

IN THE MATTER OF:

THE IMPACT OF *FOR WOMEN SCOTLAND* ON CHARITIES

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ADVICE

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Introduction and Summary

1. I am asked to advise Murray Blackburn Mackenzie (MBM) on the implications of the Supreme Court's judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16; [2025] 2 WLR 879 (*FWS*) for charities whose stated sole beneficiaries are women and/or girls.
  
2. Murray Blackburn Mackenzie (MBM) is an Edinburgh-based policy analysis group which researches and writes about women's sex-based rights and gender self-identity across different areas of public policy in the UK.
  
3. MBM is currently working on a project on the implications of *FWS* for charities whose stated sole beneficiaries are women and/or girls, for which this Advice is required. I have been asked a series of particular questions which I address at the end of this Advice. As to the issues more broadly, in summary I advise as follows,
  - (a) The Charity Commission (CC) and the Office of the Scottish Charity Regulator (OSCR) are responsible for regulating and registering charities.
  - (b) A charity is an institution which is established for charitable purposes.
  - (c) Permissible charitable purposes are wide ranging and include, for example, the prevention or relief of poverty; the advancement of education; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the

advancement of human rights, equality and diversity; and the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage.

(d) A charity's purposes should be precise and "use plain, simple language" avoiding "vague or ambiguous wording".

(e) A charity's purposes may restrict its benefits to women only.

(f) If a charity's purposes clearly state that the beneficiaries are women and/or girls, the fact that the charity has decided to provide services to men and/or boys who identify as women or girls, does not alter the meaning of its charitable purposes.

(g) A charity may alter its charitable purposes, and apply funds donated to it for different purposes, but only in narrow circumstances. This area of the law is complex and cannot be dealt with in a general advice such as this.

(h) The CC's and OSCR's register of charities contain the names of every charity registered with the CC and the OSCR. A charity will have an official name on the register. It may also have a working name; that is, another name that it uses. A main name or a working name must not be misleading by, for example, suggesting that the charity does something that it does not. If it does, the CC may direct the charity trustees to change the name or the working name of its charity.

(i) Where a charity's main or working name indicates that it is for women and/or girls ("Women's Aid", Women's Institute", for example) thereby suggesting that its purposes or activities are restricted to benefiting women and/or girls only, the name is likely to be misleading if the charity's purposes are not so restricted and/or its benefits are extended to men who identify as women. In these circumstances, the CC and OSCR can direct the charity to change its name.

(j) Trustees' primary and overarching duty is to further the purposes of the charity. They are required to act honestly, reasonably (with all due care and skill) and responsibly and in the best interests of the charity and its purposes. They must exercise their powers in good faith for the proper

purposes for which those powers were given; that is, to advance the charity's purposes, not personal advancement or for other interests. A charity must apply funds and other resources for those charitable purposes only.

(k) Trustees must further the purposes of their charity for the public benefit. This means that where the charity's beneficiaries, as reflected in its purposes, are women, it is the continuing duty of the trustees to further its purposes for the benefit of women. For example, a women's charity the purpose of which is the relieving of the emotional, psychological and/or physical distress of women and girls caused by sexual violence, will not be furthering the purposes of the charity for the public benefit if it applies its resources to the relief of emotional distress of men, whether or not they identify as women.

(l) Trustees who act in breach of their legal duties can be held responsible for the consequences that flow from such a breach and for any losses that a charity incurs as a result. Additionally, the CC and the OSCR can take action under the Charities Act 2011 (CA) and the Charities and Trustee Investment (Scotland) Act 2005 (CTI(S)A), respectively, to have them disqualified from acting as a trustee.

(m) Charities are bound by the Code of Fundraising Practice (Nov 2025). This is a UK wide Code. A failure to comply with it may result in the CC or the OSCR taking regulatory action, since a finding against a charity by the Fundraising Regulator may give rise to governance concerns.

(n) The Code of Fundraising Practice states that fundraising must be legal, open, honest and respectful and must not mislead existing or potential donors. This means that a charity must not claim that a donation will only be used for a particular purpose, if it may be used for another purpose.

(o) A women's charity that fundraises on the basis that funds will be applied to the benefit of women and/or girls when they are also used to benefit men who identify as women, may breach the terms of the Code.

This may result in the CC or the OSCR taking action against the charity and trustees pursuant to their powers to intervene, or taking action against individual trustees including disqualification.

(p) There are a number of regulatory and legal restrictions on campaigning arising out of, for example, regulation governing advertising (the Advertising Standards Authority; Broadcast Committee of Advertising Practice), radio and TV etc (Communications Act 2003) and defamation.

