

## 52. Do you have any other feedback about the content of the Code of Practice that you have not already mentioned?

Include references to specific changes where relevant

Any other feedback

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### Example Response:

I appreciate the EHRC's efforts to update the Code to reflect this ruling. However, I have concerns about the clarity and consistency of the definitions and guidance provided in paragraphs 2.1.1 to 2.1.5, particularly regarding the definition of "trans" and the implications of the immutability of biological sex under the Act. Below, I outline specific issues and suggestions for improvement. **Lack of Clear Definition of "Trans" (Paragraphs 2.1.2 and 2.1.3)** The Code uses the term "trans" to refer to individuals with the protected characteristic of gender reassignment, as defined in s.7(1) of the Equality Act 2010 (paragraphs 2.1.2 and 2.1.3). However, the term "trans" is not clearly defined, leading to potential ambiguity. Paragraph 2.1.3 states that "trans" refers only to those who fall within the Act's definition of gender reassignment (i.e., "proposing to undergo, undergoing, or having undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex"). Yet, it does not specify what constitutes "a process" or "attributes of sex," which risks confusion for duty-bearers (e.g., service providers, employers, associations) who must apply the law. The Supreme Court ruling establishes that "sex" in the Equality Act is biological sex, immutable for the Act's purposes, regardless of a GRC or any gender reassignment process. This raises a logical inconsistency: if sex cannot be

legally reassigned under the Act, the concept of a “process to reassign sex” (as per s.7(1)) appears misaligned with the legal framework post-ruling. The guidance does not address whether “reassigning sex” remains a valid concept under the Act, given that sex is now fixed as biological. This lack of clarity could undermine the practical application of the Code, as duty-bearers may struggle to determine who qualifies as “trans” under the protected characteristic of gender reassignment.

The EHRC should provide a clearer definition of “trans” that aligns with the Supreme Court’s ruling. Specifically, it should clarify what constitutes a “process” or “attributes of sex” in light of the ruling that sex is biological and immutable. For example, does the protected characteristic of gender reassignment now primarily protect individuals based on their intent, self-identification, or social presentation, rather than any actual change in sex (which is legally impossible per the ruling)? A precise definition would assist duty-bearers in understanding the scope of protections without relying on vague terminology like “trans” or “transsexual” without clarification.

#### **Inconsistency in Protection Criteria (Paragraphs 2.1.1 and 2.1.4)**

Paragraph 2.1.1 cites the Equality Act’s definition of gender reassignment, which requires a person to be “proposing to undergo, undergoing, or having undergone a process” to reassign their sex. However, paragraph 2.1.4 states that a trans person “does not need to be proposing to undergo, be undergoing or have undergone medical treatment or surgery to be protected.” This appears contradictory, as the Act’s definition (s.7(1)) explicitly ties the protected characteristic to a process of reassignment, yet 2.1.4 suggests that no such process is necessary. This contradiction creates confusion about the threshold for qualifying as having the protected characteristic of gender reassignment. Is it just based on hearsay? Furthermore, the Supreme Court’s ruling that sex is biological and immutable calls into question the meaning of “reassigning sex.” If sex cannot be legally changed, the criteria for gender reassignment protections need re-evaluation to ensure they are coherent with the Act’s framework. Without clear guidance, duty-bearers risk misapplying the law, potentially leading to discrimination claims based on unclear eligibility for protections. The EHRC should resolve the apparent contradiction between 2.1.1 and 2.1.4 by explicitly defining the criteria for gender reassignment protections in light of the Supreme Court’s ruling. For instance, if medical or surgical intervention is not required, what is the requirement, other than self-identification, for which we have no legal basis or definition. The EHRC could acknowledge that the concept of “reassigning sex” may need reinterpretation, as the ruling negates the possibility of legally changing sex under the Act.

