

Baroness Falkner

Chair

Equality and Human Rights Commission

To: Equality and Human Rights Commission

Dear Baroness Falkner,

Re: Concerns regarding the impact of the Supreme Court ruling on biological sex

The BMA will be submitting a formal response to the consultation on the Code of Practice, however, we are writing now to outline significant concerns our members have raised about the wider implications of this ruling, particularly for trans, intersex, and non-binary individuals. Our recommendations focus on actions the EHRC must take to address these concerns and mitigate harms arising from the misapplication or misinterpretation of the ruling. We are also writing to NHSE with our concerns.

Since the ruling, concerns raised by our members have fallen into the following themes:

- Rising discrimination and harassment against trans, non-binary and gender non-conforming people
- Threats to confidentiality and safety in managing data, single-sex spaces and same-sex health care
- Some women doctors and medical students who want to limit access to single-sex spaces, based on concerns of sexual assault or sexual violence.

The Supreme Court ruling was clear that its scope was limited, specifically that ‘it is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word ‘woman’ other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy.’

However, whilst organisations are waiting for the updated Code of Practice, a vacuum has been created where individuals are acting without direction based on their own interpretation of the ruling.

In 2022 the BMA and GLADD published a [report](#) that found almost half (49%) of trans respondents working in the NHS had directly experienced transphobia themselves at least once in the past two years. This highlights how imperative it is that EHRC acknowledge the discrimination and harassment trans and non-binary individuals face and ensure any guidance does not exacerbate this.

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Trans and non-binary people must be actively listened to, in order to understand their lived experience and inform the development of guidance from the EHRC. Targeted consultation with affected groups is essential for an effective equality impact assessment of the Code of Practice.

The interim guidance produced by the EHRC focused on the exclusion of a group of individuals instead of the practical inclusion of that group, and the proposed changes to the Code of Practice, currently in consultation, provide examples which are impractical in their application. For example (13.6), suggests altering or extending communal accommodation to separate trans people from others. This fails to acknowledge the NHS's systemic resource shortages, where breaches of the right to a single-sex hospital ward occurred 44,000 times in 2023 due to bed shortages.

We strongly recommend that EHRC:

- Takes responsibility for clearly communicating that there is no hierarchy of rights. The ruling has led to an increase in discrimination and targeting of trans, non-binary and gender non-conforming people. This must be explicitly acknowledged.
- Conducts a comprehensive, meaningful consultation process that includes engagement with affected groups to inform an effective equality impact assessment of the Code of Practice.
- Refrains from pre-empting the consultation process, ensuring that all responses are assessed before providing further advice and guidance in the public domain.

In addition, members have expressed deep distress over the possibility of being forced to disclose their sex at birth – an issue the ruling does not clarify, particularly in relation to Section 22 of the Gender Recognition Act. The amended Code of Practice would suggest how to 'sensitively' ask for this information, but this overlooks the diversity of trans and non-binary individuals and the complexities of how sex and gender interplay. Forcing a person to disclose their sex at birth is undignified, impractical and risks placing individuals at increased risk of harassment and violence.

Similarly, proposals to request trans individuals' birth certificates are highly concerning. There is a lack of guidance on when such a request is proportionate – typically it is intrusive. There is no guidance on how to handle cases where an employer or authority believes an individual with a GRC has changed their birth certificate, given requesting proof of a GRC is illegal. Furthermore, requiring a birth certificate for access to services would disproportionately affect immigrants, asylum seekers and refugees who may not have access to these documents.

The BMA firmly believes that such requests could lead to serious overreaches in authority by service providers, employers and public authorities.

We urge the EHRC to ensure the guidance:

- Explicitly states that organisation-wide monitoring of sex at birth must remain confidential.
- Clarifies that in most circumstances, there is no entitlement to know an individual's sex at birth, except in specific situations where it directly pertains to the safety and protection of an individual on a case-by-case basis.

The EHRC must focus on creating a safe and inclusive environment for all. Between 2017-2022, NHS trusts recorded [more than 35,000 sexual safety incidents](#). More needs to be done to address the causes of sexual violence, which disproportionately affects women. Our 2021 [Sexism in Medicine survey report](#) found that many women (66%) and men (43%) did not report issues of sexism and sexual harassment because they believed no action would be taken.

Trans women and men are also affected by domestic and sexual violence and are [less likely to access services](#) to support them due to fear of transphobia. At a national level the EHRC has a responsibility to communicate that everyone who is at risk of sexual violence should be protected and have access to support.

The EHRC must:

- Take the opportunity to promote guidance on workplace sexual harassment and how the EHRC will enforce non-compliance of the Worker Protection Act (Amendment of Equality Act 2010) 2023.

The health sector is limited in resources but access to care should not be determined by a perceived hierarchy of rights. At the practical level we support informed, respectful discussion by medical professionals of the best ways to manage individual patients, taking a patient-centred approach, which respects their dignity, autonomy, and human rights. The EHRC should promote a similar practical approach and support organisations to use risk-assessment and equality impact assessments frameworks to inform decisions.

We urge EHRC to ensure the guidance is:

- Evidence-based and free from political or media influence, with the intent of upholding the freedoms, dignity, and respect of everyone in the UK.

Thank you for your attention to this matter. We look forward to your response and action.

Yours sincerely,



Dr Latifa Patel
BMA Representative Body Chair