Neutral Citation Number: [2026] EWHC 279 (Admin)

Case No: AC-2025-LON-001953

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2026

Before :

MR JUSTICE SWIFT

Between:

THE KING

on the application of

(1) GOOD LAW PROJECT LIMITED
(2) BOT
(3) BNW
(4) BBS

Claimants

– and –

COMMISION FOR EQUALITY AND HUMAN RIGHTS **Defendant**

– and –

(1) HEALTH AND SAFETY EXECUTIVE
(2) SECRETARY OF STATE FOR WORK AND PENSIONS
(3) MINISTER FOR WOMEN AND EQUALITIES
(4) WELSH MINISTERS
(5) SCOTTISH MINISTERS

Interested Parties

– and –

SEX MATTERS

Intervener

- -
- -

Daniel Stilitz KC, Alex Goodman KC, Jane Russell KC, Hannah Slarks and Crash Wigley (instructed by **Leigh Day Solicitors**) for the **Claimants**

Tom Cross KC and Zoe Gannon (instructed by **Burges Salmon LLP**) for the **Defendant**

Zoe Leventhal KC and Nathan Roberts (instructed by **GLD**) for the **Third Interested Party**

Rupert Paines (instructed by **Conrathe Gardner LLP**) for the **Intervener**

Hearing: 11 and 12 November 2025
Post-hearing written submissions: 28 November 2025, 8 December 2025, 11 December 2025 and 2 January 2026

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APPROVED JUDGMENT

MR JUSTICE SWIFT

A. Introduction

1. The Claimants, the Good Law Project Limited and three individual Claimants who have been anonymised, challenge the legality of guidance contained in a document issued by the Defendant ("the EHRC") and first published on its website on 25 April 2025. The document was titled "*An interim update on the practical implications of the UK Supreme Court judgment*" ("the Interim Update"). The Interim Update was later revised, and one of the revised versions, published on the website on 24 June 2025, is also in issue in these proceedings. On 15 October 2025 the EHRC removed the Interim Update from its website. The Interim Update was published in exercise of the EHRC's power at section 13(1)(d) of the Equality Act 2006 ("the EA 2006") to "… give advice or guidance (whether about the effect or operation of an enactment or otherwise)"

2. The Interim Update concerned the Supreme Court's judgment in *For Women Scotland Limited v Scottish Ministers* [2025] 2 WLR 879 ("*For Women Scotland*") that had been handed down on 16 April 2025. The issue before the Supreme Court in *For Women Scotland* concerned the legality of guidance issued by the Scottish Ministers on the meaning of "woman" as used in section 1(1) of the Public Boards (Scotland) Act 2018. The Scottish Ministers' guidance rested on an assumption that, by reason of section 9(1) of the Gender Recognition Act 2004 ("the GRA 2004"), "woman" as used in the Equality Act 2010 ("the EA 2010") included both (a) persons born female; and (b) persons with an acquired female gender by reason of a gender recognition certificate issued under the GRA 2004. The Supreme Court's conclusion was that the assumption made in the Scottish Ministers' guidance was wrong; that the effect of section 9(1) of the GRA 2004 was displaced by section 9(3) of that Act; and that in the EA 2010 "woman" included only biological women and by parity of reasoning, "man" referred only to biological men.

3. The judgment in *For Women Scotland* is a significant decision on the understanding and application of the EA 2010. When the judgment was handed down, the EHRC was mid-way through the process of revising its Code of Practice on the provision of services, public functions and associations ("the Services Code of Practice", which concerns Parts 3 and 7 of the EA 2010). Codes of Practice are issued by the EHRC under section 14 of the EA 2006 to provide information "… designed to ensure or facilitate compliance with …" the EA 2010. Codes of Practice usually set out summaries of the law and then employ practical examples to illustrate how the law should be applied.

4. The Services Code of Practice had last been issued in 2011. The work to revise the Services Code of Practice had included a public consultation that ran from October 2024 until January 2025. As a result of the judgment in *For Women Scotland*, the EHRC undertook further consultation because the premises on which some parts of the draft Code of Practice rested needed to change. The Interim Update referred to the further consultation on the new Code of Practice that was due to commence in May 2025.

5. The conclusions reached in *For Women Scotland* had a significant impact on the parts of the Services Code of Practice that concern the provision of single-sex services.

Paragraph 13.57 of the previously published version of the Services Code Practice stated:

> "If a service provider provides single or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate [aim]".

That approach had been restated in the consultation conducted at the end of 2024. One clear consequence of the conclusion reached in *For Women Scotland* was that if, for example, a service provider provided a service to be used both by women and transsexual women, that service would not be a single-sex service.

6. When it issued the Interim Update, the EHRC said that it was taking the opportunity to "… *highlight the main consequences of* …" the judgment in *For Women Scotland*. The Interim Update focussed on the effect of that judgment on the provision of single-sex facilities, in particular on provision of lavatories for men and women, making reference also to single-sex changing and washing facilities.

7. The material part of the document was as follows:

> "Employers and other duty-bearers must follow the law and should take appropriate specialist legal advice where necessary.
>
> **Key information**
> The Supreme Court ruled that in the Equality Act 2010 (the Act), 'sex' means biological sex.
>
> This means that, under the Act:
>
> - A "woman" is a biological woman or girl (a person born female)
> - A "man" is a biological man or boy (a person born male)
>
> If somebody identifies as trans, they do not change sex for the purposes of the Act, even if they have a Gender Recognition Certificate (GRC).
>
> - A trans woman is a biological man
> - A trans man is a biological woman
>
> This judgment has implications for many organisations, including:

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

[1]
In **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.

[2]
It is not compulsory for **services** that are open to the public to be provided on single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.

[3]
In workplaces and services that are open to the public:

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

[b]
- In some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities

[c]
- however, where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use

[d]
- where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided

[e]

> - where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men"
>
> [bold type paragraph numbers/letters added; other bold type in the original]

The guidance in the Interim Update concerned application of provisions: (a) in section 29 of, and paragraphs 26 – 28 of Schedule 3 to the EA 2010; and (b) in regulations 4, 20, 21 and 24 of the Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Workplace Regulations"), regulations made pursuant to section 15 of the Health and Safety at Work Act 1974.

8. The version of the Interim Update published on 24 June 2025 contained a slightly modified version of the guidance. The paragraph marked **[1]** set out above was replaced with the following:

> "**[1]**
> In relation to **workplaces**, requirements are set out in the Workplace (Health, Safety and Welfare) Regulations 1992. These require suitable and sufficient facilities to be provided including toilets and sometimes changing facilities and showers. Toilets, showers and changing facilities may be mixed-sex where they are in a separate room lockable from the inside. Where changing facilities are required under the regulations, and where it is necessary for reasons of propriety, there must be separate facilities for men and women or separate use of those facilities such as separate lockable rooms."

In consequence of that change, paragraph **[3e]** was removed. One further change was made at the beginning of **[3]**,

> "In workplaces and services that are open to the public"

was replaced by,

> "In workplaces and services that are open to the public where separate single-sex facilities are lawfully provided …"

The words added at the beginning of **[3]** do not give rise to any submission in this case. So far as concerns the change made to **[1]** and the consequential removal of **[3e]** the Claimants' case is that that served to remove an error concerning the effect of the 1992 Workplace Regulations that had been present in the version of Interim Update published on 25 April 2025.

9. The Claimants advance three grounds of challenge: *first* that the guidance in the Interim Update was wrong in law and EHRC acted unlawfully by publishing it; *second* that publishing the guidance part of the Interim Update was in breach of the EHRC's obligations under section 3, 8 and 9 of the EA 2006; and *third* if, contrary to the first submission, the guidance in the Interim Update correctly stated requirements contained in EA 2010, those requirements are incompatible with Convention rights.

10. The EHRC opposes these grounds of challenge. Further, it contends (a) that any challenge to the guidance part of the Interim Update is academic as the document has now been removed from its website; and (b) that the First Claimant, the Good Law Project Limited lacks standing to pursue the claims.

B. Decision: the EHRC's preliminary points

11. The first preliminary point is that because the Interim Update was removed from the EHRC website on 15 October 2025 there is no longer any need for a remedy, regardless of whether the EHRC acted unlawfully by publishing the guidance. The EHRC further submits that since the Interim Update is no longer available, the better course for any person aggrieved by action in respect of single-sex service provision taken by an employer or service provider is to pursue an individual claim for discrimination through the courts.

12. The Administrative Court will be reluctant to adjudicate if a matter is academic, for example when a dispute that existed has been overtaken by events. The primarily reason for this is readily apparent. It is not simply a matter of time and resources (although those are important considerations), rather the authority of a court judgment should only be available where that judgment is necessary, because there is an existing dispute with practical consequences. In rare occasions however there may be compelling reasons for the court to adjudicate on a matter that has been overtaken by events.