(q) Advertisements and broadcasting must not be misleading. An advertisement that states that all donations will be used to fund women's services may well be misleading where those services are also provided to men.

(r) A failure to comply with regulatory guidance addressing advertising and broadcasting may result in the CC or OSCR taking regulatory action.

(s) The protected characteristics under the EqA include sex and gender reassignment. Sex means biological sex.

(t) The EqA makes direct and indirect discrimination and harassment, including sexual harassment, unlawful across a range of activities.

(u) There are exceptions under the EqA to the prohibitions on sex discrimination. Sex means biological sex, and a charity cannot rely upon these exceptions unless it treats sex as biological.

(v) Section 193, EqA contains an exception which permits a charity to restrict the provision of its benefits to persons who share a protected characteristic. If this exception applies, a charity that restricts the provision of benefits to women will not be acting unlawfully under the EqA.

(w) Discrimination and harassment by "associations" is unlawful under the EqA. An exception applies to the prohibition on sex discrimination by associations. This permits an association to restrict membership or associate membership to women only and/or allow in only female guests.

(x) Discrimination and harassment by service providers is unlawful under the EqA. “Services” include goods and facilities. This covers a wide range of services and benefits.

(y) Many charities will provide services or facilities that fall within the EqA. These might include medical or counselling services, sporting events and facilities, domestic violence services, the making of grants, among other services and facilities.

(z) The EqA allows service providers, including charities, to operate separate and single – sex services where certain conditions are met. In some circumstances, not providing separate or single-sex services may result in discrimination or harassment of a woman.

(aa) Discrimination and harassment in organising or staging sporting events may be unlawful under a number of provisions in the EqA. An exception under the EqA allows for women only sporting events and competitions where certain conditions are met.

(bb) Discrimination and harassment by employers against employees are unlawful under the EqA. An exception applies where being a woman<sup>1</sup> is an occupational requirement and certain conditions are met.

(cc) The EqA makes it unlawful for a school or further or higher education institute to discriminate against, or harass, a pupil or student or a person seeking admission as a pupil or student. Exceptions apply allowing for single-sex schools and further and higher education institutions.

(dd) Whenever a charity relies on an exception under the EqA concerning sex, it must treat women as referring to biological women in accordance with the judgment in *FWS*. If it does not do so, it will not be able to rely on the exceptions and may find itself acting unlawfully.

(ee) Under the EqA, trustees who commit acts of unlawful discrimination or harassment may be personally liable. If proceedings are brought against them, they may be found to have acted unlawfully and ordered to pay compensation.

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<sup>1</sup> The same applies to other protected characteristic but sex is relevant to this Advice.

(ff) Charities are vicariously liable for the acts of their employees where those acts are done in the course of their employment. A charity may escape liability for an employee's act if it can show that it took all reasonable steps to prevent the employee from doing the act in question or from doing acts of that description. Charities should, therefore, give clear guidance to its employees on the law as it affects their charity's functions and on its effect on services to women.

### Background

4. Enclosed with my instructions is a Briefing Note from MBM. This Note includes examples of the charitable objects of charities that currently provide services to women and girls, and to men and boys who identify as women and girls. By way of illustration and as relevant to this Advice:

Rape Crisis Tyneside and Northumberland (Charity number 1138149)  
(RCT&N)

*Charitable objects*

(a) to relieve the emotional, psychological and/or physical distress of women and girls who have experienced sexual violence at any time in their lives; (b) to educate the public in the nature of sexual violence and its impact on women and girls in particular by offering training and conducting research and disseminating the useful results of that research.

RCT&N's website states that,

We are a charity that provides services to women, trans women and girls aged 13+, who have been affected by sexual violence and abuse at any times in their lives.

Unless a group is specifically advertised as single-sex, our groups are inclusive of women, trans women and non-binary and inter-sex people who feel a women's space is right for them.

All of our services are for women and girls only and all of our trustees, staff and volunteers are women. That means that when you call us you will only speak to a woman and your worker or counsellor will be a woman.... Our definition of women-only includes trans women and non-binary people who identify that women's services are right for them.

Dundee Women's Aid Company Limited (Charity number SC006691)  
(DWA)

*Charitable objects*

(a) The provision of public benefit through the relief of women, children and young people who have experienced or are in fear of domestic abuse by:

- (i) the provision of temporary refuge accommodation;
- (ii) providing support and information on access to other services;
- (iii) providing structured supportive opportunities to allow these women, children and young people to make choices for their future;
- (iv) liaising with other services, including the police, and advocating for women, children and young people affected by domestic abuse within legal and other protection services.

