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CONFIDENTIAL

Briefing on the EHRC's new Services Code

1. The purpose of this note is to summarise the changes made by the Equality and Human Rights Commission (**EHRC**) to the Statutory Code of Practice for Services, Public Functions and Associations (the **Services Code**), an updated version of which was laid before Parliament on 21 May 2026 (the **new Code**). It will address the following questions:

    a. Executive summary: what do organisations need to think about?

    b. What are the relevant provisions of the Equality Act (**EqA**) 2010?

    c. What are the key changes from the previous (2011) Services Code? Are those the same as the proposed changes in the version of the Services Code that the EHRC consulted on in May – June 2025 (the **May 2025 draft Code**)? How do those changes reflect recent case law? This section will focus on six key issues:

        i. Defining the protected characteristics
        ii. Gender Recognition Certificates (**GRC**s)
        iii. Separate- and single-sex services
        iv. Sport
        v. Asking about someone's sex
        vi. Membership associations

2. This note will not cover matters relating to employment law, which is covered by a separate EHRC Code (which we expect to be updated in due course).

3. The new Code uses 'sex at birth' [2.49] to have the same meaning as 'biological sex' in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16. The meaning of 'biological sex' was "*assumed to be self-explanatory and to require no further explanation*" [171] by the Supreme Court - it appears to mean the sex recorded on a person's birth certificate at birth. For clarity, we have used both terms interchangeably in this note (while recognising that they are not terms everyone is comfortable with, and that there may be questions about their definitions).

4. We have used 'trans' in this note to mean anyone with the protected characteristic of gender reassignment (as has the EHRC in the new Code), though we note that it can have a broader definition in everyday use. We have used 'cis' to mean anyone who identifies as their sex at birth, i.e. who does not have the protected characteristic of gender reassignment and is not non-binary ('cis' is not a term used by the EHRC, and we note that, again, it is not a term that everyone is comfortable with).

5. It goes without saying that this is a highly contested area, where the law and guidance is rapidly developing: this note is shared by Stonewall to inform and support its stakeholders in understanding the new Code and its implications, produced by specialist EqA 2010 lawyers at Bates Wells. While this note has been drafted with legal expertise, it does not amount to legal advice for any individual or organisation to rely upon: as is set out in this note, any service

provider or organisation is likely to need to form its own view as to how to move forward, applying the legal framework to its particular circumstances, aims, constitution and risk tolerance, amongst other things. Much of the new Code remains untested, and the position will continue to develop through the decisions of the courts and tribunals (and any further changes to the Services Code). Organisations may, of course, need to take bespoke legal advice in relation to their particular positions taking into account their specific circumstances, and this note cannot take the place of that bespoke advice.

Executive summary: what do organisations need to think about now?

6. Previously – while the EqA 2010 was not entirely clear on the point – it was broadly understood that trans people (with or without GRCs) should be allowed to use services, as the EHRC put it, "*according to the gender role in which they present*".[1] On 16 April 2025, however, the Supreme Court handed down judgment in the *For Women Scotland* case, which held that – for the purposes of the EqA 2010 – "*the words "sex", "woman" and "man"…mean (and were always intended to mean) biological sex, biological woman and biological man*" [264], such that anyone assigned male at birth (including a trans woman, with or without a GRC) is a man for EqA 2010 purposes, and anyone assigned female at birth is a woman.

7. The new Code is more detailed than the May 2025 draft Code, and provides that:

    a. Service providers considering offering (biologically) single- or separate-sex services or facilities should consider whether such provision falls within one of the specific exceptions in the EqA 2010, and whether it is proportionate – weighing:

        i. considerations about the safety, privacy and dignity of people of the included biological sex; and

        ii. the impact on people of the excluded biological sex (including trans people).

    b. If (biologically) single- or separate-sex provision **is** considered to be proportionate, providers will need to consider whether it is also proportionate to exclude trans people of the admissible biological sex - e.g. exclude trans men from a women's gym – if their presence might cause discomfort or distress. Organisations should approach such decisions on a case-by-case basis - a blanket policy of exclusion is unlikely to be proportionate.

