Equalities, Human Rights and Civil Justice Committee

Implementation of the EHRC revised code of practice for services, public functions and associations

Submission from MurrayBlackburnMackenzie

Introduction

We are grateful for the invitation from the Committee to provide evidence on implementation of the EHRC Code of practice for services, public functions and associations (CoP) and its impact on people's lives.

It is over eighteen months since the UK Supreme Court (UKSC) ruling in For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16 clarified that the protected characteristic of sex under the Equality Act 2010 refers to biological sex.[1] The ruling itself is exceptionally clear.

The UKSC ruling dealt only with the effect of a Gender Recognition Certificate (GRC) under the Equality Act 2010. The effective outcome of a judgment of the Inner House of the Court of Session in 2022, that was binding in Scotland and not appealed (For Women Scotland Ltd v The Lord Advocate and the Scottish Ministers [2022] CSIH 4 (hereafter FWS1)), was that having the characteristic of 'gender reassignment' does not of itself change a person's sex for the purposes of the Equality Act. In consequence, the UKSC judgment (at para. 26) took this as its starting point, with both parties agreeing that the only point left to resolve in respect of the Equality Act was the effect of a GRC on the meaning of the protected characteristic of 'sex'.

Following a lengthy delay by the UK Government, the updated CoP came into force on 5 August 2026. Its purpose is to assist duty-bearers in implementing the Equality Act. Its status, however, is widely misunderstood. As para. 1.6 of the 2026 CoP explains, the CoP does not of itself impose legal obligations.[2]

Status of EHRC Codes of Practice

Under s14(1) and (2) of the Equality Act 2006 the EHRC is empowered, *but not obliged*, to issue a code of practice in connection with any matter addressed by the Equality Act 2010, in order to ensure or facilitate compliance with the Act or an enactment made under that Act, or to promote equality of opportunity.

Codes must be approved by the Minister and laid before the UK Parliament before they can be issued. They are generally referred to as statutory codes.

Under s15(4) of the 2006 Act, 'A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code— (a) shall be admissible in evidence in criminal or civil proceedings, and (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.'[3]

[1] For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16
[2] EHRC Code of practice for services, public functions and associations August 2026
[3] Equality Act 2006 Section 15

For this reason, paragraph 1.6 of the CoP states (emphasis added):

'**The Code does not impose legal obligations. Nor is it an authoritative statement of the law**: only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Courts and tribunals must consider any part of the Code that appears relevant to any questions arising in such proceedings.'

In our view, the key issues for the Committee's inquiry are the wider context of misinformation and/or misunderstanding about the law and the role of the Code, failures of due diligence by public bodies, and a lack of leadership by the Scottish Government. Taken together, these factors have impacted negatively on women and girls, and those with the protected characteristic of gender reassignment.

Key impacts

1. For over a decade policies based on the erroneous belief that the Equality Act 2010 provided for, indeed often compelled,[4] gender self-identification have disadvantaged women and girls in Scotland, and throughout the UK. Such policies have seen violent men housed in women's prisons and hostels, men given access to female changing rooms and placed on women's hospital wards, the loss of single-sex services for survivors of violence against women and girls (VAWG), and men occupying positions and receiving awards or prizes nominally reserved for women, based on an assertion of self-declared gender identity.
2. The UKSC conclusively rejected this interpretation in April 2025. The delayed responses of the Scottish and UK Governments to the ruling have prolonged, and continue to prolong, the type of disadvantage described above. Throughout the UK women continue to bring court cases pertaining to the correct definition of sex under the 2010 Act and their freedom to talk about the relevance of this. These cases carry significant personal and financial costs.
3. We also recognise that this situation has affected people with the protected characteristic of gender reassignment. As Lord Hodge, the Supreme Court judge who delivered the joint UKSC ruling, commented in September 2025: 'People had been led to believe by public authorities, among others, for the last 15 years that they had rights which they didn't have'.[5]

A legacy of legal misinterpretation, misinformation, and activism

4. In our view, the erroneous interpretation of the Equality Act was advanced by trans activist and advocacy groups, lent apparent authority by the 2011 CoP, and adopted by public bodies without adequate scrutiny, sometimes in consequence of working directly with activists.[6]
5. As documented by the charity Sex Matters, a small number of statements in the 2011 CoP, inserted after the formal consultation, reflecting discussions with 'transsexual stakeholder groups',[7] lent authority to the ill-founded idea that the Equality Act 2010 gave trans-identified people the right to use opposite-sex facilities and services.[8]