(b) The advancement of education by:

- (i) raising awareness of the effects of domestic abuse with the public and with young people in particular;
- (ii) providing opportunities for women, children and young people to shape the development of services, policy and practice.

(c) The promotion of equality and diversity by upholding and promoting the rights of all women, children and young people regardless of ethnicity, religion or cultural background, who have experienced domestic abuse in the belief that violence against women, is symptomatic of wider structural inequalities in society, and thus mainly perpetrated by men.

DWA's website states that,

We hold the LGBT Youth Scotland charter mark and work with members of the LGBT community who identify as women...

DWA welcomes all LGBT women and stands against prejudice and discrimination.

Women's Aid East and Midlothian (Charity number SC028191) (WAEM)

*Charitable objects*

The Company has been formed to benefit the community of women, trans-women, children and young people experiencing domestic abuse in the areas of Midlothian and East Lothian. The company's objects are: a) The relief of those in need by providing safe accommodation to women, children and young people with experience of domestic abuse b) To advance the human rights of women and children and promoting, protecting and safeguarding women's equality by actively campaigning to end violence against women c) To generate personal, social and community awareness on domestic abuse in order to create responses that protect the rights of all citizens.

WAEM's website states that,

Women's Aid East and Midlothian (WAEM) is a charity and company limited by guarantee to provide support, information, advocacy and temporary accommodation to all women (including transwomen), children and young people who have been subjected to domestic abuse.

5. There are, then, charities whose objects identify the beneficiaries as women and girls, but which provide services additionally to "transwomen" and, presumably, "trans girls"; that is, men and/or boys who identify as women or girls. There is also at least one charity (WAEM) whose name identifies it as a charity for women but whose governing document refers to "transwomen", although its objects do not. To be clear, in law sex is biological (FWS). This means that men and boys who identify as women or girls, are men and boys in law.

6. Some charities are federations with oversight of local or regional associations such as women's institutes, in the case of the National Federation of Women's Institutes<sup>2</sup>, or girl guides, in the case of the Guide Association<sup>3</sup> (Girlguiding). Some of these local or regional associations will be "associations" for the purposes of the Equality Act 2010 (EqA) (see below) and /or charities in their own right.

### Charities

7. Charities are largely regulated by the Charity Commission (CC) in England and Wales pursuant to the provisions of the Charities Act 2011 (CA), and by the Office of the Scottish Charity Regulator (OSCR) in Scotland pursuant to the Charities and Trustee Investment (Scotland) Act 2005 (CTI(S)A). The CC and OSCR have wide regulatory powers and though their powers differ, for the purposes of this Advice, they are substantially similar. The powers include the power to remove an institution from the register where they no longer consider it a charity, give directions as to the name of a charity, institute statutory inquiries (with information gathering powers), take steps to protect a charity's assets, and the power to disqualify trustees.
8. Both the CA and the OSCR keep a register of charities. An organisation that does not meet the conditions for entry on the register will not be entered, and where an organisation is already on the register and it is found not to meet the conditions for entry, it may be removed (ss.29-30, s.34, CA and ss.4-5, s.30, CTI(S)A).

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<sup>2</sup> Objects: "The main purposes of the Women's Institute organisation are: (a) to advance the education of women and girls for the public benefit in all areas including (without limitation): (i) local, national and international issues of political and social importance; (ii) music, drama and other cultural subjects; and (iii) all branches of agriculture, crafts, home economics, science, health, and social..."

<sup>3</sup> Objects: "To promote the education of girls and young women to help them develop emotionally, mentally, physically and spiritually so that they can make a positive contribution to their community and the wider world."

9. The statutory schemes and the broader legal context applicable in England and Wales and in Scotland are similar. The focus below is on England and Wales<sup>4</sup> but where there are material differences, I have pointed them out.

### *A Charity*

10. A charity is an institution which – (a) is established for charitable purposes only (s.1, CA). A charitable purpose is a purpose which – (a) falls within section 3(1), and (b) is for the public benefit (s.4, CA).<sup>5</sup>

### *Purposes*

11. Section 3(1), CA<sup>6</sup> states that charitable purposes for England and Wales, so far as most relevant to this Advice, include the following

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- .....
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- ...
- (g) the advancement of amateur sport;
- (h) the advancement of human rights,...or equality and diversity;
- ...
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage, [including relief given by the provision of accommodation or care to these persons<sup>7</sup>].
- (m) any other purposes –

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<sup>4</sup> This Advice would be too cumbersome, lengthy and complex were I to include the text of both sets of statutory provisions throughout.

