Engender Parliamentary Briefing for the Scottish Parliament Equalities, Human Rights and Civil Justice Committee's Inquiry into the EHRC revised Code implementation

November 2026

BACKGROUND

Engender is a leading feminist policy and advocacy organisation working to secure women's social, political and economic equality and realise women's rights in Scotland. We aim to make visible the impact of structural inequalities on women and wider society, and work at Scottish, UK and international levels to produce research, analysis and recommendations for intersectional feminist legislation and policy.

We have prepared this briefing for the Equalities, Human Rights and Civil Justice Committee to inform its scrutiny of the implementation of the Equality and Human Rights Commission's (EHRC) revised Code of Practice for Services, Public Functions and Associations 2026 (the Code).[1] Specifically, we have outlined our concerns about the revised Code's potential negative impacts on women's lives and how the changes limit our ability to effectively progress equality and human rights in Scotland. In doing so, we also recognise there are extensive concerns in other areas that we do not directly work on.

OUR RESPONSE

We have outlined five key areas of concern to the Committee on the revised Code and its implementation:

1. **The revised Code's interaction with international human rights standards on harmful gender stereotypes and the right to privacy.**
2. **The lack of clarity and detailed guidance on key areas, resulting in legal risk for organisations and pressure on resources.**
3. **The potential chilling effect on equality efforts.**

[1] Supreme Court Judgment. For Women Scotland Ltd v The Scottish Ministers. 16th April 2025. Available at: https://www.supremecourt.uk/uploads/uksc_2024_0042_judgment_updated_16f5d72e76.pdf

4. **The disproportionate emphasis on trans exclusion.**
5. **Apparent disconnect with the aims of the Public Sector Equality Duty (PSED).**

SPECIFIC CONSIDERATIONS

1. Interaction with international human rights standards

CEDAW: Gender Stereotypes

As we stated in our oral evidence to the Committee on September 17th 2026, the CEDAW Committee has made clear that women require protection from discrimination on the grounds of both their biological differences from men and the unequal impacts they experience due to *socially constructed conceptions of gender*. Full implementation of the Convention requires the UK to eliminate direct and indirect discrimination and improve the de facto position of women. They must also engage in the elimination of gender stereotyping as a root cause and consequence of discrimination against women.[2]

Such roles shape social norms and behaviours and determine women's access to social and economic power and resources through processes of gender stereotyping. Harmful gender stereotyping has been recognised as a pervasive human rights violation, a key driver of discrimination against women and the full range of gendered human rights violations.[3]

The CEDAW Committee's most recent General Recommendation 41 on 'Dismantling Gender Stereotypes, Prejudices, and Stigma and the Unequal Power Relations that Sustain them' was published on October 23rd 2026.[4] This further details how such *"stereotypes are ingrained in direct, indirect and structural forms of discrimination that affect the enjoyment of women's and girls' rights under the Convention, thus permeating every aspect of their lives."*

It also makes clear that tackling gender stereotypes and assumptions that dictate narrow, binary gender roles, dictating what it means to be masculine or feminine, is not only fundamental to tackling sexism and misogyny, but is also critical in

[2] CEDAW GR 25 para 7: https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf
[3] Cusack, S. Gender Stereotyping as a human rights violation. OHCHR 2013. Available at: M01_S09_Cusack.pdf
[4] CEDAW GR 41: https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedawcgc41-cedaw-general-recommendation-no-41

guarding against homophobia, transphobia, protecting intersex people and conceptions of masculinity that harm men.[5]

We are concerned that the code relies heavily on the process of gender stereotyping in implementation in relation to single sex services or associations.

The updated Code (sections 13.168 – 13.169) specifically lists evidence of concern that members of the opposite sex are trying to access a single- or separate-sex service or association, including:

> *"the **individual's physique or physical appearance**, behaviour or concerns raised by other service users. However, service providers, those performing public functions and associations must keep in mind that it is not always possible to be sure of a person's sex from their appearance."*

Although it clarifies that sex cannot always be confirmed by appearance, this acknowledgement demonstrates the EHRC's awareness that the Code's interpretation of the Supreme Court decision could lead to gender stereotyping based on appearance by members of the public.

The Code then states:

> *"Whether it is legitimate to approach any particular individual to make enquiries about their sex will be **a sensitive question that will depend on all the circumstances.** Factors that may be relevant include: the strength of the grounds for concern, whether concerns have been raised by other service users, the nature of the service or facility in question, whether there is any particular history or other evidence of improper access being a problem."*

The risks of this approach are explicitly recognised in the equality impact assessment undertaken by the UK Government: "Women who are considered masculine may face greater scrutiny about their sex as a result of the changes."[6]

The UK Government's EIA also points to the fact that the impact on cultural and social expectations of femininity was not explored in the EHRC's own equality impact assessment on the revised Code of Practice.

