

F/T: 0300 244 4000
E: scottish.ministers@gov.scot

Karen Adam MSP
Convener
Equalities, Human Rights and Civil Justice
Committee

By email: ehrcj.committee@parliament.scot

25 July 2025

Dear Convener,

You will be aware that on 20 May 2025 the Equality and Human Rights Commission (EHRC) launched a public consultation on updates to its Code of Practice for services, public functions and associations. I am writing to inform you that the Scottish Government formally responded to this consultation on 30 June 2025, and to provide you with a copy of this response.

In compiling this response, we have considered the impact of the Code of Practice on a cross-governmental basis, including from the perspective of the Scottish Government as an employer. While we did consider stakeholder feedback when considering the response, our response reflects the Scottish Government's view only.

We identified a number of cross-cutting impacts of the updated Code of Practice and consequently chose to focus our response on certain key themes. For this reason, we have not responded to the consultation on a question-by-question basis or made comments on specific drafting.

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

Consultation on EHRC code of practice for services, public functions and associations

Scottish Government response

The Scottish Government is committed to making Scotland a leader in equality and human rights: increasing fairness, tackling inequality, and removing societal and cultural disadvantages. We continue to take action to tackle persistent inequality and to advance equality of opportunity for everyone in Scotland, supporting those who are most disadvantaged and who face the greatest barriers to realising their rights. At a fundamental level, this includes embedding equality and human rights in everything that we do.

The Scottish Government accepts the Supreme Court Judgment of 16 April 2025, which ruled that the term “woman” in the Equality Act 2010 (“the 2010 Act”) means biological woman and are taking action to review existing policies, guidance and legislation which may be impacted by the judgment. At the same time, we consider that the application of equality law following the judgment, including the interpretation of the 2010 Act, must provide unequivocal protection to all those with protected characteristics. The Code of Practice for services, public functions and associations must provide clear guidance for those applying the law.

The rights of women and girls are at the heart of the Scottish Government’s vision for a fairer Scotland. We take seriously our obligations under international human rights treaties such as the UN Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). We continue to take forward work to protect, promote and improve gender equality, recognising intersectional inequality, in Scotland. This includes working to deliver and implement the ambitious recommendations from the First Minister’s National Advisory Council on Women and Girls (NACWG), as well as the Women’s Health Plan and our world-leading strategy to eradicate violence against women: Equally Safe. This summer, we will begin to develop an equality strategy for women and girls in partnership with the NACWG. The strategy will identify the gender equality goals that we will prioritise and enable us to reach beyond the baselines set by our international treaty obligations.

Equally, the Scottish Government is absolutely clear that trans men, trans women, and non-binary people are valued in our society. The number of trans men and women in Scotland is small (the 2022 Scottish census found that only 0.4% of the population of Scotland consider themselves to be trans or to have a trans history), and yet they have become the focus of disproportionate marginalisation and media attention, causing significant harm and distress to that community and its allies. Trans men and women have specific protections under the 2010 Act in terms of the protected characteristic of gender reassignment, and these and other rights must be upheld. The Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (IE SOGI), Mr Victor Madrigal-Borloz, visited the United Kingdom between 24 April to 5 May 2023. In his preliminary report [eom-statement-UK-IE-SOGI-2023-05-10.pdf \(ohchr.org\)](https://www.ohchr.org/en/press/media/doc/20230510), he raised concerns about increased “bias-motivated violence and hate speech directed at

LGBT persons”, and highlighted the “toxic nature” of ongoing public debate of these issues. In this regard, the Scottish Government continues to call for all discussions about these issues to be respectful.

The Equality Act 2010 provides key protections for women and girls and we must ensure that these are respected and maintained. An important tenet of these rights is the protection of single and separate sex services where these are a proportionate means of achieving a legitimate aim and single characteristic associations. At the same time, we must not lose sight of intersectionality and needs that may apply across protected characteristics, noting that the Scottish Government’s Equally Safe Strategy¹ for ending Violence Against Women and Girls outlined specific risk factors for transgender women and girls, including transphobic street harassment, hate crime, greater levels of social isolation, and over-representation within the sex industry.