13. In this case I do not accept the EHRC's submission that the Claimants' challenge has become academic. Even though the Interim Update is not now on the EHRC website, the evidence of the individual Claimants is that their employers changed arrangements for who should use which lavatory relying on the Interim Update and that those new arrangements remain in operation. On 8 May 2025 BOT, who is intersex but who has lived her whole life as female, was told that she should no longer use the female lavatories but should instead use the disabled/accessible one. On 1 May 2025 BNW (a trans woman with a gender recognition certificate) was told was told that she should use the lavatory that corresponds to her biological sex. I do not consider the timing of these instructions, so soon after the EHRC had published the Interim Update, was coincidental. BBS (a trans man whose application for a gender recognition certificate is pending) was told by his employer that it would be "following the guidance", a direct reference to the EHRC's Interim Update. He was told not to use the male lavatory at work but to use the disabled/accessible lavatory. The arrangement each employer has made, in reliance on the guidance on the Interim Update remains in effect.

14. Further, the evidence of the individual Claimants is that each is concerned about practices that may have been put in place by service providers for use of public lavatories, for example in restaurants, pubs, theatres and the like, in reliance on the guidance in the Interim Update. Given the significance that attaches in the public mind to guidance given by the EHRC, the Claimants' concerns are not speculative. The matters addressed by the EHRC's guidance had a high profile at the time the Interim Update was published. It is highly likely that service providers looked to and relied on that guidance when deciding what arrangements to put in place. In the absence of an up to date Services Code of Practice, the Interim Update was the only statement of the

EHRC's views. It follows that arrangements put in place will likely have remained in place and will not have been affected by the removal of the Interim Update from the EHRC website. There is no suggestion that the guidance has been disavowed; in these proceedings the EHRC contends that it was correctly given. While the guidance in the Interim Update will be overtaken when the new version of the Services Code of Practice is published, that has not yet happened.

15. The second preliminary point is that the Good Law Project Limited lacks the standing required to be a claimant in this case. The EHRC relies on the principles summarised in *R(Good Law Project Limited) v Prime Minister* [2022] EWHC 298 (Admin) at paragraphs 16 – 29 and the reasoning on the application of those principles in that case at paragraphs 31 and 54 – 59.

16. I accept this submission. The Good Law Project Limited is not personally or directly affected by the decision challenged in this case. I accept that it has a sincere interest in the subject matter of the case but that is not enough to establish the "sufficient interest" required by section 31(3) of the Senior Courts Act 1981. In this case, the analysis at paragraphs 54 – 59 of the earlier *Good Law Project Limited* case applies. Further, in this case there are claimants – the three individual Claimants – who are both directly affected by the guidance contained in the Interim Update and already before the court.

17. For these reasons, Good Law Project does not have standing to bring the challenge in this case.

C. Decision. Ground 1: is the guidance in the Interim Update an unlawful exercise of the power at section 13(1)(d) of the EA 2006?

(1) What obligation arises by reason of the EHRC's power under section 13 EA 2006?

18. Under section 13(1)(d) of the EA 2006 the EHRC may "*give advice or guidance … about the effect or operation of an enactment*". The Claimants' case is that the EHRC used this power unlawfully because the guidance in the Interim Update was wrong in law.

19. As to the nature of the obligation arising from section 13(1)(d) of the EA 2006, the parties referred to the judgments of Lords Sales and Burnett in *R(A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. That case concerned the legality of non-statutory guidance issued by the Home Secretary. The material part of the judgment is at paragraph 46.

> "46. In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e., the type of case under consideration in *Gillick* [1986] AC 112); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to

> explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. …"

20. The present case does not concern any form of policy, at least not in the sense ordinarily understood by the courts and public authorities. The relationship between the EHRC and the audience for the Interim Update (the public at large) is not the same as that between public authorities when one might issue guidance to the other or that between a public authority and its officers when a public authority publishes as policy concerning how it will exercise powers available to it. Nevertheless, any statement by the EHRC concerning the practical effect of provisions in the EA 2010 will be taken seriously by the public; it will be seen as a statement made from a position of knowledge and authority.

21. Further, there is the context provided by the EA 2006: (a) the guidance contained in the Interim Update was issued in exercise of the power to give advice and guidance about the effect and operation of enactments; and (b) whenever the EHRC exercises its functions under the EA 2006 it must do so in accordance with the objectives stated in sections 3, 8 and 9 of the EA 2006 that include the purpose of "… [promoting] *awareness and understanding of rights under the Equality Act 2010*": (see, section 8(1)(d)) and " ... [encouraging] *good practice in relation to equality and diversity*" (see, section 8(1)(b)). Reading those provisions together, the power at section 13(1)(d) must be understood as the power to give advice or guidance that is accurate. No other conclusion makes sense. In the premises, the obligation is equivalent to Lords Sales' and Burnett's principle (ii). When it issued the guidance in the Interim Update document, the EHRC had to provide an accurate statement of the law without misstatement or material omission.

(2) The statutory provisions referred to in the Interim Update

22. The guidance in the Interim Update concerned the cumulative effect of: (a) section 29 of, paragraphs 26 – 28 of Schedule 3 to, and paragraph 2 of Schedule 22 to the EA 2010; and (b) regulations 4 and 20 – 22 of the 1992 Workplace Regulations. It set out information about their application to any provision of single-sex lavatories, changing rooms and washing facilities in workplaces (under the 1992 Workplace Regulations) and single-sex lavatories and changing rooms made available for public use by service providers such as shops, cafés and so on (as affected by the provisions in the EA 2010).

23. The 1992 Workplace Regulations do require provision of lavatories etc., at workplaces. However, there is nothing in the EA 2010 that imposes any obligation to provide such facilities at all. So far as concerns any obligation to provide lavatories for public use, the legislation is a patchwork. Some of the provisions are as follows. *First*, local authorities may themselves provide public lavatories in exercise of their powers under section 87 of the Public Health Act 1936 (English local authorities) and section 116 of the Public Health (Wales) Act 2017 (Welsh local authorities). *Second*, by notice given under section 20 of the Local Government (Miscellaneous Provisions) Act 1976, local

authorities in England may require certain types of premises (including cafés and restaurants) to provide lavatories. *Third*, the Building Regulations 2010 (Schedule 1, Part T, applicable in England) require that for buildings other than dwellings, "reasonable provision" be made for "male and female single-sex toilets" or, where space prevents that, for "universal toilets". A universal toilet is one provided in a "fully enclosed room" for use by one person at a time.

24. One further general point is also important. The guidance in the Interim Update did no more than consider the application of the provisions in the EA 2010 and the 1992 Workplace Regulations. The guidance only concerned the extent to which single-sex provision of lavatories and facilities for changing and washing could: (a) be provided consistent with the requirements of discrimination law as it applies to provision of services; and/or (b) were required in workplaces by the 1992 Workplace Regulations.

25. I do not seek to understate the importance of complying with those provisions. But nor should the significance of those provisions be overstated. In the course of submissions in this case various assertions were made as to the consequences of what was said in the Interim Update: that it meant that transsexual people "must" use the lavatory that corresponds to their biological sex; or that it "was not lawful" to permit a trans woman to use a women's lavatory; or that the guidance assumed that women's rights "trump" rights of transsexual persons. This sort of language, while reflecting the polarised nature of some of the public debate, does not assist proper understanding of the reach (and limits) either of discrimination law or of the law concerning workplaces. Taken as a whole, the EA 2010 recognises a range of protected characteristics and provides for protection against discrimination for each. It provides a specific code that is carefully drawn. This is not always reflected in the way matters are presented in public debate. One example is the way in which the protected characteristic of gender reassignment is defined. The protected characteristic is identified by reference to a "*process*" for the purpose of "… *reassigning … sex by changing physiological or other attributes of sex*" (see section 7 of the EA 2010). The protected characteristic is not, therefore, defined by a notion of self-identification. Another example is the suggestion that some of the protected characteristics will "trump" others as if they were in conflict in a zero-sum game. In fact, the provisions in the EA 2010 are more nuanced. The way in which the derogations from section 29 set out at paragraphs 26 – 28 of schedule 3 to the EA 2010 are formulated is a case in point.

26. It is wrong to believe that either the EA 2010 or the 1992 Workplace Regulations provides a comprehensive code on when or in what form lavatories or other facilities must be provided or who may or must use them. The parts of the EA 2010 considered in the Interim Update concerned when it would be permissible for a service provider to make a single-sex provision. It does not exclude or prohibit other provision. Similarly, although the 1992 Workplace Regulations do prescribe a requirement for "suitable and sufficient" lavatories, and also make express provision for what will amount to "suitable" by reference to separate provision for men and women, they do not prohibit additional provision beyond what is "sufficient".