In our view, the approach set out by the EHRC risks perpetuating harmful gendered stereotypes and expectations about women's, including trans

[5] CEDAW GR 41 para 20: https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedawcgc41-cedaw-general-recommendation-no-41

[6] https://www.gov.uk/government/publications/equality-act-2010-code-of-practice-for-services-public-functions-and-associations-2026/equality-impact-assessment#introduction

women's, appearances based on preconceptions of femininity. Cases have already been reported, resulting in harassment and distress for individuals.[7] In addition to the obvious harms to trans women, this approach risks harms to other marginalised women with multiple protected characteristics. For example, cisgender women:

- whose bodies do not conform to stereotypical feminine norms due to illness, disability, disfigurement or genetic makeup.
- with conditions or disabilities that increase facial hair growth or cause hair loss, such as Polycystic Ovary Syndrome (PCOS), alopecia or cancer treatment,
- lesbian and bisexual women who do not conform to traditional notions of feminine gender expression,
- women of colour who are subject to higher degrees of 'policing' of their dress or appearance due to the intersecting racism they experience,
- women who cover their hair or face or wear wigs for religious reasons or cultural expression.

Section 13.147 of the Code outlines that:

> *"A legitimate aim for excluding a trans person from a separate or single-sex service for their own sex might be to prevent discomfort or distress for other service users. Service providers should consider whether other service users* ***could reasonably object because they are worried about sharing a single or separate-sex service with someone who appears to be of the opposite sex.*** *That will depend on all the circumstances, including the nature of the service in question and* ***the extent to which the trans person presents as the opposite sex.*** *For this reason, a service provider (including a person providing a service in the exercise of public functions) should only consider doing this on a case-by-case basis."*

This direction creates a potentially dangerous precedent, with implications for other equalities groups, including racialised groups, and scope for increased discriminatory complaints. More clarity is needed to guide organisations on what constitutes a reasonable objection in this context to avoid risking an increase in discrimination and broader impacts**.**

[7] https://metro.co.uk/2022/05/19/woman-barred-from-ms-toilets-by-worker-who-mistook-her-for-a-man-16675654/; https://www.msn.com/en-gb/news/other/woman-with-alopecia-in-tears-after-worker-accused-her-of-being-male-in-tesco-toilets/ar-AA2h0XsF ; https://transactual.org.uk/wp-content/uploads/It-Happens-Every-Time-TransActual-2026.pdf

In addition, whilst the Equality Act does not provide explicit protections from discrimination for non-binary or intersex people, the EHRC nevertheless holds a responsibility to promote their human rights. In the case of intersex adults, there is also an increased risk that their gender identity in adulthood does not align with the sex they were assigned at birth.[89]

The Right to Privacy

We share the concerns of various organisations across the UK regarding the apparent risk the revised Code poses to the exercise of the right to privacy in the UK. Article 8 of the UK's Human Rights Act (1998) protects the right to private and family life.

The European Court of Human Rights (ECtHR) has found in AP, Garcon and Nicot v France that *"The right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals."*[10]

In sections 13.161 – 13.162, which focus on requesting information about an individual's sex at birth, the risk of violating Article 8 when implementing the Code is explicitly recognised by the EHRC:

> *"13.161 Personal data includes information about a person's sex which* ***may also be protected under Article 8*** *of the European Convention on Human Rights (ECHR). In particular, it is important to be aware that some people,* ***including some trans or gender non-conforming people, may wish to keep such information private as far as possible and may find it distressing to be asked about their sex****.*
>
> *13.162 To comply with Article 8 of the ECHR,* ***a service provider must be able to objectively justify asking an individual about their sex.*** *A request for information about sex should only be made where it is a proportionate means of achieving a legitimate aim. Furthermore,* ***a request for information about sex which is not a proportionate means of achieving***

[8] UN Committee on the Elimination of Discrimination Against Women (1992) General Recommendation No. 19: Violence against women. Available at: https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm

[9] Council of Europe (2011) Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic abuse. Available at: https://rm.coe.int/ic-and-explanatory-report/16808d24c6

[10] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172913%22]}

***a legitimate aim could also amount to unlawful indirect gender reassignment discrimination.*"**[11]

Despite acknowledging potential harm to individuals, and the need to apply proportionality and the legal risks of asking for proof of sex, the Code lacks critical detail on how to practically balance these considerations and how such requests should be managed in line with individuals' rights to privacy.