    c. Similarly, operators of sporting competitions will need to consider whether the sport needs to be played on a separate-sex basis (for reasons of safety or fair competition); if it does, they should consider (and have clear policies regarding) whether trans people can be included (e.g. through additional mixed-sex categories).

    d. Providers need to be mindful that it will not be appropriate – and may be unlawful - to routinely ask people to confirm their sex at birth before allowing them access to single-sex services or facilities. Such questioning is only likely to be proportionate where (a) less intrusive ways of maintaining the service as single-sex have failed, and (b) there is clear evidence of the service being used by people who are ineligible. However, when

[1] [OLD VERSION] EHRC Services Code (2011) [13.57]

facilities, such as toilets, are ancillary to a primary service, it is unlikely to ever be practical or appropriate to ask someone to confirm their biological sex.

e. Providers of (biologically) single-sex services may need to offer additional facilities – e.g. mixed-sex provision – to ensure that trans people are not left with inappropriate, or no, provision. That is particularly likely to be required for essential facilities like toilets. Limits on the provider's space and financial resources will be relevant to an assessment of what is proportionate, and in many cases organisations will have to make difficult judgement calls.

f. A provider offering only a trans-inclusive service - for (e.g.) women including trans women - could face:

    i. a discrimination claim by a cis man claiming that a trans-inclusive service is by definition mixed-sex, and so cannot lawfully exclude him. The EHRC's position in the new Code is that such a claim would very likely succeed, but it is not definitive, and the EHRC does not expand on that view.

    ii. a discrimination or harassment claim from a cis woman who wants biologically single-sex provision. Again, the new Code does not explore the possible defences. In relation to certain services – e.g. toilets, changing rooms, or sexual violence support services - such a claim would likely succeed. In those cases, some form of single-sex provision is likely to be required (though it does not have to be the **only** form of provision). Each case will turn on its own facts.

g. The EHRC does not explore the possible defences to such claims. It may be possible for providers to argue that: the exclusion does not constitute 'less favourable treatment', and so is not discriminatory; and/or any discrimination is a 'positive action'; and/or any discrimination is indirect, and therefore capable of justification as a 'proportionate means of achieving a legitimate aim'; and/or it is a lawful use of the charities exception – but those defences are currently untested.

h. What is "*proportionate"* for public authorities (and those carrying out public functions) will need to be analysed through the prism of the public sector equality duty, which requires them to proactively consider the need to eliminate discrimination and promote equality. Such bodies might be more able to e.g. rely on a 'positive action' defence.

i. Membership associations are able to have a combined membership for people with different protected characteristics; the example in the new Code is of a lesbian, gay, bisexual and trans (**LGBT**) support group set up to include lesbian, gay, bisexual and trans people, and whose membership is restricted to people with the protected characteristic of any of those sexual orientations, or gender reassignment. By analogy, it may be possible for an association to be exclusively for (a) women and (b) trans people, but the EHRC's apparent endorsement of this approach in the new Code is novel and remains to be tested (though the courts and tribunals must have regard to the Services Code's provisions).

What are the relevant provisions of the EqA 2010?

8. The EqA 2010 concerns discrimination against people on the basis of nine "*protected characteristics*": age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

9. It prohibits various forms of discrimination, namely:

    a. **Direct discrimination** (section 13) – treating someone less favourably because they have, or are perceived as having, a particular protected characteristic.

    b. **Indirect discrimination** (section 19) – where a provision, criterion or practice theoretically applies to everyone equally, but in practice puts people with a certain protected characteristic at a particular disadvantage.

    c. **Harassment** (section 26) – treating someone, in relation to a protected characteristic, in a way that violates their dignity, or creates a hostile, degrading, humiliating or offensive environment.