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[4] EHRC concludes regulatory action on single-sex space policies 19 February 2026
[5] The Times Lord Hodge: Supreme Court had a duty to rule on gender 12 September 2025
[6] Former Scottish Trans manager James Morton uses the terms 'activism' and 'activists' to describe the formation and work of the Scottish Transgender Alliance. See 'A Scottish History of Trans Equality Activism' in Christine Burns (ed.) Trans Britain: Our Journey from the Shadows (2018) pp. 208-220
[7] EHRC The Equality Act Codes of Practice post consultation report page 11
[8] See further: Sex Matters The Equality Act: 15 years old today! 8 April 2025

6. In 2012 the Scottish Transgender Alliance (now Scottish Trans) and Stonewall published guidance that advised employers to 'Show unequivocal support for a trans employee's **right** to use the toilet facilities of the gender in which they are working' (emphasis added).[9]
7. This asserted right was not supported by the GB-wide Workplace (Health, Safety and Welfare) Regulations 1992, regs 20 (sanitary conveniences) and 24 (changing facilities), which provide for single-sex facilities. A separate EHRC Employment Statutory Code of Practice (also 2011) contained no comparable claims to those inserted in 2011 into the Code of practice for services, public functions and associations. Further, like the 2026 CoP (para. 1.6, quoted above), the 2011 CoP stated in para. 1.5 that it did 'not impose legal obligations'.
8. In 2018 James Morton, then Scottish Trans manager, explained in a chapter on the history of trans equality activism – under the sub-heading '*Ensuring gender identity self-declaration works well in single-sex services*' – how the charity had worked to persuade the Scottish Prison Service and other public services to adopt policies on that basis, an approach the chapter describes as a strategy.[10]

   > '… We strategised that by working intensively with the Scottish Prison Service to support them to include trans women as women on a self-declaration basis within very challenging circumstances, we would be able to ensure that all other public services should be able to do likewise… The learning from our prison work has made it much easier for us to assist other Scottish public services, such as NHS wards and schools, to also respect trans people's gender identities… the Scottish Transgender Alliance could see how necessary it was to have strong alliances with feminist and violence against women organisations… All Scottish government-funded violence against women services are now trans inclusive and trans activists campaign together with feminist activists on a wide range of gender equality issues.'

9. Correspondence to this Committee from the Equality Network/Scottish Trans in 2025 (prior to the UKSC ruling) shows it having 'provided advice relating to our expertise around trans equality, human rights and inclusion' to a wide range of public bodies, including local authorities, criminal justice agencies, and Scottish Ministers.[11]

Failure of due diligence

10. Public bodies, including those with dedicated legal departments, accepted that the 2010 Act provided for gender self-identification and adopted policies on these terms,[12] apparently without assessing that interpretation against the actual content of the Act. In some cases, public bodies allowed advocacy groups to co-author policies.[13]
11. Within the third sector, many charities set up specifically to benefit and advocate for women extended their reach to include men who identify as women.[14] At the time of writing, The Young Women's Movement website still states, 'Self-identifying young women, girls and non-binary people who recognise themselves within this movement are at the

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[9] Scottish Trans/Stonewall Changing for the Better: How to include trans people in your workplace 2012
[10] Morton, n 6 above, pp. 215-216
[11] Equality Network/Scottish Trans Correspondence to Equalities, Human Rights and Civil Justice Committee 20 March 2025
[12] For example, Police Scotland 2019 Transitioning at Work, Scottish Prison Service 2014 Gender Recognition and Gender Reassignment Policy. See also n 4.
[13] NHS Forth Valley Supporting Transgender Staff in the Workplace (2021) lists James Morton (Scottish Transgender Alliance) and Jay Jackson (Stonewall Scotland) as contributing authors. According to Cowan et al. (2020), James Morton 'was tasked with writing a first draft outline' of the SPS 2014 transgender prisoner policy. See: 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' [sic] Scottish Affairs pre-print submission, February 2020, page 17
[14] MurrayBlackburnMackenzie Losing focus: Women's charities and the UK Supreme Court ruling 16 April 2026

heart of everything we do.' The Women's Rape and Sexual Abuse Centre Dundee and Angus website states, 'we welcome and support women, including trans women'.[15]

