Equality and Human Rights Commission

Trans Legal Project

By e-mail only to info@translegalproject.org

4 July 2022

Dear Signatories

EHRC Non-Statutory Guidance on Single/Separate Sex Services

We are writing in response to your letter of 21 April 2022 to Lady Falkner concerning the Non-Statutory Guidance on Single/Separate Sex Services (SSS) (hereafter referred to as 'the Guidance')).

We respond to the points in your letter in the order they were made as follows:

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)

We strongly disagree with this statement. The Guidance does not imply that impact upon cisgender people must be justified and, in fact, does not refer to cisgender people at all. Rather, the group who are singled out as a group whose needs must be balanced with those of trans-users where competing needs come into conflict are women, a protected group under the EA. Clearly the operation of EA Schedule 3 Para 28 will involve the balancing of legal rights of different service users, and our guidance reflects that. This is inherent in the legislation and the reason why the exception under Para 28 exists in the first place.

2. Regardless of the impact on other service users, service providers are under no legal trans people. (*FDJ v Secretary of State for Justice* [2021] EWHC 1746 para. 88)

T: 0161 829 8100
E: legalrequest@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

The guidance at no point states or implies that services providers are under an obligation to use the EA 2010 Schedule Para 28 exception to discriminate or exclude trans people from services. Instead, the Guidance states that where there is a risk or perception that the use of SSS by trans-users *may* be discriminatory under the EA, it would in the Commission's view be appropriate to *consider* this provision to assist in reaching a proportionate, balanced and lawful decision. *FDJ* does not say otherwise.

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).

The Guidance does not promote a blanket ban on trans-users. Naturally, any guidance, whatever the subject matter, must be read as a whole. Our view is that the commentary at pages 9 -13 sets out clear and detailed advice for Service Providers (SPs) about how to take appropriate decisions, what is required before a decision is taken and the type of factors which may be pertinent to decision making.
The commentary at pages 9-13 of the Guidance make it clear that any policies drawn up and relied upon –

a. must take into account the impact on and needs of all service users,
b. need to be evidence based,
c. need to be seeking the least restrictive option possible,
d. require a balancing of different service-users' interests (such as both the interests of trans users and women for example),
e. must have considered how to best enable trans users to access the service they need, and
f. must have identified the circumstances where it is justified to depart from the policy that has been developed taking into account all services users' needs.

So far from endorsing blanket bans, the Guidance assists SPs in reaching proportionate decisions and making policies which seek to take into account all users' protected characteristics, in order to operate in a way which is workable and compliant with the EA and other legal duties. It identifies the need to depart from policies in certain circumstances.

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*

T: 0161 829 8100
E: legalrequest@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

person and the effect their use of the service may have on the other service users (Services Code para. 13.60).

The Guidance refers to policies. These are not, as you suggest, blanket bans. If it is suggested that reliance on policies is wrong, the Commission would say that pure reliance on case-by-case individual decisions, without access to an underlying policy, puts an excessive burden upon SPs when seeking to operate their services. Rather, the advice and steps set out in the guidance enable SPs to arrive at proportionate decisions about policies which can be departed from, if individual circumstances require it. This is consistent with the judgment of EJ Henshaw in *R (Authentic Equity Alliance C.I.C.) v Commission for Equality and Human Rights* [2021] *EWHC 1623* where he states (Para 23): *'the statement that a service provider can have a policy, but should apply it on a case-by-case basis, is in my view correct. There may be exceptional circumstances in which an application of an otherwise reasonable policy would not be proportionate.'*

5. 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:

We disagree that this example is problematic or that it suggests a blanket ban against trans-users. It is instead simply an example of the ways a SP could resolve a dispute about who should use which toilets. It is not a situation where the services are removed from trans-users but rather where they may be modified, depending on the circumstances. In such an example a SP would take into account the views of users in order to reach a proportionate decision.

6. Key aspects of the Statutory Services Code have been completely ignored in the new guidance:
-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).
-Any discrimination against a trans person "*must be applied as restrictively as possible*" (para. 13.60).
-*the denial of service to a [trans] person should only occur in exceptional circumstances*" (para. 13.60).
-decisions should not be based on "*ignorance or prejudice*" (para. 13.60).

T: 0161 829 8100
E: legalrequest@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com

Equality and Human Rights Commission

The CoP was written in 2011, over 10 years ago and just a year after the EA came into force. Accordingly, the EHRC is proposing to review the CoP to ensure that it is accurate and up to date with current case-law. That process of review has not yet been undertaken.

The EHRC does not accept, however, that there is any substantive contradiction or disagreement between the CoP and the Guidance. In particular nothing whatsoever in the Guidance suggests or implies decisions should be based on 'ignorance and prejudice'; the Guidance instead simply reflects the requirement under EA 2010 to balance rights in a proportionate way.

The question of balance was the echoed in the AEA decision where Mr Justice Henshaw stated (Para 21) that the CoP *'does not make any suggestion of 'automatic' entitlement to access a SSS pertaining to a person's acquired gender' (Para 13.58) and that 'the text and example show that exclusion is permissible if it would be a proportionate way of achieving a legitimate aim.'*

The Guidance likewise advises that the question of balance is essential, for example as in its Summary at page 4, where it states "*When considering how your service is provided to trans people, you must balance the impact on all service users and show that there is a sufficiently good reason for excluding trans people or limit or modifying their access to the service.*"

We hope that the contents of this letter are clear and that we have fully addressed the issues that you have raised.

Yours faithfully

Adam Sowerbutts
Chief Legal Officer
Equality and Human Rights Commission

T: 0161 829 8100
E: legalrequest@equalityhumanrights.com

Arndale House, The Arndale Centre
Manchester, M4 3AQ

equalityhumanrights.com