We share the concern of Amnesty International that ultimately, asking for a person's sex at birth could engage Article 8, whether this was done "sensitively" or not and puts organisations at risk of breaching the Human Rights Act.

2. Lack of clarity and legal risk for organisations

In our view, the process outlined in the Code on how and when to confirm a person's sex at birth lacks clear direction for organisations. The Code acknowledges that there is: *"no type of official record or document in the UK which provides reliable evidence of sex"* (section 13.179) and recommends that organisations *"seek specific legal advice"* when making these types of requests (section 13.164).

Organisations therefore lack clarity on how they:

- Adhere to the legal requirements of this code by imposing the exclusions it appears to mandate.
- And, effectively impose those exclusions without violating the individual's right to privacy, thus creating legal risk for those implementing the guidance as currently set out.

Given the tenor of public debate on this issue, combined with the breadth of contexts in which these requests could be made and the scope for harm to individuals, including young people accessing single sex provision in line with their gender identity, it is incumbent upon the EHRC to provide clear practical direction.

As things stand, service providers and associations, many of whom are small organisations, are being left in a legally precarious situation, reliant on the strength of individual legal advice that is financially burdensome.

Hundreds of organisations and employers have already raised concern that the new code is 'unworkable.' Over 650 firms wrote directly to the UK Government at the time of the EHRC consultation, warning that the guidance "would tell organisations that we must adopt practices that are incompatible with modern

[11] https://www.equalityhumanrights.com/sites/default/files/2026/EHRC_Code_of_practice_for_services_public_functions_and_associations.pdf

business values, create unworkable operational challenges, and cause significant economic harm."[12]

Since the new Code was finalised by the EHRC, over 170 MPs backed an Early Day Motion against the EHRC's guidance[13] and the Trade Unions Congress passed a motion at their 2026 national congress recognising the revised code as "discriminatory and unworkable."[14]

3. A chilling effect on equality efforts

Confusion and concern over potential legal action in relation to the Code have already contributed to an emerging chilling effect on action to combat gender inequality and progress women's rights. When faced with uncertainty and time pressure, organisations will likely seek the most straightforward and least 'risky' solution. We are concerned that this is already having unintended consequences for the mechanisms necessary to secure equality.

An example of this was evident following the recent Scottish Parliament elections, where a long-standing equality monitoring mechanism, which collects data on the protected characteristics of MSPs, was temporarily withdrawn due to apparent conflicting interpretations of the Supreme Court ruling. Since it was reinstated in June 2026 only 68 MSPs have recorded their sex and none have recorded trans status. This kind for data collection is critical to effective gender equality measures. Clear direction on how to respect individual's rights is therefore needed from EHRC to ensure confidence in such measures is maintained.[15]

We are also concerned that the lack of clarity, scope for legal risk and resource implications of how to effectively implement this Code could create an inadvertent disincentive against the provision of single-sex services and amenities and groups.

The UK Supreme Court made clear that its judgment should not be used to define the category of a "woman" for broader purposes, beyond the definition of 'sex' in the Equality Act 2010. Now that the Code of Practice has been published, it is vital that the limits and parameters of its purpose are made explicitly clear by EHRC to limit the scope for harmful impacts or misinterpretation in implementation.

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[12] https://www.independent.co.uk/news/uk/politics/supreme-court-trans-single-sex-spaces-b2826924.html

[13] https://edm.parliament.uk/early-day-motion/65938/draft-code-of-practice-on-services-public-functions-and-associations

[14] https://congress.tuc.org.uk/motion-17-oppose-the-ehrc-code-of-practice-services-public-functions-and-associations/#sthash.SLA12umg.dpbs

[15] https://www.thenational.scot/news/26252508.holyrood-gender-survey-sex-website-row-msps-row/ https://www.bbc.co.uk/news/articles/c332x6j51y6o

4. Disproportionate emphasis on trans exclusion

We understand that the Code should provide guidance on instances where trans people can be lawfully excluded from accessing a service, public function, or association. However, it is also vital that the Code outlines how duty bearers can effectively meet the needs and fulfil the rights of trans people through inclusive mechanisms and suitable alternative provisions.

The revised Code lacks clear direction on how to lawfully include or provide for trans people within service provision, and little guidance is given on how organisations can operate trans-inclusively.