Missed opportunity: FWS1

12. In FWS1 (February 2022) the Inner House of the Court of Session ruled that the definition of 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 (GRPB Act) was outside the legislative competence of the Scottish Parliament. This was because it departed from the Equality Act protected characteristic of 'sex', by reference to the separate protected characteristic of gender reassignment. In doing so, the definition excluded women who identified as men and included men who identified as women. The judgment stated:

    '36. … a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose a man is a male of any age; and a woman is a female of any age… Provisions in favour of women, in this context, by definition exclude those who are biologically male…'[16]

13. The FWS1 judgment was binding in Scotland and not appealed. The GRPB Act was amended in 2024 to remove its separate definition of 'woman', to meet the terms of the judgment.[17]
14. The judgment was silent on the effect of a GRC on the protected characteristic of sex. The Scottish Government relied on this when it revised the statutory guidance under the 2018 Act in April 2022. It removed references to the definition of 'woman' based on self-declaration, as the ruling against it required, but replaced those with references to GRC-holders; this was the subject of the second FWS challenge.
15. Non-statutory guidance published by the EHRC in April 2022 took a similar approach, stating 'A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act'.[18]
16. Regardless of the continuing argument over the status of the small number of people with a GRC, FWS1 should have drawn a line under gender self-identification in Scotland and prompted wide-ranging policy revisions throughout government and beyond. Yet in March 2022, two weeks after FWS1, the then Cabinet Secretary told Parliament that 'trans people do not need to have legal gender recognition or a certificate in order to access facilities that align with their gender. Those are protections that trans people and everyone else have under the Equality Act 2010'.[19]
17. Had government and organisations taken remedial steps at this stage, this would have curbed the ongoing detriments to women outlined above and might well have lessened the provocative, anxiety-inducing, and hostile reaction to the UKSC ruling detailed below.

Response to the ruling and work of the Commission

18. Set against a backdrop of misinformation and misunderstanding, the reaction to the UKSC ruling and work of the Commission has been variously hostile and provocative. On at least one occasion, it has involved criminal damage (see para. 22).

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[15] See: The Young Women's Movement and The Women's Rape & Sexual Abuse Centre Dundee and Angus LGBTI survivors. For charitable objects see OSCR entries: YWCA Scotland and Women's Rape and Sexual Abuse Centre Dundee and Angus. For public funding see Inspiring Scotland (YWCA) and Rape Crisis centre funding from 2014-2024: FOI release (WRASAC). Accessed 4 November 2026

[16] For Women Scotland Ltd v The Lord Advocate and the Scottish Ministers [2022] CSIH 4, 18 February 2022. For definition of 'woman' in 2018 Act as enacted see Section 2 and Explanatory Notes

[17] UK Legislation Gender Representation on Public Boards (Amendment) (Scotland) Act 2024

[18] EHRC Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions April 2022

[19] Scottish Parliament Meeting of the Parliament Official Report 3 March 2022 col. 75

19. In response to the ruling, the Equality Network stated, 'The Court appear to have prioritised a nit-picking approach to their interpretation of the exact wording of the legislation, over what was the clear intention of Government and Parliament in passing it'.[20] On 18 April 2025 The Guardian reported comments from former senior UK civil servant Melanie Field that the UKSC ruling was a 'very significant change of interpretation from the basis on which the legislation was drafted and considered by parliament'.[21]
20. However, as University of Edinburgh Lecturer in Law Scott Wortley, an academic specialist in statutory interpretation, has set out, what was in the mind of individuals involved in the law-making process, in whatever capacity, and what they may believe individual MPs intended at the time, are 'legally irrelevant' to the interpretation of a statute.[22]
21. On 25 April 2025, the EHRC published an interim update on the practical implications of the UKSC judgment. A statement by campaign group TransActual described it as 'an appalling, bigoted attempt to segregate trans people in public spaces', underpinned by 'two inherently fascist principles'.[23] In a legal challenge to the interim guidance brought by three individuals, Mr Justice Swift found that the information in the interim update was lawful and that the decision to publish, in itself, contained 'no error of law' (para. 87).[24]
22. In October 2025 protest group Bash Back claimed responsibility for smashing windows in the EHRC building in London and spraying paint on it, in retaliation for the interim update.[25] On 9 June 2026 the EHRC Chair told the House of Commons Women and Equalities Committee 'We have had to move from our premises near Vauxhall to other premises because of a vandalism attack on the building by a group that had also vandalised conferences and Wes Streeting's office'.[26]
23. On 19 June 2026, Lady Ross held that Scots law, read with the 2010 Act, requires prisons to separate men and women by biological sex, that Article 8 of the European Convention on Human Rights gives prisoners who identify as the opposite sex no right to be accommodated in a prison for that sex, and that Articles 2 and 3 impose no general obligation to do so.[27] Yet six days later the City of Edinburgh Council agreed 'to condemn the new guidance from the EHRC as discriminatory against trans people, unworkable and potentially incompatible with the European Convention on Human Rights'.[28] Scottish Trans encouraged support for it.[29]