<sup>5</sup> See too, s.7, CTI(S)A.

<sup>6</sup> Section 7, CTI(S)A identifies the charitable purposes for Scotland.

<sup>7</sup> Section 3(2)(e), CA.

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc) or under the old law,

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

(iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

12. “The advancement of health” includes the prevention or relief of sickness, disease or human suffering (s.3(2)(b), CA).

13. “Citizenship or community development” includes “the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities” (s.3(2)(c)).

14. “Sport” means “sports or games which promote health by involving physical or mental skill or exertion” (s.3(2)(d), CA).

15. As to the purposes, each item listed in s.2(2) is a description or “head” of charity rather than a fully stated charitable purpose in itself (Charity Commission (CC), Guidance<sup>8</sup>, Charitable Purposes (Sept 2013), para 2; Explanatory Notes, Charities Act 2006<sup>9</sup>, para 21).

16. Specific provision is made in relation to some recreational trusts and leisure facilities. It is charitable to provide, or assist in the provision of, facilities for – (a)

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<sup>8</sup> The CC is empowered to issue guidance for the encouraging and facilitating the better administration of charities, s.15(2) and (3), CA.

<sup>9</sup> This has been substantially repealed but this remains instructive because provision is made in the CA to the effect that law preceding the CA continues to have effect (s.3(3) and s.4(3), CA).

recreation, or (b) other leisure-time occupation, if the facilities are provided in the interests of social welfare (s.5(1), CA). Facilities are provided in the interests of social welfare where they are provided with “the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and that those persons have the need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or the facilities are to be available to members of the public at large or to male, or to female, members of the public at large” (s.5(2) and (3), CA). This applies to the provision of facilities at village halls, community centres and women’s institutes, and the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity (s.5(4), CA). The public benefit requirement must still be satisfied if an institution is to be a charity (s.5(5), CA, see below) but these facilities satisfy the charitable purposes aspect of the requirements that must be met for an organisation to qualify as a charity.

17. As can be seen, subject to the public benefit requirement (see below), the range of potential charitable purposes is wide.

18. A charity’s purposes will generally be contained in a charity’s objects clause/s.

19. The CC’s Guidance advises that, a charity’s purposes “should make it clear: what the charity is set up to achieve; how it will achieve these outcomes; who will benefit from these outcomes; where the benefits extend to.” The purposes should be precise and “use plain, simple language” avoiding “vague or ambiguous wording”. The Guidance states that terms “that may not be generally understood or have more than one meaning must be explained and all of charity’s purposes must be included, if there is more than one.” (CC Guidance, How to Write Charitable Purposes (Nov 2014)).

20. In understanding the meaning of a charity's purposes, the principles that are generally applicable to the interpretation of instruments including, for example, contracts will apply. The purposes will be given the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably be available to those to whom the purposes are directed.<sup>10</sup>

21. Where a charity is established with clearly stated purposes, the motives and intentions of the founders are irrelevant to the interpretation of the purposes. Similarly, what the charity has done since it was established will not normally be relevant in understanding its purposes.<sup>11</sup>

22. This means if the purposes clearly state that the beneficiaries are women and/or girls, the fact that the charity has decided to provide services to men and/or boys (where they identify as women or girls) is irrelevant in understanding the meaning of its purposes; they should not be read as including men or boys because a charity decides to treat them as beneficiaries.

23. The CC's Guidance states that,

If your charity's purpose will only benefit a defined group of people, this needs to be a sufficient section of the public.

Where relevant, include in your charity's purpose any specific definitions of who can benefit, such as:

their age

where they live

their gender

any other defining characteristics (Guidance, How to Write Charitable Purposes (Nov 2014)).

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<sup>10</sup> *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 16-38; *Cherry Tree Investments Ltd v Landmain Ltd* [2013] 1 WLR 481.

<sup>11</sup> *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.