### **Implications of Biological Sex Ruling for Gender Reassignment**

**Protections (Paragraph 2.1.4)** Paragraph 2.1.4 states that a trans person is protected against gender reassignment discrimination and harassment “at any stage in their transition process,” including those who have only proposed to reassign their sex. However, the Supreme Court’s ruling that a GRC does not change legal sex (2.1.6, 2.1.7) implies that any “transition process” does not alter a person’s legal sex under the Act. This raises questions about the scope and application of gender reassignment protections. For example, if a trans person’s legal sex remains their biological sex, how should service providers balance protections for gender reassignment with the Act’s provisions for single-sex services (e.g., Schedule 3, paragraph 28), which are now explicitly based on biological sex? The guidance does not adequately address this tension, particularly in scenarios where a trans person’s gender presentation conflicts with their biological sex in single-sex settings.

**Victimisation Protections (Paragraph 2.1.5)** Paragraph 2.1.5 correctly notes that the Act protects individuals from victimisation for engaging in a protected act, irrespective of their protected characteristic. This is clear and consistent with the Act. However, in the context of the Supreme Court’s ruling, the EHRC should ensure that this protection is not misinterpreted as extending gender reassignment protections to individuals who do not meet the s.7(1) definition (e.g., those who identify as trans but are outside the Act’s definition, as noted in 2.1.3). The lack of a clear definition of “trans” risks confusion here as well. The EHRC should cross-reference 2.1.5 with 2.1.3 to clarify that victimisation protections apply broadly but do not confer gender reassignment protections on individuals who do not meet the Act’s definition of gender reassignment. This would prevent misapplication of the law.

I therefore urge the EHRC to revise these paragraphs to: Define “trans” clearly, specifying what constitutes a “process” or “attributes of sex” in light of the immutability of biological sex. Resolve the contradiction between 2.1.1 and 2.1.4 by aligning the criteria for gender reassignment protections with the Supreme Court’s ruling. Ensure consistency with the Act’s terminology and avoid ambiguous terms like “trans” that may not align with the legal framework post-ruling.

### **Feedback 2: Other Points in Chapter 5 (Excluding Paragraph 5.1.3)**

**Response to EHRC on Other Changes in Chapter 5:** The updates to Chapter 5, particularly around indirect discrimination and objective justification, are a valuable clarification of the Equality Act 2010’s provisions. Below, I provide feedback on the broader changes in Chapter 5 (excluding 5.1.3) with a focus on legally protecting females as a sex class and suggest amendments to strengthen these protections.

**General Clarity on Indirect Discrimination (Paragraphs 5.1.1–5.1.2):** The explanation of “same disadvantage” indirect discrimination under s.19A is clear and aligns with the Equality Act’s intent to protect individuals who experience equivalent disadvantages without sharing the protected characteristic. However, to protect females as a sex class, the guidance should emphasise that claims under s.19A must not dilute the primary protections for groups like women, who face systemic disadvantages based on their biological sex. For example, policies impacting women’s safety or access to single-sex services (e.g., shelters, prisons) must prioritise the sex-based rights of females. **Suggested Amendment to 5.1.1:** Add a sentence: *“When applying s.19A, public authorities must ensure that protections for groups with a protected characteristic, such as females as a sex class, are not undermined by claims from individuals who do not share that characteristic but experience a similar disadvantage.”*

**Example in Paragraph 5.1.4 (Housing Benefit Fraud Checks):** While this example focuses on race, it could be adapted to include a sex-based scenario to illustrate how indirect discrimination affects females. For instance, a policy requiring in-person verification at a location inaccessible to women with childcare responsibilities could disproportionately disadvantage females. Including such an example would reinforce protections for women. **Suggested Additional Example:** Add a new paragraph: *“A local authority requires in-person attendance at a distant office for welfare benefit verification, held during weekday hours. This disproportionately disadvantages women, who are statistically more likely to have primary childcare responsibilities, limiting their ability to attend. Unless the authority can justify the policy, this may constitute indirect sex discrimination. A man with similar childcare responsibilities in the same area could also claim indirect discrimination under s.19A if the disadvantage is substantively the same.”*