10. Harassment is never lawful. But the other kinds of discrimination can be justified if a relevant exception applies, including the following:

    a. **Indirect discrimination** is lawful if it is a "*proportionate means of achieving a legitimate aim*" (section 19(2)(d)).

    b. Providers are allowed to offer **separate services for men and women –** e.g. where there are different levels of demand between men and women - provided doing so is a proportionate means of achieving a legitimate aim (schedule 3, para 26).

    c. Providers can also offer **single-sex services** in various scenarios – e.g. in hospital/care settings, other settings involving physical contact between the service provider and service user, and other cases where a service user might reasonably object to sharing the service with someone of the opposite sex - provided again that doing so is a proportionate means of achieving a legitimate aim (schedule 3, para 27).

    d. **Sporting competitions** are allowed to be divided on the basis of sex in sports where members of one sex (invariably, women) are seen as being "*generally at a disadvantage*" because of stamina or physique (making it a "*gender-affected activity*") (section 195).

    e. Taking **positive action** to benefit people sharing a particular protected characteristic is lawful, if it is a proportionate means of helping that group to overcome a particular shared disadvantage, meeting their particular needs, and/or enabling them to participate in an activity where they are underrepresented (section 158).

    f. **Charities** are sometimes allowed to restrict their provision of benefits to people who share a particular protected characteristic (section 193).

g. **Membership associations** (groups with 25 or more members, and rules about joining) are allowed to limit their membership "*to persons who share a protected characteristic*" (Schedule 16(1)).

11. Section 149 imposes a general duty on public authorities to have due regard, when carrying out their functions, to the need to eliminate unlawful discrimination, harassment or victimisation, advance equality of opportunity, and foster good relations: the public sector equality duty (**PSED**).

What are the key changes from the 2011 Services Code? Are those the same as the proposed changes in the May 2025 draft Code? How do those changes reflect recent case law?

Defining the protected characteristics

12. The new Code confirms that, in light of *For Women Scotland, "a person's sex remains their biological sex"* [2.49].

13. That has implications for the protections available to all trans people (as discussed below). In relation to sexual orientation, it also means that a trans woman who is attracted to women, or a trans man who is attracted to men, would not be defined as having the protected characteristic of same-sex sexual orientation under the EqA 2010.[2]

14. The new Code clarifies that there is no minimum age for the protected characteristic of gender reassignment [2.43].

15. People with non-binary or gender fluid identities "*will only be protected if they meet the definition of gender reassignment as set out in the Act*" [2.44] (i.e. if the person is *"proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex"* (section 7 EqA 2010). That amendment was not consulted on in the May 2025 draft Code, but it reflects the understanding that has emerged in the case law since *For Women Scotland* – namely, that since sex now has to be understood as binary, "*gender reassignment"* requires people to be transitioning from one sex to another.[3] However, a non-binary person who is discriminated against because they are **perceived** as being trans would still be protected [2.46].

Gender Recognition Certificates (**GRCs**)

16. The Gender Recognition Act (**GRA**) 2004 allows trans people to be issued with a GRC provided that they meet the requirements – for example, producing two medical reports confirming that they have gender dysphoria, and presenting evidence from a variety of sources showing that they have lived in their "*acquired gender*" for two years, and intend to live in it until death. The effect of a GRC is to change the individual's sex as recorded on their birth certificate. Section 9(1) of the GRA 2004 provides that, where a GRC is issued, "*the person's gender becomes for all purposes the acquired gender*".

[2] The definition of sexual orientation has also been slightly amended - previously, the Services Code referred to "*a gay man or a lesbian*", but the wording is now "*a gay man or a lesbian **woman***" [2.92].
[3] See L*ockwood v Cheshire and Wirral NHS Foundation Trust* (ET/240211/24) [2025]

17. In the old version of the Services Code, the EHRC said that "*where a person holds a gender recognition certificate they must be treated according to their acquired gender*" (and, in general, it endorsed taking the same approach to trans people without GRCs).

18. *For Women Scotland* then ruled that the EqA 2010 was an exception to section 9(1) GRA 2004 – i.e. that a GRC does not change someone's legal sex for the purposes of the EqA 2010. The Services Code accordingly now states that "*in relation to the* [EqA 2010]*, a person's sex remains their biological sex, whether they have a GRC or not*" [2.49]. This is in line with the changes consulted on in the May 2025 draft Code.

19. In practical terms, this means that GRCs are largely irrelevant for the purposes of the EqA 2010; possession of a GRC does not affect someone's sex, nor does it affect whether they have the protected characteristic of gender reassignment. Asking someone whether or not they have a GRC is accordingly unlikely to ever be necessary in the context of service provision.[4] But if a provider **does** for any reason learn that someone has, or has applied for, a GRC, onward disclosure of that information without their consent may be a criminal offence [13.181].

