

# Gendered Intelligence's EHRC Consultation Response Explanatory Guide

June 2025

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## Introduction

The Equalities and Human Rights Commission (EHRC) has proposed changes to its statutory "Code of practice for services, public functions and associations" in response to the recent Supreme Court ruling in the case of *For Women Scotland vs the Scottish Ministers*.<sup>1</sup> This case redefined the meaning of the term 'sex' in the Equality Act 2010 essentially to mean 'sex at birth'. This has potentially serious implications for the inclusion of trans people in all aspects of life.

There is a public consultation on these updates which **closes on 30th June**.

Gendered Intelligence encourages organisations and individuals to stand up for trans inclusion by responding to this consultation and sharing their views on the issues at hand.

## Explanatory Guides

There are several explanatory guides already available to help individuals and organisations to respond to the consultation. We aim not to duplicate those, and instead wish to signpost them here:

- [Stonewall](#) has produced two separate guidance documents [for organisations](#) and [for individuals](#)
- [Responding to the Equality and Human Rights Commission's Code of Practice Consultation](#) from [LGBT Foundation](#) – this is predominantly aimed at individuals but does give some guidance for organisations
- [EHRC Consultation Guidance](#) authored by [Trans Actual](#), [Mermaids](#) and [Scottish Trans](#) – this is predominantly for individuals who are looking to respond to the consultation

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<sup>1</sup> Note the Employment: Code of Practice remains unchanged, posing complexities and potentially furthering confusion whereby the sex and consequential treatment of service users and employees bring different legal ramifications with regards to the Equality Act 2010

In addition, Gendered Intelligence wishes to provide some wraparound framing that we hope will provide a further steer. This framing is primarily for trans inclusive service providers (as well as those that wish to be) who are looking for guidance around how to continue to advocate for and represent the needs of their trans and non-binary service users and to maximise trans inclusion in their settings.

## Framing

In our view, the consultation asks questions in a way which does not encourage a full and open response to the proposed changes. Nevertheless, we believe that individuals and organisations can still make valuable responses to demonstrate the impact of the proposed changes.

A key point is that the recent judgment changes the meaning of the term 'single-sex' in the context of the EA2010 **only**, and does not directly affect the common, everyday (trans-inclusive) use of the term outside that specific context.

Our understanding is that single **gender** spaces / services, i.e. spaces /services designated for a group of people (women or men) that are trans-inclusive can still exist. See the [Good Law Project](#) (for details click their sidebar link 'What should service providers who want to take a trans inclusive approach do?') and our own Gendered Intelligence guide - [Maximising trans inclusion after the Supreme Court Judgment](#).

The proposed changes to the Code of Practice do not explain this clearly.

We therefore think two of the most important points a trans-inclusive organisation can focus on in response to the main questions are:

### **1. The proposed changes do not explain clearly how to remain fully trans inclusive**

- If you intend to remain (or become) trans-inclusive in relation to any / all of the areas covered by the questions, you could point out that the guidance does not clearly show how to lawfully do that for your services / provision.

- If you have been running trans-inclusive provision for some time without any appreciable difficulty, you could say so. This is particularly important if you provide women's services.
- This will help to show how many organisations are keen to be trans inclusive and don't currently experience any practical problems.

## **2. There is a range of practical, ethical and legal problems you foresee as a result of the Code changes**

Give multiple examples of practical problems these proposed changes will present in the delivery of your (trans inclusive) specific services. These may include:

- reputational damage from enforcing trans exclusion. This could incur significant loss of income, alienate and lose the trust of your customers, stakeholders and staff and affect your brand identity
- an increase in costs / resources (such as staff time) to implement the changes; manage fall out; create new policy; refurbish facilities; create or amend systems, for example setting them up to ask all of your service users about their sex recorded at birth
- the challenge of identifying who is trans, in a way that doesn't rely on appearances and gender norms (and therefore impacting cisgender people too)
- the unenforceability of excluding trans people from spaces and services given that there is no evidence or documentation (not even a birth certificate) that anyone can provide that proves that they are cisgender.

Point out the many ethical and unjust consequences that emerge should it be required to exclude trans people from your service or to place them elsewhere. These might include:

- the moral imperative that trans people have a right to access services and to live a full and active life (access to sports and physical activities, health services, domestic violence refuges etc.)
- fear of causing harm if required to exclude or evict long standing trans service users, for example in communal accommodation
- that it is potentially humiliating and could be detrimental to a person's mental health for a trans person to use the facilities or services that do not align with their gender
- that forcing a trans person to use a 'third space' may single them out, breach their rights to privacy around their trans status and expose them to harassment


There are also risks of legal challenges. These include:

- potential claims of discrimination, harassment and / or an infringement of the human rights of trans, non-binary and/or intersex people as well as gender non-conforming cisgender people
- challenges around asking for (and storing) sensitive information including trans status and/or sex recorded at birth, risking potential breach of privacy and non-compliance of Data Protection Act
- risk of committing a criminal offence if asking to see a person's Gender Recognition Certificate and / or disclosing of that information without consent (Gender Recognition Act 2004)

There are other matters about the proposed changes of the Code of Practice that you may wish to comment on. These include how problematic it is that under the protected characteristic of sex, trans people may only have protections on the basis of how they are 'perceived', rather than who they are. You may also agree that referring to trans men as women and trans women as men is humiliating and degrading.

In addition, the document reinforces gender stereotypes around what women and men are supposed to look like as well as reinforcing the harmful myth that trans women pose a threat to cis women. Indeed, there is no evidence that excluding trans women will enhance the safety of cis women. You could also point out the lack of evidence that shows that trans women pose a threat to fair play and unfair advantage in sports.

In summary, you may wish to reinforce that you do not believe changes to your provision are necessary and say why – for example that they will not improve safety, access or dignity for anyone.



## Gendered Intelligence: Expanding understandings of gender and improving trans lives

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Get in touch

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