

Consultation Response

Equality and Human Rights Commission

Code of practice for
services, public functions
and associations:
Consultation 2025

June 2025

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Equalities Law sub-committee welcomes the opportunity to consider and respond to the Equality and Human Rights Commission consultation: Code of practice for services, public functions and associations: consultation 2025¹. The sub-committee has the following comments to put forward for consideration.

Updated legal definition of sex

1. Would you like to provide feedback on the updated legal definition of sex throughout the code of practice?
 - Yes
 - **No**
2. To what extent do you agree or disagree with the following statement:

The explanation of the updated legal definition of sex is clear.

- Strongly Agree
 - Agree
 - Disagree
 - Strongly Disagree
 - Do not know
3. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

¹ [Code of practice for services, public functions and associations: consultation 2025 | EHRC](#)

Change 2.1: New content on Gender Recognition Certificates

4. Would you like to provide feedback on the new content on Gender Recognition Certificates?

- **Yes**
- No

5. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new content on Gender Recognition Certificates is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

6. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Ans: We suggest that the explanations would be made clearer by including an example of what constitutes discrimination by association.

Change 2.2: New content on asking about sex at birth - individuals and legal professionals

7. Would you like to provide feedback on the new content on asking about sex at birth?

- **Yes**
- No

8. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new content on asking about sex at birth is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

9. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Ans: The changes proposed are insufficient. It does not provide adequate guidance on the following matters:

- When it is necessary and proportionate to enquire about a person's birth sex.
- What criteria service providers should adopt to decide when to enquire.

The example given does not assist. The example indicates that the receptionist should "reasonably think" that the trans woman is a biological man before making an enquiry. It does not give any detail of guidance on what is reasonable in these circumstances. Failing to set out what factors would make it reasonable to consider a person to be a trans person could result in people being gender-profiled and targeted unreasonably.

As this appears to introduce a two-stage test of (one) there being a legitimate reason to enquire about a person's birth sex and (two) a reasonable perception that a person is transgender, this two-stage test should be clearly outlined in the Code and examples used to explain the two stages of this test.

In any event we suggest that asking for a birth certificate will not achieve the purpose of establishing sex at birth – where a gender recognition certificate has been obtained, that person's birth certificate could be amended to reflect their acquired gender.

In addition, not everyone has their own birth certificate and being required to produce it to access services would have a disproportionate adverse impact on those who do not have a birth certificate in their possession. While individuals can obtain extracts of the original certificate, this takes time and there is a fee to be paid. This will prevent such people accessing single-sex services in a timely manner and will bar people who cannot afford to obtain a copy certificate from accessing those services. In addition, those who were born outside of the UK may not be able to obtain a copy of their birth certificate and therefore would also be unable to access these services.

Change 2.3: New content on defining sex at birth - individuals and legal professionals

This content defines 'sex', 'man' and 'woman', and explains how a GRC does not change a person's legal sex for the purposes of the Equality Act 2010.

10. Would you like to provide feedback on the new content on defining sex at birth?
- **Yes**

- No

11. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new content on defining sex at birth is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

12. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Ans: paragraph 2.3.3 refers to paragraphs 2.1.1 to 2.1.9 for more information about GRCs. We note that this information is not included in 2.1.1 to 2.1.9. This should be reviewed and information added either to the paragraphs referred to or separately.

The Code does not make it clear what the purpose and impact of a GRC is after the Supreme Court decision. This should be clearly explained.

Paragraph 2.3.4 does not provide clarity on who the appropriate comparators are for a trans woman or a trans man. We consider that as a result of the Supreme Court decision the appropriate comparator is a biological woman for a trans woman and for a trans man it is a biological man and this should be included in the guidance.

Change 2.4: Updated description of the protected characteristic of sexual orientation

We updated our description of sexual orientation. Our description now specifies that a person who is attracted to people of the same sex is either a lesbian woman or a gay man. The full description is as follows.

Sexual orientation is a protected characteristic (s.12(1)). It means a person's sexual orientation towards:

- persons of the same sex (the person is a lesbian woman or a gay man)
- persons of the opposite sex (the person is heterosexual), or
- persons of either sex (the person is bisexual)

13. Would you like to provide feedback on the updated description of the protected characteristic of sexual orientation?
- Yes
 - **No**

14. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated description of the protected characteristic of sexual orientation is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

15. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 4.1: New example on sex discrimination by perception - individuals and legal professionals

This example explains how discrimination can occur based on a perceived protected characteristic, in the context of sex and gender reassignment.