**Objective Justification and PSED (Paragraph 5.1.5):** The guidance on objective justification and the relevance of the PSED (s.149) is helpful but could be strengthened by explicitly requiring public authorities to consider sex-specific impacts when assessing policies. For example, policies affecting women’s access to services (e.g., healthcare, public transport) should require evidence of consultation with women’s groups to ensure compliance with the PSED’s aim to eliminate discrimination and advance equality. **Suggested Amendment to 5.1.5:** Add: *“Public authorities must specifically consider the impact of policies on females as a sex class, including consulting with women’s organisations or reviewing sex-disaggregated data, to demonstrate due regard to eliminating discrimination and advancing equality of opportunity under the public sector equality duty.”*

**Ensuring Single-Sex Exceptions are Upheld:** Chapter 5 does not explicitly

address how objective justification applies to exceptions permitted under the Equality Act, such as single-sex services (Schedule 3, Part 7). To protect females, the guidance should clarify that maintaining single-sex spaces (e.g., women's refuges, toilets) can be a legitimate aim when justified by evidence of need, such as protecting women's safety or privacy. **Suggested Addition to 5.1.5:** Add: *"When justifying policies involving single-sex services or spaces, public authorities may rely on exceptions under Schedule 3, Part 7 of the Equality Act, provided they can demonstrate a proportionate means of achieving a legitimate aim, such as ensuring the safety, privacy, or dignity of females as a sex class."*

These suggestions enhance the legal protection of females by ensuring that indirect discrimination provisions and objective justification processes prioritise sex-based rights. They also encourage public authorities to use sex-disaggregated data and consult with women's groups to comply with the PSED, thereby reducing discriminatory impacts on females. The addition of a sex-based example and clarification on single-sex exceptions reinforces the Equality Act's framework for protecting women.

To reflect the Supreme Court ruling and address the above concerns, I propose the following for the updated Code of Practice:

**Clear Definitions:** Explicitly state that "sex" means biological sex in all guidance, with examples of lawful single-sex exemptions (e.g., refuges, sports).

- **Sector-Specific Policies:** Mandate single-sex provisions in high-risk settings:
  - NHS: Female-only wards based on biological sex
  - Prisons: House inmates by biological sex
  - Schools: Single-sex toilets and changing rooms
  - Sports: Biological sex-based categories
- **Safeguarding Protocols:** Require schools to comply with the existing laws and Legislation and ensure that single-sex provisions are always provided and to prevent any mixed sex toilets as a matter of safeguarding.
- **Inclusive Alternatives:** Gender-neutral facilities alongside single-sex spaces, if available space, without being disadvantageous to people with disabilities or single-sex provisions.
- **Training and Compliance:** Provide duty-bearers with training on biological sex-based policies, emphasising privacy, dignity, and safeguarding.
- **Data Collection:** Mandate biological sex-based data in health and justice systems, per MBM, to ensure accurate outcomes.

Single-sex provisions for women and girls are a legal necessity under the Equality Act, as clarified by the Supreme Court, and are critical for their

privacy, dignity, safeguarding, and respect. Evidence from organisations like Sex Matters, For Women Scotland, Safe Schools Alliance UK, and others demonstrates the risks of mixed-sex facilities, from health impacts, safeguarding and ideology in schools to clearly documented safety threats in prisons and refuges. The EHRC's updated guidance must provide clear, sector-specific directives to ensure UK-wide compliance, balancing inclusion with the paramount need to protect female-only spaces. I urge the EHRC to adopt the proposed recommendations to uphold the law and safeguard women and girls.

Thank you for the opportunity to provide feedback. I look forward to seeing how the EHRC incorporates stakeholder input to strengthen the practical implementation of this landmark ruling, ensuring that sex-based protections are robust, clear, and equitable for all.