

03 January 2025

By email from: [info@forwomen.scot](mailto:info@forwomen.scot)  
to: [correspondence@equalityhumanrights.com](mailto:correspondence@equalityhumanrights.com)

Dear Sir/Madam,

**Code of practice for services, public functions and associations: consultation 2024**

This is a response to the consultation as published by the EHRC on 2nd October 2024. As the petitioners and appellants in the following legal cases which are relevant to the Code of Practice we wish to raise several points that do not easily fit into the format of the online response form:

- FWS1 - Court of Session Inner House, 18 February 2022<sup>1</sup>  
Exceptions making provision for women by definition, in the Equality Act, exclude biological males.
  - FWS2 - Court of Session Inner House, 01 November 2023<sup>2</sup>  
Individuals without a gender recognition certificate (GRC) retain the sex in which they were born and have no right to access services provided for members of the opposite sex.  
Individuals with a GRC have the protected characteristic of sex according to the terms of their GRC, and have a presumptive right to access services provided for members of that sex. (This part of the decision was appealed to the UK Supreme court.)
  - UK Supreme Court - currently awaiting judgment.<sup>3</sup>
1. The decision in the UK Supreme Court case regarding whether a GRC changes a person's sex for the purposes of the Equality Act 2010 is likely to be handed down within weeks of the closing date of the consultation which, regardless of the judgment, will necessitate further revision to the Code of Practice, potentially rendering the current consultation largely a futile exercise.
  2. The EHRC stated in the UK Supreme Court that, following the FWS2 decision regarding GRC holders (and under its own interpretation), the “current unsatisfactory state of the

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<sup>1</sup> <https://www.scotcourts.gov.uk/media/0a1plqgo/court-of-session-judgement-reclaiming-motion-by-for-women-scotland-limited-against-the-lord-advocate-and-others-18-february-2022.pdf>

<sup>2</sup> <https://www.scotcourts.gov.uk/media/l1imtxvx/court-of-session-judgement-reclaiming-motion-by-for-women-scotland-limited-against-the-scottish-ministers-01-november-2023.pdf>

<sup>3</sup> <https://www.supremecourt.uk/cases/uksc-2024-0042>

law” means that “important provisions of the Equality Act do not achieve their purpose, are difficult to operate in practice” and “provide insufficient protection for women’s rights”.<sup>4</sup> On this basis, a Code of Practice that attempts to provide guidance on a law that is deemed unworkable is therefore neither achievable, nor desirable. It would be more fruitful for the EHRC to work towards its recommended solution of defining sex in the Equality Act as a biological term.<sup>5</sup>

3. We consider the ruling in FWS1 to correctly represent the law as it currently stands. This judgment was never appealed against and duly became final law in Scotland, as well as a ‘persuasive’ ruling in the rest of the UK. It was not overturned by FWS2.

FWS1 ruled that the Scottish Ministers wrongly conflated and confused the two separate and distinct protected characteristics of sex and gender reassignment by incorporating those transsexuals living as women into the definition of woman (§39). Transsexuals are persons with the protected characteristic of gender reassignment and includes those with and without a Gender Recognition Certificate (GRC). Importantly, the decision stated at §36 that:

*“...a reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose a man is a male of any age; and a woman is a female of any age. Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a “female of any age”. **Provisions in favour of women, in this context, by definition exclude those who are biologically male.**”* (emphasis added)

It was the agreed position between parties to the case that a GRC cannot and does not change a person’s sex as a matter of biological fact. The subsequent court order required the Scottish Ministers to remove the unlawful definition of woman from the Act concerning positive action measures for women’s representation on public boards and extended to expunging mention of GRCs from the accompanying statutory guidance.<sup>6</sup>

We would question why FWS1 did not merit any discussion or reference in the Code of Practice, particularly when the examples for separate services for women and men and single-sex services, as given in sections 13.83 to 13.110, operate easily when biological males can simply be excluded on the basis of their sex, regardless of whether they hold a GRC. It also resolves the EHRC’s worries about satisfying the intended purpose of the Equality Act and protecting women’s rights. The examples refer only to women and men with no reference to the EHRC’s interpretation of these categories being a technical “legal sex” category rather than the common biological meaning.

