Briefing Note

EHRC's New 'Guidance' on provision of separate and single sex services (and the exclusion of trans people from them) – a train wreck.

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Intro

In April 2022 the Equality and Human Rights Commission ('EHRC') have published on its website new 'guidance' on the provision of separate or single sex services, and, in particular, the exclusion of trans people from those services.

This a shockingly poor piece of work and lends credibility to the suggestion that the EHRC, under the anti-trans regime established by Chair Kishwer Falkner and the recently-appointed Commissioners have lost many of the experienced and committed staff. That would also be supported by the banana skin related to disability and long Covid that the EHRC also slipped on recently.

How should service providers and users respond to this awful, dangerous piece of nonsense from what was once a highly respected government agency and is rapidly becoming a laughing stock?

Principal Concerns

The new 'guidance':

1. Is not statutory but does not make that plain or explain the importance of that.
2. Contradicts existing *statutory* guidance in the Statutory Code which took effect on 1.4.11
3. Appears to advise unlawful conduct.
4. Was put in place with no apparent consultation.
5. Continues a pattern of trans-exclusory behaviour by the EHRC, e.g., failure to issue schools guidance on trans pupils, volte-face on trans conversion therapy ban.

Statutory Guidance

The Equality Act 2006 gave the EHRC powers to issue Statutory Codes of Practice. The process for doing so includes public consultation and approval by Parliament (EqA 2006 s14).

Once that has been done, the Statutory Code can be taken into account by a court or tribunal in deciding whether there has been a breach of discrimination legislation (EqA 2006 s15).

Following the Equality Act 2010 becoming law on 1.10.10, a Statutory Code on the provision of services was produced following the above process and came into effect on 1.6.11.

It includes specific provisions on separate and single sex services and the access to them by trans people. The Code runs to over 300 pages but paragraphs 13.59 and 13.60 deal specifically with these matters. They provide that:

> "Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary." (para 13.59, part)

The guidance re-iterates the 'proportionate means of achieving a legitimate aim' test for excluding a trans person, and also provides:

> 'the provider will need to show that a less discriminatory way to achieve the objective was not available'. (para 13.60, part).

The lawfulness of the Statutory Code was recently tested in the High Court in the case of *AEA v EHRC* in which the challenges brought to the guidance were said to be 'absurd'.

The New 'Guidance'

The new 'guidance' is not statutory (it has not been laid before Parliament – which allows a review process) but strangely fails to mention the statutory guidance (which is still in full effect). This failure is misleading and dangerous for service providers where there is a conflict between the Statutory Code and non-statutory 'guidance'. Following the new 'guidance' would be no defense for a service provider who followed it and acted unlawfully, whereas failing to follow, or breaching, the Statutory Guidance can be relied on as evidence of discrimination.

'Biological' Sex?

The new 'guidance' does not lack boldness, however. In a section entitled 'What the Equality Act says about the protected characteristics of sex and gender reassignment' the following passage appears:

> "Under the Equality Act 2010 'sex' is understood as binary, being a man or a woman. For the purposes of the Act, a person's legal sex is their biological sex as recorded on their birth certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate. A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act."

These are an interesting series of assertions, particularly as:

1. The Equality Act makes no reference to 'biological sex', 'birth certificates' or the Gender Recognition Act procedure as a determinant of legal sex under the Equality Act.
2. Who has the 'understanding' set out in the first line is unclear, as is what its effect might be.

These statements ignore the effect of the well-known cases of *Croft v Royal Mail* and *Chief Constable of West Midlands v A (No.2)* and *MB v Secretary of State for Work and Pensions* which considered when a transitioning individual was to be regarded as being of their affirmed sex for Equality Act purposes. It also appears to ignore a number of provisions of the Equality Act itself, like section 7, which refers to 'physiological **and other attributes of sex**' which shows that the drafters of the Act ***did not*** regard 'sex' as purely biological. A recent

pair of *Scottish* cases came to different conclusions on this subject – the 'Census' and 'Public Boards' cases.

Lastly, of course, a birth certificate (as originally issued or as re-issued after grant of a Gender Recognition Certificate) does not record 'biological' sex but rather the legal sex observed, assigned or declared at birth or later altered by correction by a Registrar or after the grant of a Gender Recognition Certificate ('GRC').