27. Each set of statutory provisions considered in the Interim Update provides a floor for provision of facilities. But neither provides a ceiling. It is fanciful to believe that these laws seek to regulate every possibility that can arise, day-to-day, and in circumstances that are too numerous to anticipate. Some public discourse is stated in terms of whether

a person has a "right" to use a particular lavatory. If that is intended to refer to legal right, it is a bizarre turn of phrase. Those who provide facilities whether to the public or to their employees should comply with the law but also be guided by common sense and benevolence rather than allow themselves to be blinkered by unyielding ideologies.

28. With these matters in mind, the effect of the provisions in the EA 2010 and the 1992 Workplace Regulations that concerned the matters covered in the Interim Update may be summarised in the following propositions.

> *Provision of services*
> (1) When (for whatever reason) lavatories or changing-rooms are provided for public use at any premises, that is the provision of a service for the purposes of Part 3 of the EA 2010.
>
> (2) By section 29 EA 2010, a person (A) providing a service to the public, may not discriminate by not providing the service to a member or members of the public who require the service (B), or as to the terms on which the service is provided to B, or by subjecting B to any other detriment.
>
> (3) Discrimination has the meaning set out in Chapter 2 of Part 2 of the EA 2010, subject when applied by section 29, to the exceptions at section 28 of the EA 2010 (none of which is material for present purposes).
>
> (4) Were section 29 to apply without qualification, the consequence would be that any lavatory or changing room provided for public use should be available to all, without discrimination on grounds of sex or gender reassignment.
>
> (5) Schedule 3 to the EA 2010 contains derogations from section 29.
>
> (6) By Schedule 3, paragraph 26(1), it is no contravention of section 29 on grounds of sex discrimination to provide separate services for persons of each sex if: (a) a joint service for persons of both sexes would be less effective; and (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (7) By Schedule 3, paragraph 27, it is no contravention of section 29 on grounds of sex discrimination to provide a service only to persons of one sex if: (a) any of the conditions at paragraph 27(2) – (7) is met; and (b) the limited provision is a proportionate means of achieving a legitimate aim. The condition at (6) is that the service is provided for or is likely to be used by two or more persons at the same time and the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.
>
> (8) By Schedule 3, paragraph 28, there is no contravention of section 29 on grounds of gender reassignment, only if the conduct is either: (a) the provision of separate services for persons of each sex; or (b) the provision of a service only to persons of one sex; and in all cases (c) the conduct is a proportionate means of achieving a legitimate aim.

> *Workplaces*
> (9) Specific provision is made for workplaces under the 1992 Workplace Regulations. By regulation 4 every workplace must comply with the requirements in the Regulations.
>
> (10) By regulation 20, "*suitable and sufficient sanitary conveniences*" must be provided at readily accessible places. Sanitary conveniences are not suitable unless separate rooms containing conveniences are provided for men and women, except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.
>
> (11) Materially identical provision is made by regulation 21 requiring provision of separate "*suitable and sufficient washing facilities*" for men and women.
>
> (12) Regulation 24 requires that in certain circumstances suitable and sufficient facilities to change clothes must be provided, and states that when such facilities are required they will not be suitable "*unless they include separate facilities for, or separate use of facilities by men and women where necessary for reasons of propriety*".
>
> (13) By paragraph 2 of Schedule 22 to the EA 2010, a person who does something "in relation to a woman" that under the 1992 Workplace Regulations is required to be done, will not contravene the provisions in the EA 2010 prohibiting sex discrimination at work.

(3) The meaning of the guidance in the Interim Update

29. The premise for the guidance given by the EHRC was the conclusion stated by the Supreme Court in *For Women Scotland* that for the purposes of the EA 2010 "woman" meant a biological female and "man" meant a biological male. The Supreme Court's conclusion specifically concerned the position of trans women and trans men with a gender recognition certificate since that was the issue before the court in that case (see *For Women Scotland* at paragraph 8). However, the Supreme Court's conclusion applies equally if not *a fortiori* to all those who have the protected characteristic of gender reassignment under section 7(1) of the EA 2010 – i.e. any person who

> "(1) … 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 by changing physiological or other attributes of sex."

30. By section 7(2) of the EA 2010 persons in this class are referred to as transsexual persons. In this judgment that term and the words trans women and trans men will be used in the same manner. However, for the purposes of sex discrimination under the EA 2010, all persons with the protected characteristic of gender reassignment continue to be considered by reference to their biological sex.

31. The guidance in the Interim Update concerned the provision of single-sex facilities and considered the effect of such provision for transsexual persons (i.e. those with the protected characteristic of gender reassignment). The guidance at paragraphs **[1]** to **[3]** of the Interim Update is as follows (the numbers in square brackets correspond to the numbering added to the quotation at paragraph 7 above).

Workplaces

(i) Single-sex lavatories must be provided in workplaces (paragraph **[1]**).

Services

(ii) So far as concerns provisions on services in EA 2010, there is no requirement to provide single-sex lavatories (paragraph **[2]**).

(iii) Provision of a single-sex lavatory is permitted by the EA 2010 if that is a proportionate means of achieving a legitimate aim (paragraph **[2]**).

(iv) Failing to provide a female single-sex lavatory could comprise indirect sex discrimination against women (paragraph **[2]**).

Workplaces and services

(v) Single-sex lavatories will cease to be single-sex if transsexual persons are permitted to use them other than in accordance with their biological sex (paragraph **[3a]**).

(vi) If trans women are permitted to use a single-sex female lavatory, all biological males must be permitted to use that lavatory (paragraph **[3a]**).

(vii) In some circumstances equality law may permit transsexual persons to be excluded from single-sex lavatories that correspond to their biological sex (paragraph **[3b]**).

(viii) Lavatories in lockable rooms used one person at a time, can be used by anyone (paragraph **[3e]**).

(ix) If you provide single-sex lavatories do not fail to make provision for transsexual persons (paragraph **[3c]**).

(x) If you provide single-sex lavatories (or other facilities), where possible also provide a mixed-sex facility (paragraph **[3d]**).

32. At the beginning of the Interim Update there was an important precautionary statement:

> "… this update is intended to high light the main consequences of the judgment [in *For Women Scotland*]. Employers and other duty-bearers must follow the law and must take appropriate specialist legal advice where necessary."

(4) Are the points made in the Interim Update accurate?

33. Whether Ground 1 of the Claimants' claim succeeds depends on whether points (i) – (x) above are consistent with the propositions set out at paragraph 28 above. My conclusions are as follows.

*(i) Single-sex lavatories must be provided in workplaces (paragraph **[1]**).*

34. Read on its own, point (i) is not a complete statement of the requirements in the 1992 Workplace Regulations. An employer can comply with the Regulations either by providing separate facilities (e.g., separate single-sex male and female lavatories) or by providing the facilities in a room which may be locked from the inside and may be used only by one person at a time: see regulation 20(2)(c), regulation 21(2)(h) and regulation 24(2). The complete position under the 1992 Workplace Regulations is presented if point (i) is read together with point (viii). When the Interim Update was revised on 24 June 2025 it included a revised version of paragraph **[1]**: see above at paragraph 7. This combined the information published in the 25 April 2025 version of the Interim Update at paragraph **[1]** and **[3e]**.

35. The Claimants submitted that the guidance in the Interim Update concerning the 1992 Workplace Regulations was wrong for two reasons. The first was that, even assuming that in the 1992 Workplace Regulations woman means biological woman and man means biological man, the EHRC had misunderstood the extent of the obligations arising from each of regulations 20 to 21 and 24, respectively. Taking regulation 20 as the example, the Claimants' submission was that the requirement to provide "*suitable and sufficient sanitary conveniences*", suitable being defined as requiring "*separate rooms containing conveniences [to be provided for men and women]*" would be met if an employer provided conveniences in separate rooms for men and women but then, for example, made it clear that any person could use either room. Short of this, the Claimants' submission was that having provided a room for women, the 1992 Workplace Regulations do not prevent the employer adopting a policy that the room could be used by both women and trans women. Thus, the submission goes, regulation 20 requires no more than the provision of facilities and says nothing as to the manner in which those facilities should be used.

36. I do not accept this submission. *First*, it places form over substance, disregarding the obvious purpose of regulations 20 – 21 and 24. The obvious albeit unspoken premise of regulation 20 is the provision of private space for each sex for reasons of conventional decency. This purpose is referred to on the face of regulation 24 which concerns changing facilities that are to be available when employees have to wear "*special clothing for the purpose of work*". The changing facilities must be provided separately for men and women "*where necessary for reasons of propriety*". These words account for the fact that the special clothing required could vary significantly. In some circumstances it might comprise a full uniform in others it may be a single item such as for example safety boots. Like provision is made within regulation 21, which concerns the availability of washing facilities but excludes the requirement for separate facilities if washing facilities "*are provided for washing hands, forearms and face only*". Thus, the purpose on the face of regulation 24 is implicit in each of regulations 20 and 21.