Scottish Government failure of leadership

24. Rather than provide clear direction and take steps to actively de-escalate tensions, following the UKSC ruling the Scottish Government used waiting for publication of the CoP as grounds for not immediately remedying its non-compliant policies, thereby setting a precedent for other public bodies and organisations to do the same.

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[20] Equality Network UK Supreme Court rolls back trans rights 16 April 2025
[21] The Guardian Court ruling on 'woman' at odds with UK Equality Act aim, says ex-civil servant 18 April 2025
[22] Scott Wortley The strange case of Melanie Field: is an individual civil servant's views on policy relevant in interpreting legislation 19 April 2025. See: University of Edinburgh Scott Wortley
[23] TransActual Statement on EHRC 'guidance' on single sex spaces 26 April 2025
[24] Good Law Project Ltd and others v Commission for Equality and Human Rights [2026] EWHC 279 (Admin), 13 February 2026 (Swift J). See: EHRC High Court judgment summary: Good Law Project v Equality and Human Rights Commission 23 February 2026
[25] Pink News Protest group vandalises EHRC HQ over controversial trans guidance: 'We will not stop until we are free' 31 October 2025
[26] Dr Mary-Ann Stephenson, EHRC Chair Women and Equalities Committee Oral evidence: Work of the Equality and Human Rights Commission 2026-27, HC 174: Q47 9 June 2026
[27] For Women Scotland Ltd v Scottish Ministers [2026] CSOH 59 (paras. 178, 181-183) held SPS transgender prisoner guidance unlawful (Lady Ross, 19 June 2026). The Scottish Government said it would not appeal: Cabinet Secretary for Justice to Criminal Justice Committee Convener 23 June 2026
[28] City of Edinburgh Council Minutes 25 June 2026
[29] Scottish Trans Edinburgh Council supports motion to condemn EHRC's Code of Practice 26 June 2026

25. In April 2025 the Scottish Government established a Short Life Working Group to 'ensure the Scottish Government is ready and prepared **once the EHRC's revised Code of Practice is published**' (emphasis added).[30] The Scottish Government later dropped 'short life' from the title, and the work remains ongoing.[31]
26. Minutes of a meeting between the Commission and Scottish Government (released under FOI) record that the then EHRC Chair Baroness Falkner 'cautioned against delaying action until the revised Code of Practice comes into force' and 'made it clear that EHRC consider bodies should seek their own legal advice and implement the law as it is today, which is not reliant on the production of EHRC advice.'[32]
27. On 24 June 2025 the Permanent Secretary, Joe Griffin, told a Scottish Parliament committee that the advice of 'the relevant officials who support me' was to wait for the EHRC to finalise its guidance before taking some actions. Asked to specify actions already taken, Mr Griffin said he could not do so 'right now'.[33]
28. The Scottish Government cited the forthcoming revised CoP as grounds for declining to withdraw its policy on housing some men in women's prisons.[34] It took further litigation by For Women Scotland, and a ruling that the prison guidance was unlawful, for the Scottish Government to accept that it could not hold any men in the female prison estate (para. 23).
29. The Scottish Government delayed updating its 2021 *Supporting Transgender Pupils in Schools* guidance, despite it being in conflict with a ruling of the Outer House of the Court of Session on 23 April 2025 (Hurley v Scottish Borders Council). In that case, the Court granted a declarator, which the council did not oppose, that schools must provide single-sex toilets under the School Premises (General Requirements and Standards) (Scotland) Regulations 1967.[35] On 18 June 2025 The Scotsman reported Education Secretary Jenny Gilruth as saying that schools would have to wait for guidance on single-sex toilets, adding 'we have to wait for that update from the EHRC'.[36]
30. Over a year after the UKSC judgment, on 4 June 2026, the Outer House of the Court of Session ruled that toilet provision at a West Lothian primary school had breached the School Premises (General Requirements and Standards) (Scotland) Regulations 1967 and constituted unlawful indirect discrimination under the Equality Act 2010, by placing female pupils at a particular disadvantage (paras. 51-53).[37] Rather than provide separate toilet areas for girls and boys, the Council had in February 2026 applied to the Scottish Government to modify the 1967 Regulations as they affected the Council (citing the erroneous Scottish Government 2021 *Supporting Transgender Pupils in Schools* guidance, see para. 29 above) and continued to defend the claim.[38]
31. To the best of our knowledge, as of 4 November 2026, no national guidance on single-sex services and spaces has been issued for NHS Scotland.