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<sup>4</sup> Video, 27 November 2024 afternoon session: <https://www.supremecourt.uk/cases/uksc-2024-0042>

<sup>5</sup> The Times, 04 April 2023, “Kishwer Falkner: A biological definition of sex is needed”

<https://archive.ph/3qPC6>

<sup>6</sup> <https://forwomen.scot/wp-content/uploads/2022/03/Interlocutor.pdf>

4. Where the Code of Practice discusses gender reassignment discrimination and separate and single-sex services in sections 13.111 to 13.123 it gives advice which is not consistent with either FWS1 or FWS2.

The following two examples replicate the provision in the previous Code of Practice (at 13.57) that “they should treat transsexual people according to the gender role in which they present”.<sup>7</sup> It is untenable to continue misleading service providers to grant transsexuals access to women-only services based on how well they pass as the opposite sex when FWS1 states biological males should be excluded and FWS2 solely considers whether the person holds a GRC with no regard for appearance. Furthermore, §38 of FWS1 concluded that “neither [P v S] nor the Chief Constable of West Yorkshire Police (No 2) (supra) case, which anticipated the 2004 Act, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present”.

*“13.113 There are circumstances where a separate or single-sex service provider can prevent, limit, or modify trans people’s access to the service. This is allowed under the Act. However, limiting or modifying access to, or **excluding a trans person from, the separate or single-sex service of the gender in which they present might be unlawful** if the service provider cannot show such action is a proportionate means of achieving a legitimate aim. **This applies whether the person has a GRC or not.**”*

*“13.119 If the service provider’s reason for their action does outweigh the discriminatory effects, it is likely to be lawful to exclude trans persons from the single sex service of **the gender in which they present**, or to modify or limit their access to the service.”*

As well as the use of “trans person” in 13.113 and the example of “trans woman” below, the Code of Practice is replete with similar non-statutory terminology. Research shows that 40% of the population does not understand that a “trans woman” is a person born male<sup>8</sup> and such unclear and misleading terminology is likely to result in duty bearers falling into error. FWS1 found the lower court had misrepresented the law, in part due to using similar misleading wording that does not appear anywhere in any legislation and, at §40, observed “Therein lies the rub: ‘transgender women’ is not a category for these purposes; it is not a protected characteristic”.

The example below also considers the possibility that a male should be included in the women-only provision, and does not comply with FWS1 which clarifies the lawfulness of blanket exclusion of all males. Nor does it comply with the EHRC’s own interpretation of the law as given in FWS2 which requires the “trans woman” to be in possession of a GRC before possibly being housed in the women’s wing of the nursing home.

*“13.120 A private nursing home has separate wings for men and women, as a large proportion of residents request single-sex accommodation for reasons of privacy and*

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<sup>7</sup> <https://www.equalityhumanrights.com/equality/equality-act-2010/codes-practice/services-public-functions-and-associations-code-0#document-download>

<sup>8</sup> <https://murrayblackburnmackenzie.org/2023/08/07/clarity-matters-how-placating-lobbyists-obscures-public-understanding-of-sex-and-gender/>

*dignity. A **trans woman** asks to reside in the women-only wing of the nursing home. The provider must consider whether there is any impact on the privacy and dignity of existing service users living in the women's wing, and balance this against any potential negative impact on the trans resident, such as her privacy and dignity, if she were asked to reside in a male-only wing."*

Footnote 79 in the example below refers to FWS2 as justification for using the terminology "legal sex". This is incorrect and is in fact a circular definition since FWS2 mentions the term at §57 when quoting from the EHRC's own letter to the Minister for Women and Equalities on 03 April 2023. "Legal sex" is terminology invented by the EHRC and is not used in any statute. Accordingly, it tends to mislead and should not be used in the Code of Practice.