37. *Second*, by reference to regulation 20, the Claimants' submission cannot stand with the proviso in regulation 20(1)(c) that separate rooms containing conveniences for men and women need not be provided *"… where and so far as each convenience is in a separate*

room the door of which is capable of being secured from the inside". It is clear from this that the objective of regulation 20 is that men and women should use conveniences in separate rooms, not together in the same room.

38. *Third*, the Claimants' further contentions in support of their construction of regulation 20 are not convincing. The Claimants contended that a female lavatory does not cease to be single-sex if, for example, (a) it is cleaned by a man, or (b) a mother brings her young son to use the lavatory, or (c) a man uses the lavatory in an emergency. Thus they submitted it would be just the same were an employer to allow trans women to use a female lavatory. The Claimants refer to this approach as a "trans-inclusive lavatory" and I will refer to it in the same way in this judgment. However, the examples the Claimants rely on do not support their conclusion. Who cleans a female lavatory from time to time, is a matter entirely apart from whether that lavatory remains single-sex. The "emergency" example carries no weight precisely because it is an emergency – an event that is unplanned and driven by extreme circumstances. The example of the mother taking her young son to use the female lavatory is a bad example. That (and the corresponding practice for fathers and young daughters) is a common practice but is no more than a facet of ordinary parental responsibilities. No one could reasonably or seriously contend that when a mother takes her young son to use a single-sex female lavatory the lavatory ceases to be single-sex. Further, none of the examples above would be materially the same as the one of the employer who decided that the lavatories provided to meet the obligation under regulation 20 should be trans-inclusive. Rather, that employer has adopted a policy or practice to allow some biological males to use the female lavatory. An employer would not comply with the obligation under regulation 20 (to make sufficient provision in separate rooms containing lavatories provided for men and women, respectively) if he permitted the room for women to be used by some men and *vice versa*. That would go against the purpose of the regulation.

39. The final contention in support of this submission is that a reading of regulation 20 that require the lavatories in the room provided for men to be used by biological men, and those in the room provided for women to be used by biological women, would place too great a burden on employers, requiring them to either "police" the use of lavatories or risk prosecution for breach of the 1992 Workplace Regulations. This point is significantly overstated.

40. If the obligation under regulation 20 is as I have concluded, an employer who provides the lavatories required in the rooms required, and who in good faith adopted and applied a policy that the female lavatories were available only to biological women and the male ones only available to biological men, would do what is required by the Regulations. The employees concerned would know what was expected of them. Contrary to the Claimants' submission, this is not to say that an employer's compliance with regulation 20 will depend on the "minutia" of how the use of lavatories is managed. The notion that an employer or anyone else is required to "police" the use of a lavatory, person by person and day by day, reveals the application of a "logic" so strict that it is divorced from reality and from any sensible model of human behaviour.

41. Following the hearing, the Claimants filed written submissions relying on the judgment of the Edinburgh Employment Tribunal in *Kelly v Leonardo Limited* (Case 8001497/2024, sent to the parties on 24 November 2025). This was a claim under the EA 2010 but in the course of its reasoning the Tribunal had cause to consider the

meaning and effect of regulation 20 of the 1992 Workplace Regulations. I have considered the relevant part of the Tribunal's reasons (paragraphs 207 – 245) but none of the points set out there cause me to doubt any of the conclusions above or the meaning and effect of regulation 20.

42. One important matter to have in mind is that my conclusions above concern only what is required to comply with regulation 20 of the 1992 Workplace Regulations. All employers have to comply with that regulation but they must also comply with their obligations under Part 5 of the EA 2010, including the obligation not to discriminate directly or indirectly by reason of the protected characteristic of gender reassignment. Thus, where an employer provides lavatories as required by regulation 20 the consequence will not be that a transsexual person is required to use the lavatory that corresponds to biological sex. Rather, and in addition to complying with the requirement under the 1992 Workplace Regulations for "sufficient" and "suitable" lavatories the employer must also ensure that the lavatory provision he makes is not discriminatory on the ground of gender reassignment.

43. In the alternative, the Claimants submitted that references in the 1992 Workplace Regulations to "men" and "women" have to be read consistently with section 9(1) of the GRA 2004. That provides.

> "(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

Thus, on the Claimants' case, "men" includes trans men who have a gender recognition certificate and "women" includes trans women with a gender recognition certificate. This submission, like the one addressed by the Supreme Court in *For Women Scotland* raises whether section 9(3) of the GRA 2004 applies.

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

44. The Supreme Court considered that the operation of section 9(3) of the GRA 2004 was not limited to the exclusion of section 9(1) by express words or necessary implication (see the judgment at paragraph 102), and that its effect was not confined to statutes post-dating the GRA 2004 (judgment at paragraph 103). At paragraph 108, the court stated:

> "108. … the effect of the rule in section 9(1) on the very many statutes referring to men and women, whether enacted before or after the GRA 2004, must be carefully considered in the light of the wording, context and policy of the statute in question. It is likely to be unhelpful for the coherence of the law to impose a stringent test for the application of section 9(3)."

45. It was suggested that it was material that the 1992 Workplace Regulations were made in exercise of powers in the Health and Safety at Work Act 1974 and were not legislation "about discrimination". I do not attach any significance to this point. The Regulations are to be construed on their own terms. In the present case three matters taken together, require the conclusion that section 9(3) operates to displace the effect of section 9(1) of the Act. *First*, consideration must be had to the whole of the 1992 Workplace Regulations not just regulation 20. The reference in regulation 25(4) to "pregnant women" can only be understood by a reference to biological women. *Second*, were section 9(1) of the GRA 2004 to apply, so that "woman" includes both biological women and trans women who have a gender recognition certificate, that would adversely impact on paragraph 2 of Schedule 22 to the EA 2010. As that paragraph applies to the circumstances now under consideration, it provides that an employer will not act in breach of the obligations not to discriminate on grounds of sex or pregnancy or maternity under Part 5 of the EA 2010 by doing something required to be done to comply with the 1992 Workplace Regulations. Given the conclusion reached by the Supreme Court in *For Women Scotland* on the meaning of "woman" and "man" in the EA 2010, any contrary reading of the same words in the 1992 Workplace Regulations would make the application of paragraph 2 of schedule 22 to the EA 2010 certainly less coherent, and likely impossible. *Third*, if section 9(1) of the GRA 2004 applied to the 1992 Workplace Relations, that would create a new version of the issue identified at paragraph 224 of the judgment in *For Women Scotland*. There, the Supreme Court considered paragraph 3 of Schedule 23 to the EA 2010 which provides an exemption under that act for communal accommodation which "*for reasons of privacy*" provide separate sleeping accommodation for the sexes. At paragraph 224 the Supreme Court stated as follows.

> "224. Here too it is plain that sex has its biological meaning. The Inner House however, held at para 59 that "sex" in this context is defined as including birth sex for those still living in that sex, and "acquired sex" for those in possession of a GRC in the opposite gender. In our judgment, this would undermine the very considerations of privacy and decency between the sexes both in the availability of communal sleeping accommodation and in the use of sanitary facilities which the legislation plainly intended to provide for. If sex has a certificated sex meaning it is difficult to envisage any circumstances in which this gateway could sensibly be met since there would be no rational basis for saying that "for reasons of privacy" any communal accommodation and sanitary facilities should be used by women and trans women with a GRC (so legally female but biologically male) only, but not by trans women without a GRC who may be indistinguishable from those in possession of a GRC (and vice versa). This interpretation would run contrary to the plain intention of these provisions."

The same reasoning applies to regulation 24 of the 1992 Workplace Regulations which refer to reasons of "propriety". As stated above, that purpose which is on the face of regulation 24 is necessarily implicit in both regulations 20 and 21.

46. The Claimants' submissions to the contrary are not persuasive. For the most part the Claimants' submissions on coherence and workability rest on the premise that the obligation under regulation 20 (and those under regulation 21, 24 and 25) only concern provision of the bare physical facilities. For reasons already stated I do not accept that premise.