We recognise the complexity involved in striking the necessary balance between these rights and protections, which is not an issue unique to the sex and gender space – all efforts to advance a more inclusive society require the balancing of rights, for example between those with protected characteristics related to religion and belief and to sexual orientation. We welcome the opportunity to respond to the consultation and encourage the EHRC to engage further with stakeholder groups in Scotland to gather their views.

In compiling our response, we have considered the impact of the Code of Practice on a cross-governmental basis, including from the perspective of the Scottish Government as an employer. While we have also reached out to stakeholders to understand their views, our response reflects the Scottish Government’s view only. We have encouraged all stakeholders, including public bodies in Scotland, to submit their own individual responses to the consultation to ensure that their views are fully expressed and considered in the drafting of the final Code of Practice.

In our response, we have chosen to focus on certain key themes and for this reason we have not responded to the consultation on a question-by-question basis or made comments on specific drafting. Where a point refers to a specific chapter and/or paragraph number this is provided.

Emphasis within the Code of Practice on exclusion as opposed to inclusion

We note that illustrative examples have been included throughout the Code of Practice to clarify how protections in relation to the protected characteristics of sex and gender reassignment in the 2010 Act may be balanced in particular situations. We welcome the addition of these examples and consider them to be useful in demonstrating how the guidance may apply in a practical setting.

We note that the approach taken to the illustrative examples in the updated Code of Practice has, in the most part, been to provide guidance on where and how transgender people can be excluded from services and associations.

¹ [Equally Safe strategy - Violence against women and girls \(VAWG\) - gov.scot](https://www.gov.scot/publications/equally-safe-strategy/pages/1.aspx)

The examples provided generally relate to situations where a service provider has a legitimate reason for providing a single or separate sex service. **In this context we consider it would be helpful for service providers to be guided on the need to be clear that they are providing a single sex service, the justification for doing so and how that will operate in practice, as well as the provision of information to trans people on relevant or equivalent services that are open to them.**

We also consider that it would be helpful to provide illustrative examples within the Code of Practice to provide guidance on how a service provider may lawfully implement an inclusive approach. This would be particularly helpful in situations where a service provider has identified a need that exists for both biological women and trans women, for example in relation to those who have experienced domestic abuse, homelessness or trafficking. Without this clarity, providers may simply stop offering any services to trans people due to concerns about legal risk.

We have been informed by stakeholders across civil society that, following the Supreme Court judgment, many transgender people have chosen to remove themselves from public life, fearing exclusion as a default. We believe that examples of inclusivity may alleviate some of these concerns and maintain the inclusive ethos of the 2010 Act.

Interaction with human rights

The Scottish Government is committed to securing all human rights, for everyone in Scottish society. In Scotland, the Scotland Act 1998 and the Human Rights Act 1998 require that Scottish legislation, the acts of Scottish Ministers, the actions of public authorities, and private bodies delivering public functions, all comply with the rights contained in the European Convention on Human Rights (ECHR). It is unlawful for Ministers and other public authorities, including the Scottish Parliament, to act incompatibly with these ECHR rights. In addition, the Scottish Ministerial Code reminds Ministers of their “overarching duty ... to comply with the law, including international law and treaty obligations”.

We note that these obligations may particularly arise in relation to decisions to create single and separate sex spaces whilst also respecting the human rights of those people who are or are assumed to be transgender, often solely as a result of their appearance.

In particular, we think it important to consider the human rights implications of situations where:

- a) People will be expected to produce a birth certificate, and in some cases additionally provide evidence that they do or do not hold a gender recognition certificate (GRC), to access services (change 2.2, paragraphs 2.2.1 – 2.2.10). And,
- b) Transgender people, or indeed people presumed to be transgender, may be excluded from services provided to their birth sex on a case-by-case basis – in effect, on the basis of their appearance (change 13.5, paragraphs 13.5.4 – 13.5.9).