*"13.112 Providers should note that for the purposes of the Act, '**sex**' means **legal sex [footnote 79]**. This is a person's sex recorded either on their birth certificate, or their Gender Recognition Certificate."*

The decision in FWS2 is cited again in footnote 80 despite it being currently under consideration by the Supreme Court. We presume "trans man" in the example below refers to a woman with the protected characteristic of gender reassignment who may or may not have a GRC. FWS1 would, of course, fully provide pregnancy protections for such a person, as would FWS2 having clarified in §62 that the terms of any GRC in the male gender would be disregarded in favour of sex as a matter of fact and biology. The claim that a "trans man" would only be "likely" to be protected is a reflection of the EHRC's flawed argument in the Supreme Court that some women are not entitled to pregnancy rights in law.

*"13.141 When explaining these exceptions we use the same language as the Act, which refers to discrimination against women on the grounds of pregnancy and maternity. As explained at paragraph 4.54, **a trans man who becomes pregnant is likely to be protected** under the protected characteristic of pregnancy and maternity [footnote 80]."*

The aversion to accurately naming pregnant women as women is further evident in Chapter 4 where mother is substituted on no less than six occasions and pronouns reflecting the sex of the woman have been pluralised. This does not accurately reflect the terminology in the Equality Act where the example below refers to s17(5) which says: "the day on which a **woman** gives birth is the day on which - (a) **she** gives birth to a living child, or (b) **she** gives birth to a dead child (more than 24 weeks of the pregnancy having passed)". The Code of Practice should not amend the specific wording of the statute where the language is sexed for good reason.

*"4.56 **Mothers** are protected even if **their** baby is stillborn, if the pregnancy lasted for at least 24 weeks before **they** gave birth."*

The gender reassignment discrimination and separate and single-sex services section of the Code of Practice is focused on if and when "trans women" should be included in women-only services. No guidance is provided on when it is appropriate to include

women with GRCs in the male gender in women's services. It would not be safe to house such "trans men" in the male prison estate and they may need to attend women-only clinics for cervical smear tests or access women-only rape crisis centres, for example. Under FWS1 this would not be an issue but the EHRC's interpretation of the Equality Act always treats these individuals as men. Accordingly, while they may on occasion be excluded from men-only services, the EHRC decrees there are no circumstances when they can be included as women as a biological fact. This is chilling and a major flaw in both the FWS2 ruling and the EHRC's interpretation which should be addressed in the Code of Practice.

*"13.118 If the justification for **limiting or denying trans persons' access to the single sex service for their acquired gender** does not outweigh the potential discriminatory effects, it is likely to be unlawful to do so."*

We note that while the binding decision in FWS1 is omitted, the decision in FWS2 which is still being considered by the Supreme Court is twice referenced in the footnotes to Chapter 13.

**Numerous sections of the EHRC Code of Practice therefore appear to significantly misdirect duty bearers in Scotland with guidance which completely ignores a relevant, final and binding ruling of the Court of Session Inner House. Instead, the Code either defers to the contested judgment in FWS2 which is still under appeal and may well be shortly overturned, or advises service providers to allow some men access to women's services on the basis of how they look or how they self-identify their sex. This clearly falls foul of both our judicial review decisions.**

We previously brought the terms of the FWS1 ruling to the EHRC's attention in advance of the publication of its guidance for providers of single-sex services on 04 April 2022 and were dismayed when it was wholly discounted with no explanation or justification.

Since this has now been repeated in a Code of Practice that courts and tribunals must take into account in cases involving the Equality Act we think the EHRC should address this urgently. Many respondents to the consultation will be unaware of the ruling and are entitled to know both why they were denied this relevant information and on what legal reasoning the EHRC has disregarded it.

We would be grateful if you could confirm the safe receipt of this letter and that it will be included as a response to the consultation.

Yours faithfully,

Trina Budge, Marion Calder and Susan Smith  
Directors, For Women Scotland