47. A further submission rested on reasoning of the Court of Appeal in *Croft v Royal Mail Group Plc* [2003] ICR 1425. *Croft* concerned the circumstance of a long-standing employee. The employee was a biological man diagnosed with gender dysphoria. She wished to change gender and commenced hormone treatment. She informed her employer that from a particular date she intended to live and work as a woman. There was then a discussion about which lavatory she should use at work. The employer said she should use the disabled lavatory. The employee was upset by this decision; sometime later she resigned; she commenced claims for unfair dismissal and discrimination on the ground of gender reassignment. Those claims were dismissed by the Employment Tribunal. The Court of Appeal upheld those conclusions.

48. In reaching its decision the Employment Tribunal had concluded that the employer's refusal to permit the employee to use the female lavatory was not less favourable treatment because at the time of the decision the employee "*was still of the male gender*". This conclusion was considered in the judgments in the Court of Appeal. Pill LJ stated this at paragraphs 46 – 49 of his judgment.

> "46. I do not accept that the employers can escape liability on the basis that the applicant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men. Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks. …
>
> 47. However, I do not accept that a formerly male employee can, by presenting as female, necessarily and immediately assert the right to use female toilets. The status of transsexual does not automatically entitle the employee to be treated as a woman, with respect to toilet facilities. The right does not arise automatically but it is acquired by making progress in the procedure described by Lord Nicholls. The tribunal has to make a judgment as to when the employee becomes a woman and entitled to the same facilities as other women though that judgment must have regard to the applicant's self-definition and cannot be determined by the views of other employees.

> 48. The employee did not have less favourable treatment than a man, who could not claim to use the female toilets. The employee is not being treated less favourably than other women employees unless and until the employee can establish that she should be treated as a woman. The court should have regard to the particular difficulties which arise with respect to toilet facilities, the obligation and the need for separate facilities for men and women, and the fact that acquiring the status of a transsexual does not carry with it the right to choose which toilets to use.
>
> 49. With respect to other facilities the employee's self-definition may be a very important factor in determining the sex in which the employee is entitled to be treated. In the case of toilet facilities, for reasons given, it is less important and the employer is not bound by it when making a judgment as to when the change has occurred."

The "procedure" mentioned was "four steps" of treatment set out by Lord Nicholls in his speech in *Bellinger v Bellinger* [2003] 2 AC 467 at paragraph 9.

> "9. … The four steps are psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the "real life experience"), and finally, in suitable cases, gender reassignment surgery."

49. The Claimants submitted that the assumption behind this reasoning is that when a person is in the process of undergoing gender reassignment there comes a point where she should be treated as a woman when deciding who is the appropriate comparator on a claim of gender reassignment discrimination. The Claimants submitted that at the latest, that point must come when the person has obtained a gender recognition certificate. This, they contended, lends support to the argument that the 1992 Workplace Regulations must be read consistently with section 9(1) of the GRA 2004.

50. I do not attach any weight to this submission. To the extent that Pill LJ's reasoning in *Croft* might be taken to suggest that in a gender reassignment discrimination claim the identity of the comparator will alter depending on whether the claimant was proposing to undergo gender reassignment, was undergoing it, or had undergone it, that point was not taken up in the judgment of Jonathan Parker LJ in *Croft*. At paragraph 74 he stated.

> "74. In my judgment, the true comparators in the circumstances of the instant case are employees of the employers (whether male or female) who are not persons to whom section 2A applies: that is to say, employees of either sex who are not transsexual."

It is also notable that in *For Women Scotland*, Lord Hodge, Lady Rose and Lady Simler stated (at paragraph 134)

> "134. … to demonstrate less favourable treatment in subsection (1) an actual or hypothetical comparator is often relied on to demonstrate that a person without the relevant protected characteristic was or would have been treated more favourably by person A. Such a comparator (actual or hypothetical) must be a person who does not share B's protected characteristic. Section 23(1) makes clear that, apart from the protected characteristic, there must be "no material difference between the circumstances relating to each case" when determining whether B has been treated less favourably. Accordingly, where sex is the protected characteristic, a woman relying on section 13(1) must compare her treatment with the treatment that was or would have been afforded to a man whose circumstances are not materially different to hers; in other words, a similarly situated man. Where gender reassignment is the protected characteristic, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman (although there may be situations where the comparator's sex is immaterial to the comparison). See for example, *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, at para 74."

In *For Women Scotland* the only reference to the judgments in *Croft* was to the judgment of Jonathan Parker LJ, and there was no suggestion that in a claim of discrimination on grounds of gender reassignment, the identity of the comparator could depend on whether the claimant had completed a relevant process for gender reassignment. It is also important that *Croft* pre-dates the existence of section 9(1) of the GRA 2004 and that it was not a case that concerned the meaning and effect of the 1992 Workplace Regulations. Taking these matters together, I do not consider that either Pill LJ's reasoning or the notion that the relevant comparator for a claim of gender reassignment discrimination will change, can survive the reasoning in *For Women Scotland*.

*(ii) So far as concerns provisions on services in EA 2010, there is no requirement to provide single-sex lavatories (paragraph **[2]**).*
*(iii) A single-sex lavatory is permitted by the EA 2010 if it is a proportionate means of achieving a legitimate aim (paragraph **[2]**).*

51. Points (ii) and (iii) at paragraph 31 above are accurate. No submission was made to the contrary.
*(iv) Failing to provide a female single-sex lavatory could comprise indirect sex discrimination against women (paragraph **[2]**).*

52. Point (iv) does no more than raise the possibility that absence of single-sex female lavatories could amount to indirect sex discrimination. The success or failure of such a

claim would be fact-dependent, for example on how the matters referred to at section 19(1)(b) (disadvantage), and (d) (proportionality) fell to be assessed. To this extent the point made was accurately made.

*(v) Single-sex lavatories provided will cease to be single-sex if transsexual persons are permitted to use them other than in accordance with their biological sex (paragraph **[3a]**).*

53. Point (v) is also accurate; it is an inevitable consequence of the conclusion of the Supreme Court in *For Women Scotland* that in the EA 2010 "man" means a biological man and "woman" means a biological woman.

54. The Claimants sought to contend otherwise. The submissions for the Claimants were those above at paragraphs 35 – 38.

55. The Minister for Women and Equalities made no overall submission on whether the Claimants' claim should succeed or fail, but did make submissions on this point. She submitted that if single-sex lavatories were provided they could continue to be a single sex-service for the purpose of the provisions in Schedule 3 to EA 2010 notwithstanding what she referred to as "derogations" – i.e., situations where (taking lavatories as the example) a man used the female lavatory. The examples relied on were of a piece with those the Claimants relied on. Based on those examples the Minister submitted that a trans-inclusive lavatory (as above, see paragraph 38) could continue to have the protection of one or both of the exceptions at paragraph 26 and 27 of Schedule 3 to the EA 2010 as a single-sex provision.

56. This submission was not easy to follow, not least because the Minister disavowed the suggestion that a female lavatory habitually made available for use by trans women necessarily remained as single-sex service. Rather, the point seemed to be that, accepting that a trans inclusive lavatory was not a single-sex provision, it could be lawful to exclude other men and not thereby discriminate against those men on grounds of sex. Assuming that was the submission made, it is better considered in the context of point (vi).

*(vi) If trans women are permitted to use a single-sex female lavatory all biological males must be permitted to use that lavatory (paragraph **[3a]**).*

57. The legal premise for point (vi) is that a man excluded from a trans-inclusive female lavatory (for the purposes of the EA 2010, a mixed-sex provision) would succeed on a claim of direct discrimination on grounds of sex.

58. In this scenario, not all men would be prevented from using the trans-inclusive lavatory. However, the direct discrimination claim would not fail for that reason: see and compare the judgment of Baroness Hale in *R(Coll) v Secretary of State for Justice* [2017] 1 WLR 2093 at paragraphs 28 – 31.

59. Whether point (vi) is correct will depend on the circumstances of the case and how, in those circumstances the matter of assessment that emerges from the judgments of the Court of Appeal in *Smith v Safeway plc* [1996] ICR 868 and *R(Al Hijrah School) v HM Chief Inspector of Education* [2018] 1 WLR 1471 is decided. The relevant matter is

whether, notwithstanding that the man is differently treated, is he less favourably treated?

60. In *Smith v Safeway* an employer had a code on staff appearance which applied different rules for men and women. Men were required to have *"... tidy hair not below shirt collar length. No unconventional hair styles ..."*. A man sporting a ponytail was dismissed. He made a claim of sex discrimination. The Industrial Tribunal dismissed the claim and that conclusion was upheld by the Court of Appeal. Phillips LJ stated (at page 878B – D).