20. The new Code confirms that, whether or not they have a GRC, trans people will be protected from:

    a. discrimination on the basis of gender reassignment [2.52]; and

    b. sex discrimination both on the basis of their sex at birth, and the sex they are **perceived** to have [2.53] [4.53].

<u>Separate- and single-sex services</u>

21. The most extensive changes to the Services Code relate to single- or separate-sex services. As explained above, such services are on their face discriminatory (against the excluded sex), but are in some cases authorised by specific exceptions in the EqA.

22. The new Code is clear (as was the May 2025 draft Code) that such services must define sex biologically if they are to benefit from the specific exceptions in the EqA 2010. That means trans women would have to be excluded from a service for women, and trans men from a service for men. This follows naturally from *For Women Scotland*.

23. The new Code maintains that (e.g.) a service for women which includes trans women *"is very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it"* [13.131]. Depending on the nature of the service, it may also constitute discrimination against cis women who want biologically single-sex provision.

24. Various possible defences could be available to discrimination claims of this nature, none of which are expressly considered by the new Code, and all of which are (for now) relatively untested by the courts – for example:

    a. It could be considered – as it was by Swift J in Good Law Project's unsuccessful challenge to the Interim Update published by the EHRC in April 2025, shortly after the

[4] There might still be situations where an **employer** needs to know whether an employee has a GRC, e.g. in relation to pension arrangements – this should be covered when the Employment Code is updated.

For Women Scotland decision[5] - that excluding a cis man from a trans-inclusive women's service does not in fact discriminate against him, provided alternative facilities are available to him, because it does not constitute 'less favourable treatment' as required by section 13 EqA 2010. However, this reasoning is implicitly rejected in the new Code.

b. A trans-inclusive service could be argued to be a "*positive action"* (under section 158 EqA 2010) in favour of (say) women and trans people, but the scope of this exception is relatively untested in this context.

c. Where any discrimination is indirect, it could be justified as a proportionate means of achieving a legitimate aim (such as the aim of inclusivity).

d. Where the defendant is a charity, it could rely on the charities exception to provide services to (say) women and trans people if its objects allow it to restrict its benefits in that way, but this would depend on the precise wording (and interpretation) of its governing document.

25. The new Code maintains that it may also be lawful to exclude trans people from a service provided for people of their biological sex. That is, as well as being excluded from services for (biological) men, a trans man could be excluded from services for (biological) women, if his presence is likely to cause "*discomfort or distress*"[6] [13.147] to other service users. This will depend on the nature of the service and "*the extent to which the trans person presents as the opposite sex*".

26. However, the new Code emphasises – as did the Interim Update and the May 2025 draft Code – that trans people should not be left with no (or no appropriate) provision [13.148]. The new Code confirms that a failure to act proportionately in this regard is "*very likely*" to amount to discrimination on the basis of gender reassignment [13.149].

27. In cases where single-sex provision is considered to be proportionate, it may be necessary to also provide additional services to make sure trans people are not left with no practical provision (particularly in relation to essential facilities such as toilets). As per the *Good Law Project* case, where there is a requirement to provide (biologically) single-sex facilities, that will be a floor, not a ceiling – providers can (and may have to) go beyond it. E.g. separate facilities for men and women might be operated alongside a mixed-sex facility.

28. Concerns have been raised that requiring trans people to use separate facilities may make them uncomfortable, and/or reveal that they are trans without their consent. The new Code appears, however, to agree with Swift J's findings in the *Good Law Project* case that requiring trans people to use a mixed-sex / 'third' space is unlikely to constitute discrimination or a breach of their right to respect for their private life (under Article 8 of the European Convention on Human Rights). [7]

29. What is proportionate will depend partly on the service provider's size and resources. The Services Code gives new examples to illustrate this:

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[5] *R (Good Law Project) & ors v EHRC* [2026] EWHC 279 (Admin)
[6] This is a slight variation of the "*alarm or distress*" referred to in the Interim Update and May 2025 draft Code.
[7] The claimants are seeking permission to appeal the decision.