In our view, any steps taken in relation to these areas, and potentially others, interacts with Article 8 (so far as it protects the right to private and family life) and Article 14 (prohibition of discrimination) of the ECHR, in particular. Any expectations being set for public bodies in this area must be compatible with human rights, otherwise they risk being guided towards unlawful actions.

We ask the EHRC to ensure that the Code of Practice supports public bodies to balance their obligations under the 2010 Act and their human rights obligations. We would like to understand more how the Commission intends to achieve this balance through the further development of the updated Code of Practice.

Impact of a Gender Recognition Certificate

The updates to the Code of Practice provide, following the Supreme Court judgment, that for the purposes of the Equality Act 2010, a Gender Recognition Certificate (GRC) does not change a person's legal sex. **While this is not the subject of the consultation, we note that it will be important for those applying the law to have clarity on the circumstances where a GRC does change a person's legal sex.**

Clarity regarding exceptions within a single-sex space

Paragraph 13.4.2-13.4.3 of the Code of Practice outlines exceptional situations in which someone whose legal sex does not match the separate or single-sex service that they intend or wish to use may still be allowed to access the service. We consider the guidance on these exceptional circumstances to be helpful. In this regard, **wider consideration and examples of the situations in which this may be permissible would be valuable**, for example a male child accompanying a mother in a domestic abuse refuge – noting that the Code of Practice identifies a male child as low risk to women.

Determination of sex and gender: practical implications

The Scottish Government understands that the updated Code of Practice cannot provide guidance on every scenario which may arise following the Supreme Court judgment, however public bodies have been clear about the need for the Code of Practice to be as clear and comprehensive as possible.

In addition to the points raised above in relation to human rights protections, there are a number of practical implications relating to the determination of a person's sex. In particular, we would ask for the Code of Practice to consider and provide additional guidance on the interaction with legislation relating to data protection and the provisions in and under the Gender Recognition Act 2004 which relate to the prohibition of onward disclosure of information, for example in relation to recording information about gender recognition certificates and applications for them. Further guidance and consideration could also be given to the situation of those who have a birth certificate or documentation from outside of the UK or who may not have documentation such as a birth certificate at all. At the same time, we note that Paragraphs 2.2.3 and 2.2.6 mention different tests for having a good reason to make

requests about a person's birth sex/certificate: "necessary and proportionate" in 2.2.3 and "reasonable and necessary" in 2.2.6. It would be helpful to have clarity on the appropriate test and when it will be appropriate to ask a person for a birth certificate.

We also note that when a person born in Scotland obtains a GRC, an entry is made in the Gender Recognition Register in line with schedule 3 of the Gender Recognition Act 2004. This generates an extract (certificate) with the information in the 'sex' space changed from the sex at birth to the acquired gender on their GRC. Individuals may have extracts (certificates) from both the birth register and the Gender Recognition Register. Both documents will look the same but show different sexes. Therefore, asking for a birth certificate will not always confirm sex at birth.

We note that the impact of the guidance may lead to situations where some members of the public will take it upon themselves to judge appearances and assume someone's sex based on their perception of that person's sex or gender identity. This sense of distrust in others and social policing of bodies is detrimental not only for trans and non-binary people, but for those who are born male or female who may not fit into society's current expectations of what a man or woman looks like, which change over time, and in different contexts and places.

The example provided in the consultation at 2.2.7 seems to encourage service providers to adopt this attitude when considering whether someone can access a service. Encouraging a situation where authority is given to question someone's biological sex and ask for proof thereof may lead to abuse if not done appropriately. At the same time this places an undue burden on individuals, requiring untrained staff / providers to make assumptions or judgments about whether a person appears to present as trans, which is potentially discriminatory and unfair. We would ask the EHRC to consider the impact of this on public authorities' obligations under the Public Sector Equality Duty to foster good relations between people who share a protected characteristic and those who do not, and the related impact on community cohesion. In this regard, it may be helpful to promote the use of EQIAs, including within the private sector, when developing a policy where there is a need to balance different rights.