> "As Mr. Elias has pointed out, a code which made identical provisions for men and women but which resulted in one or other having an unconventional appearance, would have an unfavourable impact on that sex being compelled to appear in an unconventional mode. Can there be any doubt that a code which required all employees to have 18-inch hair, earrings and lipstick, would treat men unfavourably by requiring them to adopt an appearance at odds with conventional standards? … A code which applies conventional standards is one which, so far as the criterion of appearance is concerned, applies an even-handed approach between men and women and not one which is discriminatory"

Leggatt LJ agreed (see at page 881G – H)

> "Discrimination consists, not in failing to treat men and women the same, but in treating those of one sex less favourably than those of the other. That is what is meant by treating them equally. If men and women were all required to wear lipstick, it would be men who would be discriminated against. Provided that an employer's rules, taken as a whole, do not result in men being treated less favourably than women, or vice versa, there is room for current conventions to operate."

In *Al-Hijrah School*, a co-educational primary school segregated pupils by sex from age 9. In an inspection report, school inspectors described this as direct discrimination on grounds of sex. The school challenged that conclusion. The court concluded, by a majority, that separate but equal treatment could constitute less favourable treatment and therefore discrimination; the different treatment was detrimental both to boys and girls; and that on the facts, both boys and girls were less favourably treated. The judges in the majority (Etherton MR and Beatson LJ) considered the decision in *Smith v Safeway* on which the school relied. The school had submitted the case was:

> "74. … clear and binding authority that different but equal treatment for reasons of sex cannot constitute unlawful discrimination unless those of one sex are treated less favourably than the other sex, and so the same is necessarily true where they are treated similarly."

At paragraph 76, the judges concluded:

> "76. We do not consider that *Smith's* case is of any assistance on this appeal. As the judge pointed out … the facts of that case are very different from those of the present case. They are so different, and the social context in which they arose was so different, that [the reasoning of the court in *Smith*] … cannot usefully be translated by analogy to the application of section 13 of EA 2010 in conjunction with section 85(2) of EA 2010 to the facts in the present case."

61. Whether different treatment is also less favourable treatment is, therefore, a qualitative question. In a case where the provision of separate lavatories labelled male and female was materially similar in terms of the extent of the provision, location, and so on, I consider there would, in principle, be scope for a strong argument that a rule or practice that permitted trans women to use the "female" lavatory but required other biological men to use the male lavatory would comprise different but not less favourable treatment on grounds of sex. However, the circumstances of the case would be decisive. (For the purposes of the EA 2010 the lavatory would be mixed-sex, but for the purposes of the Claimants' submission in this case it would still be labelled "women".)

62. The Claimants put the same point in a different way contending that providing a trans-inclusive lavatory could be permitted positive action under section 158 of the EA 2010 and that for that reason, any claim of direct discrimination brought by a man would fail. I do not consider it necessary to consider this point separately. Insofar as it might further be said that section 158 would provide a response to the claim of indirect sex discrimination anticipated in point (iv) (the claim made by women when no single-sex provision was made), reliance on section 158 would not lead to consideration of any matter not already relevant to the justification defence to such an indirect discrimination claim.

*(vii) In some circumstances equality law may permit transsexual persons to be excluded from single-sex lavatories that correspond to their biological sex (paragraph **[3b]**).*

63. Point (vii) reflects what was said by the Supreme Court in *For Women Scotland* at paragraph 221. When considering the effect of paragraph 28 Schedule 3 to the EA 2010 (see above, paragraph 28, proposition 8) and the submission that it only applied to persons holding a gender recognition certificate, the court stated as follows.

> "221. … Nor is the EHRC correct to assert that paragraph 28 is redundant on a biological interpretation of sex. On the contrary, if sex means biological sex, then provided it is proportionate, the female only nature of the service would engage paragraph 27 and would permit the exclusion of all males including males living in the female gender regardless of GRC status. Moreover, women living in the male gender could also be excluded under paragraph 28 without this amounting to gender reassignment discrimination. This might be considered proportionate where reasonable objection is taken to their presence, for example, because the gender reassignment process has given them a

> masculine appearance or attributes to which reasonable objection might be taken in the context of the women-only service being provided. Their exclusion would amount to unlawful gender reassignment discrimination not sex discrimination absent this exception."

*(viii) Lavatories in lockable rooms used one person at a time, can be used by anyone (paragraph **[3e]**).*

64. Point (viii) is correct, not only for the purposes of the complying with the requirement under regulation 20 of the 1992 Workplace Regulations, but also for the purpose of any argument that might be raised under the EA 2010. For example, if a shop or café were to provide lavatories on this basis, in a lockable room, to be used by one person at a time, the provision of that service in that way would not give rise to sex discrimination or discrimination on grounds of gender reassignment.

*(ix) If you provide single-sex lavatories do not fail to make provision for transsexual persons (paragraph **[3c]**).*
*(x) If you provide single-sex lavatories (or other facilities) where possible, also provide a mixed-sex facility (paragraph **[3d]**).*

65. Points (ix) and (x) may be considered together. In isolation, neither seems objectionable. Neither is contrary to any requirement in the 1992 Workplace Regulations nor constitutes discrimination under the EA 2010 on grounds of gender reassignment.

66. Point (ix) is to the effect that in no circumstances should no lavatory facilities be available to trans women and trans men. The legal issue laying behind this is that the derogation from section 29 EA 2010 at paragraph 28 of Schedule 3 operates subject to a condition – that provision of single-sex lavatories will not comprise a breach of section 29 on grounds of gender reassignment only if that is "… *a proportionate means of achieving a legitimate aim*". Thus, a service provider who made single-sex provision; made no further provision for transsexual persons; but rather, expected transsexuals to use lavatories corresponding to their biological sex, might be unable to show this was proportionate in the manner required. These provisions in the EHRC guidance assume that such circumstances would not be proportionate and would comprise discrimination on grounds of gender reassignment.

67. Point (x) encourages provision of mixed-sex facilities in addition to single-sex ones. This would be one way of meeting the requirement for proportionality in paragraph 28 of Schedule 3 to the EA 2010 where the service provider has otherwise made single-sex provision. It might also serve to address any claim of discrimination on grounds of gender reassignment against an employer who had complied with the 1992 Workplace Regulations other than by provision of lavatories in separate lockable rooms to be used by one person at a time.

68. The Claimants contend the position is less clear cut and that providing additional mixed-sex lavatories or expecting transsexual persons to use accessible lavatories (that are commonly provided in separate rooms for use by one person at a time) may not be sufficient either to meet the proportionality requirement in paragraph 28 of Schedule 3,

or to meet a claim of gender reassignment discrimination brought against an employer. This leads to the Claimants' overarching submission under Ground 1, that the focus of the guidance in the Interim Update is the legality of single-sex provision and that the guidance fails to capture the fact-sensitive nature of the requirements in EA 2010.

69. One way in which the submission was put was that in substance, the guidance amounts to the proposition that service providers can require transsexual persons to use lavatories that correspond to their biological sex. I do not consider this is a reasonable reading of the guidance. Both points (ix) and (x) encourage provision that would not produce that result. These points are to be read with point (iii) – that single sex provision in permitted only to the extent that it is a proportionate means of achieving a legitimate aim. That principle which, taking account of paragraph 28 of Schedule 3, is a condition for any derogation from the prohibition against discrimination on grounds of gender reassignment.

70. It may be said that this analysis is essentially legalistic, and that it is unrealistic because it fails to recognise how the guidance in the Interim Update directed to service providers and employers might have been understood by non-lawyers. That misses important points. *First*, although the intended audience is not an audience of lawyers it will not be an unsophisticated audience. *Second*, the EHRC's guidance did concern matters where the application of law was especially dependent on factual circumstances. But that would also be the common experience of any employer or service provider who had any acquaintance with discrimination or employment law. *Third*, those reading the document would or ought readily to understand the warning at the beginning of the Interim Update to "take appropriate specialist legal advice where necessary".

71. These considerations would apply both to service providers and to employers. When a service provider provides single-sex lavatories the exclusion of the possibility that that provision could give rise to discrimination of grounds of gender reassignment depends on whether the provision of the single-sex lavatories is proportionate to the objective being pursued (paragraph 28 of Schedule 3). That condition tends against a situation where the consequence of the single-sex provision is either no provision for transsexual persons or a requirement that all must use lavatories corresponding to biological sex. Such an outcome would have to be justified as proportionate. For employers, the position will be the same. Although the 1992 Workplace Regulations prescribe the provision of single-sex lavatories, that requirement does not exclude the provisions in the EA 2010 on gender reassignment discrimination at work: see and compare the derogation in paragraph 2 of Schedule 22 to the EA 2010, which only applies to the protected characteristics of pregnancy/maternity, and sex.

72. The second way in which the overarching provision was put was that mixed provision or single use provision, if alongside single-sex lavatories, could comprise less favourable treatment. This point has been made in different ways by each of the three individual Claimants. BOT stated she was concerned that if she followed her employer's instruction to use the accessible lavatory other employees would think she was acting unusually and that would cause speculation about the reasons for her change of practice. The evidence of BBS was to similar effect. All three Claimants refer to being concerned about public lavatories including using unisex or accessible lavatories when single-sex ones are also provided.

