regulation 20 of the Workplace Regulations 1992, and/or s.9(1) GRA 2004 were incompatible with article 8 read alone or together with article 14. It would be bound to disapply regulation 20 or make a declaration of incompatibility accordingly (unless they could be read down pursuant to section 3).

The Minister's comments about the scope and effect of the judgment in *For Women Scotland* made shortly after the judgment was handed down are referenced above. The

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Claimants invite the Minister to clarify her position as to the current status of the law, and its compatibility with UK's obligations under the Convention.

Proposed ground 4: unlawful consultation

We consider that the scope and premise of the consultation will necessarily be undermined by the Commission's own erroneous understanding of the law. The Commission will be consulting on the practical ramifications of an incorrect understanding of the law. It follows from its understanding of the law that it will not consult on, for example, what practical steps different service providers could feasibly take or anticipate taking to offer trans inclusive toilets that also meet the needs of cis women. Its own error of law precludes it from asking this vital question and many others.

Details of action the defendant is expected to take

The Commission is requested to withdraw its Interim Update immediately and to state publicly that the Interim Update is of no effect and its advice should not be followed.

ADR proposals

The Claimants are willing to consider any ADR proposals. The starting point must be removal of the Interim Update and a process for proper consultation in respect of accurate new guidance that fairly and lawfully caters for the needs of trans people.

Details of documents and information sought

The Claimants request the decision-making documents underlying this Interim Update, including any impact assessments, non-privileged legal analysis, human rights analysis and relevant correspondence with Commissioners.

The Claimants are of course particularly interested to understand in full the legal basis for the Interim Update and any independent legal advice upon which it was based.

The address for reply and service of documents

Correspondence in this matter should be sent by email to [redacted] copying [redacted] and [redacted].

Good Law Project
167-169 Great Portland Street
5th Floor
London
W1W 5PF
W: goodlawproject.org

Proposed reply date

In view of the urgency of the matter, including the risk that more employers will follow the instructions in the Interim Update and engage in unlawful conduct against trans employees, we seek a reply from the Commission and the Minister **by 4pm on 23 May 2025**. This urgency arises from the severe and widespread impact that this unlawful guidance is having. Further, given that the Commission considers that the legal position is "clear", has no intention of hearing any consultation responses on the legal implications of *For Women Scotland* and was able to issue the Interim Update within nine days of the Supreme Court's decision, we assume it will be well-placed to respond to this letter within seven days.

Yours faithfully,

Good Law Project

Good Law Project