A similar question is raised by the example provided in para 13.5.6 and the exclusion of trans people from a separate or single-sex service on the grounds that it may prevent alarm or distress for other service users. This example suggests that this will in part depend on the extent to which the trans person presents as the opposite sex.

In this context we are mindful of the three requirements of the Public Sector Equality Duty and that, in addition to the requirement to eliminate unlawful discrimination, public bodies are required to **advance equality of opportunity** between people who share a protected characteristic and those who don't and foster or **encourage good relations** between people who share a protected characteristic and those who don't.

The Scottish Government does not want to see unnecessary barriers for anyone in society, and we would ask the EHRC to consider how advice can be

given through the updated Code of Practice to ensure that the guidance does not inadvertently undermine the public sector equality duty requirement to foster good relations.

Interaction with other codes of practice and legislation

While the code of practice relates to services, public functions and associations (Parts 3 and 7 of the Equality Act 2010) and there is a separate code relating to employment (Part 5), **it would be helpful to understand whether this code should be applied by employers to workplace facilities and similarly the relationship between these two guidance documents.** It would also be helpful to understand EHRC guidance on how the definition of legal sex should be read across to other pieces of workplace related legislation, particularly the definition of “men” and “women” in the Workplace (Health, Safety and Welfare) Regulations 1992 and the applicability of the judgment to any claims under Part 5 of the Equality Act. Whilst the amendment to the EHRC’s interim update provided on 24 June does clarify what the Workplace Regulations say about single occupancy lockable spaces, it does not explicitly clarify the EHRC’s view as to how the definition of “men” and “women” in the regulations should be interpreted.

Intersex People

We note that in her session before the Women and Equalities Committee on 11 June 2025, Baroness Falkner confirmed that intersex people (we acknowledge that other terms are used here) had not been considered in the development of this Code of Practice. **We recognise that having variations in sex characteristics is not a protected characteristic, but we believe that consideration of the needs and life experiences of intersex people is essential,** and we have already received feedback from intersex individuals who have been wrongly ‘assessed’ by others to be transgender and have been excluded from services on this basis, which may constitute direct discrimination by perception.

Conclusion

The Scottish Government represents all people of Scotland. We recognise and protect the intrinsic value of all people and are a society founded on fairness, dignity, equality and respect, where people’s rights are upheld and no-one experiences discrimination. At the same time, we recognise and accept the Supreme Court Judgment of 16 April 2025 and understand the importance of a clear and accurate updated Code of Practice which takes this judgment into account and guides those implementing and applying the law.

We believe it is imperative, for the inclusion and rights of all people, for this Code of Practice to be carefully thought through and complete; and for it to be informed as much as possible by engagement with people with lived experience of accessing services as described in the Code.

As such, we ask the EHRC to consider the provision of:

- Illustrative examples within the Code of Practice to provide guidance on how a service provider may lawfully implement an inclusive approach.
- Assurance that the Code of Practice will support public bodies to balance their obligations under the 2010 Act and their human rights obligations.
- Clarification of the circumstances in which a GRC will change a person's legal sex.
- Wider consideration of when persons of the opposite sex may use a single-sex space.
- Assurance that the guidance does not inadvertently undermine the public sector equality duty requirement to foster good relations.
- Clarification of whether this code should be applied by employers to workplace facilities, the relationship between this Code and the Employer Code of Practice, and the read across to other related workplace legislation.
- Consideration of the potential impacts of the Code of Practice on intersex people.

We would appreciate consideration of the points we have raised above and would welcome further engagement as the process continues.

30 June 2025