73. I accept these concerns are sincerely held. However, the existence of less favourable treatment is a question for the court to decide; a Claimant's subjective beliefs are not determinative. On this issue, the circumstances of a particular situation could, as a matter of theory, lead to the conclusion that a requirement to use the unisex or accessible lavatory rather than an available single sex one might amount to less favourable treatment, but I consider this is likely to be the more rare rather than more common conclusion. So far as concerns use of public lavatories it ought rarely, if ever, be the case that a person using a unisex lavatory rather than an available single-sex one will ever be a matter of comment by others. One point raised was that the unisex provision is often labelled "accessible" or "disabled". That is a current common practice, but it is not a practice that is invariable or need continue. There is no reason why, if only as a matter of sensible accommodation, the labelling could not change. A propensity for gossip is a feature of every workplace. So far as concerns gossip at work, no employee can expect not to be the subject of gossip about something on some occasion. Gossip is usually temporary; it is in its nature to be short-lived, as one subject is quickly overtaken by another. Up to a point, being the subject of comment by others is burden that anyone can expect to bear from time to time, and ought not to be a foundation for legal redress.

74. Overall, I do not consider that either point (ix) or point (x) contains any misstatement of law.

(5) Conclusion on Ground 1

75. I do not accept the Claimants' submissions on Ground 1. Drawing together the matters above, two possible criticisms of the guidance in the Interim Update emerge.

76. The first concerns the 1992 Workplace Relations: that the points made in paragraph **[1]** and **[3e]** of the Interim Update (see above at paragraph 7) ought to have been stated together as they were by the time the Interim Update was republished on 24 June 2025. Although I agreed that this would have made the explanation of regulation 20 more clear, what was said in the Interim Update as published on 25 April 2025 was not, considered in the round, inaccurate. It is not unreasonable to assume that anyone concerned with providing single sex facilities in a workplace would have read and considered all the parts of the Update that concerned workplaces – i.e. both paragraph **[1]** and paragraph **[3]**.

77. The second possible criticism concerns the proposition at **[3a]** considered at point (vi) (above at paragraphs 57 – 62). While I am less certain than the Interim Update that a man prevented from using the Claimants' trans-inclusive female lavatory would be likely to establish the less favourable treatment necessary to make good a claim of direct sex discrimination, I do not consider that the way the point is put in the Update is necessarily wrong. Rather, it is a point that may turn on the facts of a situation. Even though the EHRC's obligation when exercising its power under section 13(1)(d) of the EA 2006 is to provide an accurate statement of the law, the court must apply this requirement recognising that any statement of law will rest on some assumption of fact, even if only generic. Where a body such as the EHRC has issued guidance that rests on factual premises that are permissible, the court should hesitate before concluding that the guidance as issued was unlawful. Thus, I do not consider that the EHRC's approach to point (vi) gives rise to any legal error.

78. The Claimants submitted generally, that what was said in the Interim Update failed sufficiently to recognise that the application of the provisions in the EA 2010 concerning single-sex provision of services including paragraphs 26 – 28 of Schedule 3 to the Act was heavily dependant on circumstances. I do not agree. That point was sufficiently recognised at paragraph **[2]** of the Interim Update. That refers to the "proportionate means of achieving a legitimate aim" test. That is the requirement for factual evaluation that permeates through all the provisions on single-sex provision and the possibility of derogation from the prohibition against discrimination at section 29 of the EA 2010.

79. The Claimants' further general submission was to the effect that the Interim Update did not include matters that should have been included. I do not consider any such error occurred in this case. A requirement to state the law accurately is not the same as a requirement to give a comprehensive statement – to include everything that could possibly be said. Any different conclusion would either render lawful use of a power such as the one at section 13(1)(d) impossible, or ensure that the lawful use of the power produced a publication that was likely to be impenetrable to its intended audience. There may be situations where an omission is misleading and renders what is included inaccurate. However, the present case was not that situation. The guidance in the Interim Update was directed to the provision of single-sex facilities. This was the matter that the judgment in *For Women Scotland* had affected and the EHRC did not act unlawfully by addressing only this in the Interim Update rather than more general issues relating to the gender reassignment protected characteristic.

80. Ground 1 of the Claimants' challenge therefore fails.

C. Decision, Ground 2. Breach of sections 3, 8 and 9 of the EA 2006

81. Sections 3, 8 and 9 of the EA 2006 identify the general purposes that the EHRC must pursue when exercising its powers under Part 1 of the EA 2006, under which the EHRC was established and operates. Section 3 (described as the "general duty") requires the EHRC to exercise functions.

> "**3. General duty**
>
> The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which –
>
> (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
>
> (b) there is respect for and protection of each individual's human rights,
>
> (c) there is respect for the dignity and worth of each individual,
>
> (d) each individual has an equal opportunity to participate in society, and

> (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights."

Section 8(1) is headed "Equality and Diversity" and requires the EHRC to exercise its powers in pursuit of each of seven stated purposes:

> "(a) promote understanding of the importance of equality and diversity,
>
> (b) encourage good practice in relation to equality and diversity,
>
> (c) promote equality of opportunity,
>
> (d) promote awareness and understanding of rights under the Equality Act 2010,
>
> (e) enforce that Act,
>
> (f) work towards the elimination of unlawful discrimination, and
>
> (g) work towards the elimination of unlawful harassment."

Section 9(1) is a provision to like effect in respect of human rights. The EHRC is to exercise its powers to:

> "(a) promote understanding of the importance of human rights,
>
> (b) encourage good practice in relation to human rights,
>
> (c) promote awareness, understanding and protection of human rights, and
>
> (d) encourage public authorities to comply with section 6 of the Human Rights Act 1998"

82. Taken together, the purposes referred to in these sections cover all aspects of the EHRC's objectives. How these purposes are pursued must, primarily, be a matter for the EHRC taking account of the context of whichever of its substantive or operative powers it is exercising. The duties in these sections are not so dissimilar from the generally-framed duties in section 7 of the Children and Young Persons Act 2008 considered in *Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin), per Lewis J at paragraph 83. The purposes are stated in broad terms. Precisely how each is pursued from time to time, or on any specific occasion, is primarily a matter for the EHRC. It is in the nature of these provisions that a court ought not to be too prescriptive when considering complaints of non-compliance; the EHRC should be afforded latitude which the court must recognise. To take section 3 as an example, how to encourage and support development of the "society" there referred to is a matter for the judgment and assessment of the EHRC as an expert public authority.

83. In this instance, the relevant substantive power is the one at section 13(1)(d) to provide advice and guidance "… about the effect or operation of an enactment or otherwise". The Claimants' submissions start by revisiting matters relied on in support of Ground 1. It is submitted that if the EHRC issued the guidance in the Interim Update in breach of section 13, it will follow for the same reasons, that the decision to issue guidance was also in breach of section 3 and one or both of sections 8 and 9. I do not consider that the one necessarily follows from the other. A public body may still act in pursuit of a required purpose even if its exercise of one of its operative powers is faulty. Instead, when considering any matter of alleged non-compliance with duties such as those in section 3, 8 and 9 of the EA 2006 it is necessary to consider the particular ways in which it is said the EHRC failed in this instance in its exercise of the power at section 13(1)(d) of the EA 2006.

84. Be that as it may, since for the reasons already given, I have dismissed the Claimants' claim under Ground 1 that the EHRC acted in breach of section 13 this part of the Claimants' submission on Ground 2 must also fail.

85. The next part of the Claimants' submission is that the Interim Update failed to mention matters that ought to have been stated: (a) that in *For Women Scotland* the Supreme Court stated that it did not consider its conclusion served to diminish the protection against discrimination on grounds of gender reassignment (see the judgment in *For Women Scotland* at paragraphs 248 – 263); and (b) the need to consider the dignity of trans men and trans women.

86. This submission requires careful handling. In context, it is to the effect that what was published lacked "balance" through omission risks, and thus risks inviting the court to take control of the EHRC's section 13 power to publish information. In a very clear case the submission might succeed. However, in other cases it should not.