a. A community group opens a small advice centre; it provides separate-sex toilets for men and women, and extends the use of the accessible toilet to make it available as a mixed-sex facility for anyone who does not wish to use the toilets available to their biological sex. This is likely to be proportionate – though (in a change from the May 2025 draft Code) the new Code adds that, if the community group is exercising a public function, the PSED will require it to monitor the ongoing impacts of this arrangement on trans and disabled people [13.124].

b. Women in a gym have requested single-sex changing rooms. The gym already has individual lockable rooms available to all, about which there have been no complaints; it concludes that it would be disproportionate to introduce additional single-sex facilities, given the gym's space constraints and the likely costs. This is likely to be lawful [13.127].

c. A gym has separate-sex changing rooms; in addition, it also provides mixed-sex changing rooms. When a non-binary service user asks which changing room to use, they are invited to use either the facilities corresponding to their sex at birth, or the mixed facilities. They choose the mixed facilities, as they are concerned about being harassed if they use the facilities for their sex at birth [13.132]. The EHRC says "*this example would also apply to a person who identifies as gender fluid*". The new Code does not expressly expand this example to treatment of a trans person, but would presumably endorse the same response, save that providers may discourage that person from using the facilities for their sex at birth if their presentation could cause "*discomfort or distress"*, and simply direct them to the mixed facilities.

30. Where access to the service in question is not essential – e.g. a recreational service with a lot of available alternatives – it might be lawful to provide the service on a strictly single-sex basis and exclude trans people altogether. The new Code gives an example:

    a. A women's centre provides a gym used predominantly by Jewish women who have religious objections to sharing the space with men. The gym considers limiting its provision to people whose sex at birth was female – i.e. to exclude cis men and trans women – on the basis that there are numerous other local gyms that they could attend. This is likely to be proportionate and lawful. They may also, on a case-by-case basis, decide to exclude trans men, depending partly on how they present [12.128].

31. Providers will accordingly need to consider three key questions if they are proposing a single- or separate-sex service:

    a. Does the service fall within one of the specific exceptions in paragraphs 26-27 of schedule 3, EqA 2010 – e.g. is it a service where a user might "*reasonably object to the presence of someone of the opposite sex*" (which is likely to include, for example, services like toilets, changing rooms, and sexual violence support services)?

    b. If so, is single-sex provision proportionate in all the circumstances, balancing:

        i. considerations about the safety, privacy and dignity of people of the included biological sex; and

ii. the impact on people of the excluded biological sex (including trans people)?

c. If so, does proportionality require making additional provision for trans people (such as mixed sex facilities?)

Sport

32. Section 195(1) EqA 2010 allows competitive sport to be run on a separate-sex basis where it is "*gender-affected*", i.e. where stamina or physique are thought to give men an advantage over women. Section 195(2) provides that trans people can be lawfully excluded from such activities if necessary to secure fair competition or the safety of other competitors.

33. The previous (2011) Code understood section 195(2) as meaning that trans people could generally compete in sport in accordance with their gender identity, but that their participation could be restricted if necessary – e.g. a trans woman could be excluded from a women's triathlon, but only if the organisers thought that she would pose a risk to safety or fair competition.

34. In *For Women Scotland* the Supreme Court held that that understanding was wrong, and that in fact organisers of sporting competitions who wished to rely on the 'gender-affected' sport provisions had to interpret them biologically - so trans women are barred from women's competitive sport by default, and section 195(2) should be understood as providing that trans **men** could also be barred from women's sport if necessary. Some sporting bodies moved to ban trans women from women's sport in the wake of the ruling.

35. The May 2025 draft Code said that the law on section 195(1) was "*not settled and there is therefore uncertainty".* It broadly maintained the position in the original 2011 Code, e.g. by suggesting that a trans man could only be excluded from a men's boxing competition "*if the gym can demonstrate that that there would be a genuine health and safety risk if trans men were allowed to join the competition*".

36. The new Code retains some of that uncertainty, but is more closely aligned with the Supreme Court's position: "*The law on the exception for sex discrimination in relation to gender-affected activities in section 195, paragraph 1 is not settled…However, it is unlikely to permit rules or arrangements that treat trans people as the sex with which they identify, and participants or prospective participants may bring claims of direct or indirect sex discrimination about such rules or arrangements*" [13.73]. The boxing gym example cited above has been amended to describe a trans man being excluded from a **women's** boxing competition for reasons of safety / fair competition (rather than a men's competition).