16. Would you like to provide feedback on the new example on sex discrimination by perception?
- Yes
 - **No**

17. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination by perception is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

18. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 4.2: Removed reference to superseded caselaw - individuals and legal professionals

We removed content that explained that, for trans men holding a gender recognition certificate (GRC), the protection from pregnancy and maternity discrimination under the Equality Act 2010 (the Act) arose from case law. This case law set out that trans men were still protected irrespective of them having a GRC that stated that their legal sex was male. Following the For Women Scotland ruling, their legal sex is now female for the purposes of the Act, and they therefore have protection on that basis

19. Would you like to provide feedback on Change 4.2?

- Yes
- **No**

20. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in Change 4.2 is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

21. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 5.1: New example on sex discrimination - same disadvantage - individuals and legal professionals

This example explains how indirect sex discrimination can occur when people experience the same disadvantage, even if they do not share the same protected characteristic. The example is in the context of sex and gender reassignment.

22. Would you like to provide feedback on the new example on sex discrimination - same disadvantage?

- **Yes**
- No

23. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on sex discrimination - same disadvantage is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

24. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

We consider that it would be helpful to illustrate the new provisions in the code if additional examples are included of what will be considered indirect discrimination due to gender reassignment.

We suggest that examples should also include when the service provider decides to request a birth certificate to establish a person's birth sex. We refer to our response to question 9 in response to Change 2.2 and why requesting a birth certificate could have a disproportionate negative impact on certain groups.

We also consider that the changes to this section are unclear in relation to restricting access to services. It appears to suggest that restricting services based on birth sex would amount to indirect discrimination, but this would tend to contradict the section covering single-sex services. It would tend to suggest that excluding trans people from single-sex services is automatically objectively justified. It is therefore important to include examples of where a person's biological sex is relevant to the service provided.

Change 8.1: Updated example on harassment related to sex - individuals and legal professionals

We produced a new example to explain how harassment can occur based on a perceived protected characteristic, in the context of sex and gender reassignment.

We have included additional information to provide context for this example. We are only looking for feedback on the example in paragraph 8.1.6b.

25. Would you like to provide feedback on the updated example on harassment related to sex?

- **Yes**
- No

26. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated example on harassment related to sex is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

27. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Ans: we suggest that the Code should also include examples of harassment related to sex where the individuals are transgender, and in particular, include examples featuring trans men.

Change 12.1: New example on women-only associations - individuals and legal professionals

The example in this section explains when applications to an association can be lawfully refused based on a protected characteristic, in the context of sex and gender reassignment.

28. Would you like to provide feedback on the new example on women-only associations?

- Yes
- **No**

29. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new example on women-only associations is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

30. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 13.1: Updated section on competitive sport - individuals and legal professionals

This section has been updated to explain the circumstances in which it may be lawful to exclude participation in competitive sporting events in relation to the protected characteristics of sex and gender reassignment. It also sets out considerations that should factor into policy decisions regarding the exclusion of trans people from competitive sporting events.

31. Would you like to provide feedback on the updated section on competitive sport?

- Yes
- **No**

32. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated section on competitive sport are clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

33. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 13.2: Updated section on separate and single-sex services for men and women - individuals and legal professionals

This section has been updated to provide guidance on how separate or single-sex services can be provided for men and women. It also sets out when providing these services is likely to be lawful.

34. Would you like to provide feedback on the updated section on separate and single-sex services for men and women?

- Yes
- **No**

35. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated section on separate and single-sex services for men and women is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

36. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 13.3: New section on justification for separate and single-sex services - individuals and legal professionals

This section sets out the considerations that should be given to all potential service users when deciding whether separate and single-sex services are a proportionate means of achieving a legitimate aim. It also sets out circumstances in which mixed-sex services may be necessary, and the potential legal implications of providing only mixed-sex services.

37. Would you like to provide feedback on the new section on justification for separate and single-sex services?

- **Yes**
- No

38. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new section on justification for separate and single-sex services is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

39. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

Ans: We suggest the following

- that the final sentence in paragraph 13.3.7 “ Trans people are likely to be disadvantaged by this, by comparison to people who are not trans.” would provide more clarity if it is placed at the start of paragraph 13.3.8. An example to explain the content of 13.3.7 should be added
- An example to explain the content of 13.3.8 should be added
- Paragraphs 13.3.7 – 13.3.10 – add information to explain the context of these. This should include what is the disadvantage, and how to weigh those to achieve a legitimate aim. Examples could be used to explain these concepts.
- Paragraph 13.3.19 is unclear. As worded, this paragraph states the admission of a trans person to a single-sex space or service would mean that the exceptions in 13.2.3 to 13.2.22 cannot be relied upon but does not rely on the service provider knowingly admitting a trans person. This imposes strict liability on service providers who would become liable for discrimination and harassment claims if a trans person is admitted without their knowledge. We also note that this paragraph makes no reference to proportionality, so that it is suggesting that one instance of unknowingly admitting a trans person to a service or space would result in the exceptions becoming unavailable. This could have the consequence of all potential service users being required to provide their birth certificates to prove their biological sex before being able to access such services. We consider this would be unworkable for many service providers and would exclude people who cannot provide a birth certificate. This could result in service providers withdrawing or not providing such services to avoid these risks. We suggest that the Code should state that service providers have to knowingly admit a trans person before there will be a liability for claims and that a *de minimis* provision be included to ensure that one-off errors are accommodated. This should also include examples to explain the various scenarios such as where a service provider unknowingly admits a trans person to single-sex space, when this is done knowingly and examples of what amounts to a *de minimis* example (and therefore the service provider is not liable for claims) and what does not meet a *de minimis* provision.
- Paragraph 13.3.20 covers the situation where only a mixed sex service is provided could be direct or indirect sex discrimination however it only mentions this as being towards women. We suggest that this section should clarify whether such claims are available to biological men, and examples of what amounts to direct and indirect discrimination and what does not should include examples relevant to both men and women.

- There is no information included on how to provide services for trans people appropriately. As stated in the Code, failure to provide services for trans people could amount to discrimination based on gender-reassignment so this should be covered within the Code, and examples provided of what is appropriate to accommodate the needs to trans people and what is not appropriate.

Change 13.4: New content on policies and exceptions for separate and single-sex services - individuals and legal professionals

This new content explains that service providers may need to develop policies regarding the provision of separate or single-sex services. It also covers specific circumstances that may require a different approach to that set out in policy, and examples of those circumstances.

40. Would you like to provide feedback on the new content on policies and exceptions for separate and single-sex services?

- Yes
- **No**

Change 13.4: New content on policies and exceptions for separate and single-sex services

41. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new content on policies and exceptions for separate and single-sex services is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

42. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Change 13.5: Updated section on separate or single-sex services in relation to gender reassignment - individuals and legal professionals

This section explains that service providers should consider their approach to trans people's use of their services when deciding whether to provide a separate or single-sex service. It includes examples of relevant considerations when deciding whether the exclusion of trans people from a separate or single-sex service is a proportionate means of achieving a legitimate aim.

43. Would you like to provide feedback on the updated section on separate or single-sex services in relation to gender reassignment?

- **Yes**
- No

44. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated section on separate or single-sex services in relation to gender reassignment is clear.

- Strongly Agree
- Agree
- **Disagree**
- Strongly Disagree
- Do not know

45. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

- Paragraphs 13.5 and paragraph 13.3.19 set out different tests for when trans people can be excluded from single services and spaces. As noted above 13.3.19 as worded sets out that service providers have strict liability to not admit trans persons to a single-sex service or space which accords with their acquired gender, however 13.5 allows for the exclusion of trans people from services which accord with their biological sex if it is a "proportionate means of achieving a legitimate aim". The impact of applying both tests is that a trans person could be excluded from any single sex services or space.
- Paragraph 13.5.5 introduces a concept of other service users "reasonably object[ing]" to the presence of a trans person. This requires further explanation and examples provided of what amounts to a reasonable objection from other service users, and how a service provider can assess this.
- Paragraph 13.5.6 states that a legitimate aim for excluding a trans person might be to prevent alarm or distress to other service users, and whether it

is reasonable to do so should be considered on a case-by-case basis. We suggest that further guidance on who should carry out this assessment and what the comparator is should be included here and examples included to aid understanding.

- Further in relation to Paragraphs 13.5.5 and 13.5.6, as the decision to exclude a trans person from a service will depend upon the views or assumed views of other service users, we suggest that guidance should be included on whether information can be disclosed about whether a trans person might attend the service or space.
- Paragraph 13.5.7 states service providers should consider whether there is a suitable alternative service for the trans person to use. We consider that the Code should confirm that service providers have a duty to provide a suitable alternative service, if there is no alternative already available. Otherwise as noted above, trans people may be excluded from services without the service provider having a clear duty to provide an alternative.

Change 13.6: Updated content on communal accommodation - individuals and legal professionals

This content explains the application of the Act to communal accommodation in respect of the protected characteristics of sex and gender reassignment.

46. Would you like to provide feedback on the updated content on communal accommodation?

- Yes
- **No**

47. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the updated content on communal accommodation is clear.

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Do not know

48. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

N/A

Any other feedback

49. Do you have any other feedback about the content of the code of practice that you have not already mentioned?

Throughout the Code there is no reference to the impact of intersectionality of protected characteristics in relation to trans status. We suggest that this should be reflected in the updates to the Code.



For further information, please contact:

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