

TRANSLEGALPROJECT

The Baroness Falkner of Margravine,
Chair of Commissioners,
The Equality and Human Rights Commission,
Arndale House,
The Arndale Centre,
Manchester,
M4 3AQ.

April 21st, 2022

Dear Lady Falkner,

EHRC Non-Statutory Guidance on Single/Separate Sex Services

We write as Trans Legal Project, together with other legal professionals, academics and concerned individuals, with regard to the EHRC's recent non-statutory guidance regarding trans people's use of single/separate sex services. Unfortunately, this guidance is not fit for purpose. It is contrary to case law and also to the EHRC's own Statutory Services Code, breaches of which must be taken into account by the courts.

This non-statutory guidance states that the approach of operators of single/separate sex services to providing services to trans people "*must be a proportionate means of achieving a legitimate aim*". The guidance refers to a need to "*balance the impact upon all service users*". This is then followed by case studies. Every case study which features the discomfort of cisgender people suggests that the 'balance' is achieved by a *blanket ban on trans women*. None of this is the law and indeed an organisation that followed this approach could well breach the Equality Act 2010 ('EA 2010').

Specifically:

1. The guidance incorrectly implies that the impact on *cisgender* people of trans people's use of single/separate sex services "*must be a proportionate means of achieving a legitimate aim*". This is not the case, as being cisgender is not a protected characteristic. The legal test only applies to the impact on *trans people* should the service provider choose to *discriminate* against them. (EA 2010 sched. 3 para. 28)
2. Regardless of the impact on other service users, service providers are under no legal obligation to use the EA 2010 sched. 3 para. 28 exception to discriminate against trans people. (*FDJ v Secretary of State for Justice* [2021] EWHC 1746 para. 88).
3. Any blanket bans against trans women are not lawful (*Croft v Royal Mail* [2003] EWCA Civ 1045 para. 53, Services Code para. 13.60).
4. Should a service provider wish to make use of the EA 2010 sched. 3 para. 28 exception to discriminate against a trans person, then a case-by-case approach must be taken with the balancing exercise looking at the impact on *this specific trans person* and the effect their use of the service may have on the other service users (Services Code para. 13.60).

The actual legal requirements on service providers are completely at odds with the non-statutory guidance issued by the EHRC which implies that service providers must enact blanket bans against trans people

The community centre example is particularly problematic:

1. The suggestion that providing a gender-neutral toilet makes it lawful to prohibit all trans people from using toilets that match their lived gender is directly contrary to case law covering access by trans people to toilets, albeit in the context of employment (*Croft*).
2. As trans men are often identical in appearance to cisgender men, permitting them to use the women's toilet would impact the privacy and dignity of women, making a complete mockery of the purported "*legitimate aim*" of the policy in the first place.

Further, key aspects of the Statutory Services Code have been completely ignored in the new guidance:

1. If a trans person is visually and practically indistinguishable from a non-trans person then "*they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary*" (para. 13.59).
2. Any discrimination against a trans person "*must be applied as restrictively as possible*" (para. 13.60).
3. "*[T]he denial of service to a [trans] person should only occur in exceptional circumstances*" (para. 13.60).
4. Decisions should not be based on "*ignorance or prejudice*" (para. 13.60).

In issuing guidance that encourages organisations to breach the EA 2010, we are extremely concerned that the EHRC has acted unlawfully. We therefore urge the EHRC to withdraw this prejudicial guidance with immediate effect, before its malign and chilling effects begin to be felt by Britain's increasingly vulnerable trans community.

We look forward to hearing from you.

Yours sincerely,

Trans Legal Project

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