Practically, few babies are genetically tested and even knowing 'chromosomal sex' is not a full answer to biological sex.

Oh dear, oh dear.

The Most Troubling Example – Public Toilet Provision

One of the most troubling examples given in the new guidance illustrates the problems the new guidance raises:

> "Example: A community centre has separate male and female toilets. It conducts a survey in which some service users say that they would not use the centre if the toilets were open to members of the opposite biological sex, for reasons of privacy or dignity or because of their religious belief. It decides to introduce an additional gender-neutral toilet. It puts up signs telling all users that they may use either the toilet for their biological sex or to use the gender neutral toilet if they feel more comfortable doing so."

This is a very troubling example. This is the most common scenario among the examples given and could be taken to apply to all public toilet provision. It mirrors the 'bathroom bill' legislation introduced (and declared unconstitutional) in a number of US states. Experience suggests what happened in the US was that gender non-conforming women, for example, masculine lesbians, were often subject to challenge. The 'guidance' starts from a principle of exclusion which would suggest that trans women should be using male toilets and trans men female toilets. That seems designed to cause difficulties.

It is to be inconsistent with the statutory code, paragraph 13:59 which provides:

> "Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary."

The new 'guidance':

1. Does not mention the 'strong reasons' test, let alone say if it is met; does not refer to the need for exclusion to be proportionate 'in the individual circumstances' Statutory Code para 13.60, nor to avoiding decisions based on 'ignorance or prejudice' for which this example appears to open the door.
2. Does not mention of the enjoinder in the Statutory Code to deal with such matters 'on a case-by-case basis'. It will readily be seen that there is a substantial difference between a trans person who transitioned many years before, perhaps as a teenager, and someone just starting on their journey.

3. Suggests that trans men (who often look very masculine) should be using the female facilities.
4. Appears to suggest that objections based on prejudice by a small number of users should determine trans people's accommodation. This would seem to encourage and validate discrimination.

Crucially, the 'Community Centre' example fails to consider that part of Statutory Code para 13.60 which states that:

> 'the provider will need to show that a less discriminatory way to achieve the objective was not available'.

In the example given, it would obviously be ***less discriminatory*** were the community centre to say that the additional toilet facility was to be available to *anyone* who wished to maintain a higher standard of privacy than is provided by the communal facilities. That would accommodate both the personal and religious sensitivities of others *and* the needs of a trans person early in their transition.

The change suggested above would also avoid all the *practical* problems of policing the regime the example suggests should be introduced:

1. Who would be checking 'biological sex' and how? Visual inspection of genitals?
2. Would users have to carry evidence of sex? Identity papers? Birth Certificate? Driving licence, passport, chromosome test?

These difficulties were raised at a recent session at a London Barrister's Chambers attended by a Commissioner and representatives of the Commission. The response appeared to be that the 'guidance' was about service provision not enforcement, to which no thought had apparently been given. That instantly ignores the 'practicality' requirement for good guidance.

The effect of the 'guidance' being implemented would appear to be either it falling into abeyance and disrepute, or enforcement by vigilantes. A hapless situation.

Trespassing into workplaces

Finally, just after the example above, the new 'guidance' refers to toilet provision in workplaces, but fails to explain that workplaces are not caught by the service provision parts of the Equality Act 2010.

Not permitting a worker to access facilities which align with their gender identity is almost certainly unlawful discrimination under the separate Statutory Code which applies to employment.

Other examples in the 'guidance'

All have considerable difficulties:

Example: A group counselling session is provided for female victims of sexual assault. The organisers do not allow trans women to attend as they judge that the clients who attend the group session are likely to be traumatised by the presence of a person who is biologically male.

The 'guidance' does not address who is "biologically" male in this situation or how this would be addressed in practice. Would a chromosome test be required? Should a birth certificate be requested? It also wrongly suggests that a blanket ban would always be proportionate. For example, if a trans woman was prescribed puberty blockers as a teenager and so has never experienced male puberty and, absent a chromosome test, is indistinguishable from a natal woman, would it really be a proportionate means of achieving a legitimate aim to exclude her in the above circumstances?