37. The new Code confirms that the effect of these provisions will be to significantly limit trans people's ability to play competitive sport. However, a decision to run a sporting competition on a separate-sex basis, and/or a decision to exclude trans people from competitions for people of their biological sex, need to be proportionate to be lawful. "*Organisers should therefore consider whether there are additional alternative arrangements that could be made to enable trans people to participate in the activity in question. This might include, for example, having mixed-sex categories in addition to separate-sex categories, or having a category in a gender-affected team activity with specified numbers of men and women on each team*" [13.82].

38. The law in this area may be clarified through challenges to (a) whether a sport is truly 'gender-affected' such that it needs to be provided on a separate-sex basis, and (b) when it is, whether proportionality requires the provision of additional, trans-inclusive categories. In the meantime, organisers should consider the issues carefully and are advised by the new Code to have clear policies in place [13.83].

Asking about someone's sex

39. *For Women Scotland* led to concern in some quarters that routinely interrogating people about their sex at birth would be lawful in the context of single-sex spaces. It was possible to read the EHRC's May 2025 draft Code as endorsing that assumption, though it recognised that asking someone about their sex at birth, especially in a "*combative manner"*, could interfere with their Article 8 rights. The May 2025 draft Code suggested that, in some cases, the fairest approach would be to simply ask **everyone** their birth sex as a matter of course. It also suggested that (where there were "*genuine concerns"* about whether someone had accurately reported their sex) it might be lawful to ask to see a copy of their birth certificate.

40. The new Code will allay those concerns to some extent. In the new Code, the EHRC has introduced additional safeguards (and more specificity) around the circumstances in which someone can lawfully be asked about their sex at birth. Such a request must be:

    a. made pursuant to a **legitimate aim**, which could include diversity monitoring, a need to know someone's sex for "*operational reasons*", or the maintenance of a single- or separate-sex service [13.163]; and

    b. a **proportionate means** of achieving that aim, noting that:

        i. It will not often be proportionate to go straight to asking someone to confirm their sex; providers should first try to achieve their "*legitimate aim*" in a less intrusive way. E.g. if a provider is seeking to ensure that a service for men is used only by (biological) men, they should in the first instance try to do so by communicating clearly about the nature of the service (e.g. through signage, promotional materials, and enrolment / admission processes) [13.167].

        ii. If that fails, and there is "*clear evidence of an issue with members of the opposite sex accessing or seeking to access the single or separate-sex service or association in question*" [13.168], it may be legitimate to ask someone to confirm that they are of the eligible sex.

        iii. Relevant "*evidence of an issue*" might include *"the individual's physique or physical appearance, behaviour or concerns raised by other service users*", but the EHRC accepts that "*it is not always possible to be sure of a person's sex from their appearance*" [13.168].

        iv. In relation to toilets, in particular, the Services Code says that: "*It is unlikely to be either practical or appropriate to approach any particular individual to make enquiries about their sex in relation to facilities, such as toilets, which are incidental to the primary service*" [13.170]. (This seems to envisage that the

position will be different for 'standalone' toilets not connected to another service – e.g. some public toilets – but the new Code does not discuss why.)

41. In a further change to the May 2025 draft Code, the new Code clarifies that, even if you have doubts about someone's stated birth sex, it is "*unlikely to be proportionate or practical to ask for further evidence of a person's sex*" because "*[t]here is no type of official record or document in the UK which provides reliable evidence of sex*" [13.179] (given that the effect of a GRC is to amend the sex on someone's birth certificate).[8]

42. Questioning someone about their sex accordingly might constitute discrimination / harassment, unless it is justified by "*clear evidence*" of a problem – and it is unlikely to be justified in relation to toilets.

43. The new Code accordingly introduces additional safeguards to the EHRC's position in the consultation, but it could still be read as legitimising (to some degree) questioning someone's sex if they are gender non-conforming or otherwise deemed insufficiently feminine / masculine. The limits of what is acceptable on this front will likely be tested in court.