The Code implies that service providers and organisations have a duty to exclude trans people from all single-sex services and spaces, rather than the option to do so where this is deemed proportionate to achieve a legitimate aim. Concerns have been raised publicly, including by senior legal figures, that this constitutes a misreading and overreach of the Supreme Court judgment. This includes former Supreme Court judge, Lord Sumption, who asserted that: *"It's quite important to note that you are allowed to exclude trans women from these facilities. But you are not obliged to do it."* [16]

United Nations human rights experts have warned that overreach in the interpretation of the Supreme Court judgment should be avoided and must not lead to the unnecessary exclusion of trans people and violations of their rights[17]

The Council of Europe also raised significant concerns about the updated code of practice[18] The Council's Commissioner for Human Rights wrote to the UK Government and Parliament to warn against measures that could exclude trans people from many areas of life.

5. Coherence and compliance with the Public Sector Equality Duty

As we have already detailed, we remain deeply concerned about the potential increase in the 'policing' of individuals based on their appearance and gender expression that the proposed changes to the Code appear to endorse. This carries potential risks for community cohesion, well-being, and freedom of association.

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[16] The Independent (2025) Former top judge says we've 'misunderstood' Supreme Court ruling. Available at: https://www.independent.co.uk/news/uk/politics/lord-sumption-trans-biolgical-woman-supreme-court-b2735828.html

[17] United Nations experts (2025) UN experts warn of legal uncertainty and rights implications following UK Supreme Court ruling. Available at: https://www.ohchr.org/en/press-releases/2025/05/un-experts-warn-legal-uncertainty-and-rights-implications-following-uk#:~:text=While%20the%20ruling%20was%20limited,aspects%20of%20life%2C%20including%20education

[18] https://www.coe.int/en/web/commissioner/-/united-kingdom-commissioner-addresses-human-rights-issues-in-policing-of-protests-and-the-situation-of-trans-people

In our view, the lack of clarity in the EHRC's guidance runs contrary to its obligations under the Public Sector Equality Duty to: "foster good relations between people who share a protected characteristic and those who do not."[19]

The equality impact assessment by the UK Government on the revised Code of Practice[20] identified significant risks to PSED compliance. In relation to the protected characteristics of sex and gender reassignment:

> *"The changes to the Code will still mean many organisations/organisers have difficult, finely balanced decisions to make to determine the appropriate provision of events and services for users depending on their sex and whether they possess the protected characteristic of gender reassignment.*
>
> *In making these decisions, it is likely that some service users will more starkly see their needs balanced against those with other protected characteristics, and* ***this has the potential to create animosity and division between these groups****."*

In relation to the protected characteristics of disability and gender reassignment:

> *"the additional content in relation to the gender reassignment section amended following the FWS ruling,* ***concerning the potential need for trans people to use disabled toilets as 'third space' facilities, may not foster good relations between groups****."*

Many organisations subject to this guidance will likely struggle to offer dignified alternative options for trans people due to resources, lack of funding, physical infrastructure, and vital services.

CONCLUSION

Implementation of the revised EHRC Code of Practice raises significant concerns about regression on equality protections and alignment with international human rights standards, particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The revised Code specifically risks reinforcing harmful gender stereotypes.

Implementation of the Code appears to heavily rely on subjective assessments of gender expression to determine access to services. This will disproportionately impact trans, intersex and non-binary people but also marginalised cis women with multiple protected characteristics. This includes cis women whose bodies do not conform to stereotypical gender norms due to illness, disability or genetic

[19] https://www.equalityhumanrights.com/guidance/public-sector-equality-duty-psed
[20] https://www.gov.uk/government/publications/equality-act-2010-code-of-practice-for-services-public-functions-and-associations-2026/equality-impact-assessment#introduction

makeup and women of colour who face heightened policing of their appearance due to racism.

The Code also places disproportionate emphasis on excluding trans people from services whilst providing inadequate guidance on inclusion and proportionate provision of alternatives.

The Code lacks detail and clarity several key areas. This makes it difficult for organisations to implement their duties under the Equality Act 2010 with confidence. The apparent contradictions regarding when it is "necessary and proportionate" to ask about an individual's sex recorded at birth, combined with insufficient guidance on balancing rights across protected characteristics, expose service providers to significant legal risk.

Widespread uncertainty on how to implement these changes has already contributed to a chilling effect on equality efforts. Work that focuses on women and on addressing gender inequality will continue to face barriers if organisations feel there are legal risks. As the UK's National Human Rights Institution, the EHRC has a responsibility to uphold equality and human rights protections for all groups and ensure its guidance promotes dignity, respect and fairness.

FOR FURTHER INFORMATION

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ABOUT US

Engender is Scotland’s feminist policy and advocacy organisation, working to increase women’s social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.