Similar points can be made in respect of the example regarding the abuse refuge that also appears in the EHRC Guidance.

Example: A leisure centre introduces some female only fitness classes. It decides to exclude trans women because of the degree of physical contact involved in such classes.

What is the legitimate aim relied upon?

How would excluding ALL trans women, including in particular those who have fully transitioned, potentially many years before, be a proportionate means of achieving an (unspecified) legitimate aim?

How would this be enforced in practice, if, for example, a trans woman presents as female and is, absenting a test of her genitals and chromosomes, indistinguishable from a cis (non-trans) woman?

The example conflicts with the existing Statutory Code of Practice which emphasises that trans people should only be excluded in exceptional circumstances and that each case should be decided on a case-by-case basis.

Example: A gym has separate-sex communal changing rooms. There is concern about the safety and dignity of trans men changing in an open plan environment. The gym therefore decides to introduce an additional gender-neutral changing room with self-contained units.

The starting point hasn't been thought through. If the trans man does not have a GRC, then, according to the EHRC 'guidance', then, however fully they have transitioned, they are female and should be using the female changing rooms. The illogicality of the 'guidance' is exposed.

A much less discriminatory and more proportionate response is available rather than creating a separate gender-neutral changing room likely to have the effect of "othering" trans service users. Why not simply add cubicles to the existing changing rooms (if space permits) to allow all service users to access them? This possibility is not even addressed in the 'guidance'.

Why has this 'guidance' appeared?

In recent times the EHRC has been seen by many as failing trans citizens. Other protected groups have also been unhappy with its work. Trans-related examples are the failure to provide the long-promised guidance for the accommodation of trans pupils in schools (after a good draft lurked on the 'drawing board' for many months), and its volte-face on trans conversion therapy.

Consultation / Legal Advice

In its report published on 21 December 2021, the Women and Equalities Select Committee of the House of Commons asked for guidance produced:

'… in collaboration with trans rights groups, on best practice to provide trans and non-binary inclusive and specific services.'

It is entirely unclear *who* was consulted about the new 'train-wreck' guidance. I am very active in this space and no organisation to which I am close seems to have been consulted. The difficulties are obvious.

It is presumed the Commission took legal advice on the non-statutory 'guidance'. There seems no legitimate reason why that advice should not be published.

This new 'guidance':

1. Is not what was asked for by the W&ESC,
2. Seems not to have been consulted upon, effectively, or at all.
3. Fails *all* citizens as it does not accurately reflect the Equality Act and encourages service providers to act contrary to the relevant Statutory Code, which it fails to reference, **setting a trap for those who find this 'guidance' but not the Statutory Code**.
4. Even in the examples given, suggests approaches which themselves appear to be discriminatory.

What is to be done?

The new 'guidance' should be withdrawn forthwith.

What should service PROVIDERS do?

Until the 'guidance' is withdrawn or replaced, service providers should ignore it and look only to the Statutory Code to avoid acting unlawfully.

What should service USERS do?

They might wish to supply a copy of this briefing note to service providers and seek an assurance that the 'guidance' will not be followed.

If refused access to facilities, this briefing note should assist in challenging that.

Further trouble on the way.

At the event at a London barristers' chambers mentioned above, it was suggested that new Statutory Guidance might be in prospect. If so, and if it is as badly produced as the 'guidance' then it is likely to be in conflict with the Equality Act.

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Note: This briefing note represents the writer's opinion on the 'guidance' published by the EHRC in April 2022. It should not be taken to be legal advice on any particular service-provision or other situation. Equality Act matters are usually fact-sensitive.

Cases

AEA v EHRC [2021] EWHC 1623 (Admin)

Chief Constable of West Midlands v A (No.2) HoL [2004] ICR 806

Croft v Royal Mail Group plc [2003] EWCA civ 1045

MB v Secretary of State for Work and Pensions C-451/16 [2019] ICR 155 (ECJ)

Fair Play for Women [2022] CSOH 202

FWS Ltd v The Lord Advocate [2022] CSIH 4

Train Wreck at the Gare Montpartnasse, Paris, 1895