Conclusion

32. Clarification of the definition of sex was achieved through litigation brought by a grassroots women's organisation, in a significant victory for women's rights. After the inadequate

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[30] Scottish Government UK Supreme Court ruling on meaning of sex in Equality Act: update 28 May 2025
[31] Scottish Government UK Supreme Court Judgment (For Women Scotland Ltd v The Scottish Ministers) working group minutes: 3 September 2026
[32] Scottish Government minutes (the release is undated). See also reporting in The Times UK human rights boss told SNP to end fight against Sandie Peggie 20 October 2026
[33] Scottish Parliament Finance & Public Administration Committee Official Report 24 June 2025 cols. 17-18
[34] Scottish Parliament Question reference: S6W-38153 12 June 2025
[35] BBC Judge orders schools to provide single-sex toilets 23 April 2025
[36] The Scotsman Scottish schools told to wait for guidance on single-sex toilets after Supreme Court ruling 18 June 2025. The Scottish Government published revised school guidance on 29 September 2025.
[37] DE and FG v West Lothian Council [2026] CSOH 52, 4 June 2026
[38] Correspondence between West Lothian Council and Scottish Government 3 February 2026

response to the ruling in FWS1, the UKSC ruling in April 2025 should have prompted sweeping policy corrections across public bodies.

33. Instead, the Scottish Government deferred decision-making, relying on the pending CoP as a reason to delay updating its policies. The delay even extended to its obligations as an employer – which the Code of practice for services, public functions and associations does not cover. That it did so whilst equipped with the resources of a large legal directorate specialising in public law raises significant questions about its priorities regarding protections and rights for women. This situation was further exacerbated by the UK Government, in its delay in approving the revised CoP. The former EHRC Chair attributed this delay to 'internal politics and misplaced priorities'.[39]
34. The critical issue here is not the CoP itself. If anything, events underscore the structural vulnerability of a system where primary legislation in a contested area is accompanied by administrative guidance that cannot be updated without a further level of political approval. Just as the 2011 CoP was leveraged at a late stage in its development by interested parties to promote a substantial reimagining of the law, the battle over the 2026 CoP may be read as a proxy war on the UKSC ruling.
35. In our view the key problems arise from a wider backdrop of legal misinformation and/or misunderstanding, reliance on activist and advocacy groups, longstanding failures of due diligence by public bodies, and a lack of leadership by Scottish and UK Governments.
36. The impacts of this are twofold. First, the Scottish Government has unnecessarily fostered inertia in response to the UKSC ruling, to the further detriment of women and girls. This is exemplified by its drawn-out failed attempt to retain a policy of housing men in the women's prison estate.[40] Second, the Scottish Government has failed to provide clarity and direction for those with the protected characteristic of gender reassignment, who have been encouraged to believe, to their detriment, that the law here is in some way negotiable.
37. The Committee may also wish to consider the public costs of the litigation and of remedying non-compliant policies. A further and more comprehensive inquiry by the Committee could investigate how governments, public bodies and legislators misconstrued the law for so long, and the extent to which substantial public funding for third-sector advocacy and activism contributed to this.

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4 November 2026

MurrayBlackburnMackenzie is an Edinburgh-based policy analysis collective, made up of Dr Kath Murray, Dr Lucy Hunter Blackburn, and Lisa Mackenzie. We do not receive any funding from the Scottish Government.

[39] Baroness Falkner of Margravine New EHRC Code of Practice Published 22 May 2026
[40] n 27 above