<u>Membership associations</u>

44. "*Membership associations*" (groups with 25 or more members, and rules about joining) can restrict their membership "*to persons who share a protected characteristic*" (schedule 16(1) EqA 2010) – the 'single characteristic association' exception.

45. Single characteristic associations cannot, however, according to the new Code, "*discriminate in relation to any other protected characteristic*" [12.72] – e.g. an association for women could not exclude disabled women. It generally been accepted, however – including by the EHRC – that associations can limit their membership to people with a **combination** of protected characteristics (such as Christian women) - i.e. it is lawful to target additional protected characteristics for inclusion, but not for exclusion.

46. After *For Women Scotland,* the EHRC suggested in its Interim Update that a "*women-only or lesbian-only association should not admit trans women (biological men), and a men-only or gay men-only association should not admit trans men (biological women).*" The new Code confirms that, in light of *For Women Scotland*, an association for women can lawfully refuse membership to a trans woman [12.68] (but it could not exclude a trans man).

47. In the new Code – in an addition which did not feature in the May 2025 draft Code – the EHRC has clarified its thinking on the single characteristic association exception: "*Section 6(c) of the Interpretation Act 1978 states that, in any act, words in the singular include the plural and words in the plural include the singular, unless the contrary intention appears. Applying this provision, the Equality Act 2010…permits associations to be based on more than one protected characteristic*" [12.74].

[8] The new Code adds that: "*Information about sex is sensitive and should be treated as special category personal data. Such information should be held securely and not be retained longer than is reasonably necessary for achieving a legitimate purpose*" [13.175]. The accuracy of this is not clear - sex is not defined as special category data by the GDPR, though "data concerning health" is (Art 9(1), and sex could arguably come under that heading in some scenarios). Sex Matters have written to the Minister asking her to withdraw this section.

48. The EHRC suggests that, so interpreted, 'persons who share a protected characteristic' can be read as meaning 'persons who share protected characteristics (plural)' – so an association could limit its membership to people who share one protected characteristic (such as women), or to people who share a combination of protected characteristics (such as Christian women). This is fairly straightforward and accords with the previous understanding.

49. The EHRC then goes further and suggests that, because "*words in the singular include the plural",* 'persons who share a protected characteristic' can be read as meaning (in effect) 'persons who have any protected characteristic from a list'. They say an association could be for people who "*have any of more than one protected characteristic (for example lesbian, gay, bisexual or trans people)*" [12.75]. That is somewhat harder to follow as a matter of statutory interpretation - it does not import the plural into the singular as such, and arguably substantively changes the meaning of the provision (not least because it contradicts the requirement that the group's members "*share*" the protected characteristic/s).

50. Logically, the EHRC's reading could be extended to allow a trans-inclusive women's association, described as an association for (e.g.) women and trans people (though the new Code does not give an example to that effect). The position would be still more complex if the association wished to be for cis women and trans women only (excluding trans men who wished to join), because it would require stretching the analysis still further – i.e. to say that an association could be for 'persons who have any characteristic, **or specified combination of characteristics,** from a list'.

51. The EHRC's analysis is novel, and it is likely to be tested. While the courts will not lightly depart from the Services Code, on this issue the scope of the EqA 2010 provision remains somewhat unclear, and further judicial scrutiny may be forthcoming. Any judicial decision which contradicted the EHRC's position would be significant, and would have implications for a range of associations – e.g. an association for LGBT people (as per the EHRC's example), or one for Muslims and Jewish people.

52. Organisations wishing to rely on the new Code to operate an association for (say) women and trans people - seeking to achieve a trans-inclusive women's association - would accordingly appear to have some basis on which to so, but it is far from risk free.

Summary

53. Overall, as noted in the executive summary above, the new Code is more specific, and in some respects offers more room to those wishing to take a trans-inclusive approach, than the position advanced by the EHRC in the Interim Update and the May 2025 draft Code. However, following the *For Women Scotland* decision, the new Code reflects that it is much more difficult to take a trans-inclusive approach overall. Much of the new Code remains untested, and the position will continue to develop through the case law. Organisations will need to think carefully about what form of provision is proportionate in their particular circumstances (seeking legal advice if necessary), and should document their thinking carefully.

2 June 2025