87. In the present case the context for publishing the Interim Update was important. The conclusion stated by the Supreme Court that in the EA 2010 man and woman meant "biological man" and "biological woman" respectively, had wrong-footed the published version of the Services Code of Practice (see above at paragraph 5). So far as concerned access to single-sex services, although the process of revising and reissuing that Code of Practice was already underway that process was likely to continue for some time, and the EHRC considered that something needed to be published promptly. Of itself, the decision to publish promptly reveals no error of law. What the EHRC published was described as referring to the "main consequences" of the judgment in *For Women Scotland*, and the focus of the Interim Update was the effect of that judgment on single-sex service provision. In this context it is not significant when considering compliance with section 3, 8 and 9 of the EA 2006, that the Interim Update did not refer to every aspect of the Supreme Court's reasoning. The requirements in those sections did not prevent the EHRC highlighting only the effect of the judgment on single-sex provision. It is also to be noted that nothing in paragraphs 248 – 263 of the judgment in *For Women Scotland* touches on provision of single sex-services.

88. In any event, the Interim Update did state both that the consequence of single-sex lavatory provision should not be that no provision was made for transsexual people, and did encourage provision of unisex or single person use facilities (see points (ix) and (x)

above at paragraph 31. These two matters directed any reader of the Interim Update to consider the consequences for gender reassignment discrimination of providing single-sex lavatories and thus also, to considering the dignity of transsexual people.

89. In the premises, I do not consider that the EHRC's decision to publish the Interim Update was contrary to the obligations in section 3, 8 and 9 of the EA 2006 by reason of matters not set in the document.

90. The third part of the Claimants' submission concerned how the EHRC went about taking its decision to publish the Interim Update, how the Update was revised after its first publication, and the reasons why the Interim Update was removed from the EHRC website in October 2025. The Claimants contend: that the decision to publish was rushed and not properly considered by the EHRC's board; that after first publication on 25 April 2025 the Interim Update was amended by stealth; and that the reason for removing the Interim Update from the website was inconsistent with the purposes at section 3, 8 and 9 of the EA 2006.

91. I do not consider that the first of these three points goes to compliance with any requirement arising under any of sections 3, 8 or 9 of the EA 2006. The purposes referred to in those sections attach to the EHRC's substantive exercise of its operative functions. I do not consider that those provisions ought to be understood as giving rise to procedural or other similar requirements. I accept that in a particular case it may be possible to draw an inference about compliance or otherwise with obligations such as those at section 3, 8 and 9 of the EA 2006 from the way in which an operative function has been performed. However, in this case having considered the evidence of John Kirkpatrick, the EHRC's Chief Executive, that explains how the Interim Update came to be published, I am satisfied that no such inference can be drawn.

92. Nor am I satisfied that the second part of the submission supports any conclusion on whether EHRC met the obligations arising under sections 3, 8 and 9 of the EA 2006. It is not surprising that revisions were made to the Interim Update after it was first published on 24 April 2025. The approach to and consequences of single-sex provision of lavatories, changing rooms etc., are controversial matters. Even an expert body such as the EHRC is entitled to develop its thinking. Yet the way those changes were made was opaque and, for that reason, was very unsatisfactory. As first published, the Interim Update was labelled published "25 April 2025". When changes were made to it (including but not limited to the changes made on 24 June 2025: see above at paragraph 8) the document on the website continued to be labelled "published 25 April 2025" giving the impression that the document on the website was the same document as originally published. The fact that the document had been revised was mentioned only at the end of the document and ,even then, only in general terms. The changes that were made should have been much more clearly flagged. However, none of these matters either comprises or gives rise to any inference of failure to comply with any of sections 3, 8 or 9 of the EA 2006.

93. The third part of the submission concerned the EHRC's decision on 15 October to remove the Interim Update from its website notwithstanding that by that time there was no new version of the Services Code of Practice. The decision to remove the Update from the website is explained in Mr Kirkpatrick's second witness statement. The material part of that statement comes to this. The EHRC had submitted the proposed

new Code of Practice to the Minister of Women and Equalities ("the Minister") on 4 September 2025. (By sections 14 and 15 of the EA 2006 and among other matters, the EHRC may issue a Code of Practice only with the approval of the Secretary of State, who is also the Minister.) By October 2025, the Minister had yet to decide whether to approve the new Code. Mr Kirkpatrick states that the EHRC wished to "encourage" the Minister to take her decision and was concerned that the only issued Services Code of Practice was the one that pre-dated the judgment in *For Women Scotland*. Removing the Interim Update was thought to be one way of "encouraging" the Minister to discharge her obligation in respect of the proposed new version of the Services Code of Practice. Further, by October 2025 the EHRC considered that the Interim Update had served its purpose, and was concerned that were it to remain on the website indefinitely it might, *de facto*, assume the status of guidance contained in a Code of Practice. In place of the Interim Update, the EHRC website now has an announcement that: explains that the Interim Update has been removed; refers to the fact that ministerial consideration of the proposed new Code of Practice remains pending; states that the existing code of practice is out of date; and then states that service providers (i.e., those subject to the obligation under section 29 EA 2010) "*should continue to take specialist legal advice*" as to the requirements arising.

94. I do not consider that the EHRC's motive for removing the Interim Update from its website affects whether that decision was consistent with the objectives stated in sections 3, 8 and 9 of the EA 2006. How the EHRC thinks it best to achieve its objective that a revised version of the Services Code of Practice is published is not likely to (and in this instance, does not) engage any legal issue. In this instance what matters is what remains on the EHRC's website, which is an encouragement that the those concerned take legal advice – i.e., seek to comply with the obligations arising under the EA 2010, a warning that parts of the existing Services Code of Practice have been overtaken by events, and an indication that a new Services Code of Practice remains pending. None of this is inconsistent with any requirement arising out of any of sections 3, 8 or 9 of the EA 2006.

95. For these reasons, Ground 2 of the challenge fails.

D. Decision, Ground 3. Convention rights

96. The Claimants submit that if the statements of law made in the Interim Update are correct, that gives rise to a breach of Convention rights. Regardless of the matter concerning the standing of the First Claimant (see above at paragraph 15 – 17) this claim under the Human Rights Act 1998 is only capable of being pursued by the individual Claimants as only they satisfy the victim test at section 7(1) of the Act.

97. The premise for the submission is the Strasbourg court's case law on article 8 which confirms that the area of personal autonomy protected by article 8(1) includes personal identity. The cases concerned legislation or state practice that affected gender reassignment recognition as a matter of civil status: see for example *Goodwin v United Kingdom* (1992) 35 EHRR 18, *AP v France* (application number 79885/12 and others, judgment 6 April 2017) and *TH v Czech Republic* (application number 33073/22, judgment 12 June 2025). In the alternative the Claimants also rely on article 8 read together with article 14. I do not consider that reliance on article 14 adds anything to the Claimants' case. The Claimants then submit that if either the provisions of the EA 2010 or those of the 1992 Workplace Regulations prohibit provision of a trans-inclusive

lavatory (the female lavatory that may also be used by trans women) that is an unjustified interference with the Claimants' article 8 rights.

98. For present purposes I will assume that a prohibition on provision of a trans-inclusive lavatory is capable of comprising an interference with article 8 rights and does give rise to some interference with article 8 rights. However, each of those propositions is open to doubt. *First*, such a prohibition is of a different order to any of the issues considered to date by the Strasbourg court; in each of *Goodwin, AP* and *TH* the applicant was transsexual and faced obstacles to recognition of her civil status. *Second*, the absence of a trans-inclusive lavatory is not the same as no lavatory at all. Even assuming interference with article 8 rights the interference would be less significant than considered by courts so far.

99. As explained already: (a) subject to the point on whether such provision might amount to less favourable treatment of men (see above at paragraphs 57 – 62) trans-inclusive lavatories could be provided consistently with the requirements of the EA 2010; and (b) consistently with the single-sex provision required by regulation 20 of the 1992 Workplace Regulations, an employer could provide a trans-inclusive lavatory as additional provision (see above at paragraphs 26 and 71). On this analysis neither the EA 2010 nor the 1992 Workplace Regulations gives rise to any necessary interference with any aspect of the Claimants' article 8 rights.

100. However, even if that analysis is wrong, the Claimants' case still fails. Even if there is a relevant prohibition on provision by a service provider or an employer of a trans-inclusive lavatory, and a consequent interference with article 8 rights, that interference would be capable of being justified taking into account the rights and freedoms of others. Justification would depend on the facts of any particular situation. Nevertheless, the fact that justification is possible and on many scenarios highly likely to be present, is sufficient to dispose of this ground of challenge.

E. Disposal

101. Shortly before the hearing of this claim the Claimants sought permission to rely on further witness statements in reply to evidence filed by the Intervener. No party objected to the application to admit those statements. The Claimants' application to rely on those witnesses statements is granted.

102. The hearing was a rolled-up hearing. I grant the applications by the Second, Third and Fourth Claimants for permission to apply for judicial review. The First Claimant's application for permission to apply for judicial review is refused for want of standing (see above at paragraphs 15 – 17).

103. For the reasons set out above, each of the three grounds of challenge fails. The application for judicial review is therefore dismissed.