24. While “gender” is used in the Guidance, it is plainly used as a synonym for sex. The term “gender” has no legal meaning and, absent clear definition in a charity’s purpose clause or governing document, it is insufficiently precise. As is apparent from case law, gender is often used interchangeably with sex but to mean sex (*R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559, para 52). To be clear, whether sex or gender is used,

legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders (terms which have been used interchangeably). Some rights differ according to whether a person is a man or a woman: for example, rights of succession to hereditary titles. There are criminal offences that can only be committed against persons of a particular gender: for example, female genital mutilation. There is a raft of legislation which assumes that only a woman can give birth to, or be the mother of, a child, including legislation relating to maternity rights and benefits, health provision and fertility treatment, and nationality. The legislation governing the registration of births requires the sex of children to be recorded. Legislation relating to marriage and civil partnership (including legislation permitting same sex marriages) assumes that everyone is either a man or a woman. Equality legislation protects people from discrimination if it arises from their being a man or a woman (*R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559, para 52).

25. Sex, therefore, is “binary” (*R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559, para 52). The equality legislation to which *Elan-Cane* refers is the EqA. The EqA defines “man” and “woman” as corresponding to “male” and “female” and these terms refer to biological sex (*FWS*). The CC’s Guidance on the EqA is clear that the relevant characteristic is sex and where trans identity is concerned, gender reassignment.

*Public benefit*

26. A purpose must be for the public benefit if it is to be a charitable purpose (s.4(1), CA) (“the public benefit requirement”) and this is not to be presumed (s.4 (2), CA, see too s.8, CTI(S)A) in slightly different terms<sup>12</sup>).
27. The Charity Commission (CC) has issued Guidance on the public benefit requirement, pursuant to its powers so to do (s.17(1), CA, see too s.9, CTI(S)A<sup>13</sup>). The trustees of a charity must “have regard” to any such guidance when exercising any powers or duties to which the guidance is relevant (s.17(5), CA).
28. The CC’s public benefit Guidance (Public Benefit: The Public Benefit Requirement (PB1) (Sept 2013), 5) states that there are two aspects of public benefits: the “benefit aspect” and the “public aspect.” In general, for a purpose to be “for the public benefit” it must satisfy both the “benefit” and “public” aspects.<sup>14</sup> The “benefit aspect” of public benefit is about whether the purpose is beneficial. The “public aspect” is about whom the purpose benefits. To satisfy the public aspect of public benefit the purpose must benefit the public in general, or a sufficient section of the public.
29. Where a charity has more than one purpose, each purpose on its own must meet the public benefit requirement.

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<sup>12</sup> (1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit. (2) In determining whether a body provides or intends to provide public benefit, regard must be had to – (a) how any – (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and (ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

<sup>13</sup> The OSCR has issued guidance on meeting the charity test; <https://www.oscr.org.uk/becoming-a-charity/meeting-the-charity-test-guidance/>.

<sup>14</sup> In the case of poverty charities the position is different. In the case of charities for the relief and in some cases the prevention of poverty, the courts consider that the public benefit requirement can be satisfied by the benefit aspect only. There is no separate consideration of the public aspect. This means that charities to relieve poverty may sometimes have smaller sections of the public than my otherwise be expected in ordinary charities, so they can define who can benefit by reference to for example employment by an employer.

30. A purpose cannot be a charitable purpose where any detriment or harm resulting from it outweighs the benefit. The fact that a purpose is for the benefit of women only, does not mean it is detrimental to men.
31. The benefits of a charitable purpose may be restricted to those with a particular protected characteristic under the EqA, where certain conditions under the EqA are met. This means that a charity's purpose may restrict its benefits to women where this is a proportionate means of achieving a legitimate aim, see s.193, EqA (discussed below) (Public Benefit: The Public Benefit Requirement (PB1) (Sept 2013), 11; *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] PTSR 1074, para 97). If a charity decides to restrict its benefits to women only, it must treat women as referring to biological women (FWS).

*Altering purposes and cy pres*

32. In certain circumstances, a charity may alter its purposes. There are complex rules about this but generally the authority of the CC or OSCR is required in advance of any change. A charity may wish to alter its purposes where, for example, the group that a charity's purposes benefit has reduced significantly in size over time, but there will be other circumstances. In deciding whether to seek authority to change its purposes, a charity must consider whether, for example, the needs or circumstances of its beneficiaries have changed, or whether new circumstances affect who those beneficiaries are, or how they are defined.<sup>15</sup>
33. Where a charity's purposes identify women as the sole beneficiaries, but that charity has in practice provided benefits to men who identify as women, the charity could conceivably seek authority to amend its purposes so as to include men who identify as women as beneficiaries (assuming the class of beneficiaries could be defined sufficiently clearly and without ambiguity).

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<sup>15</sup> See the CC's guidance at <https://www.gov.uk/government/publications/changing-your-charity-governing-document-cc36>.

34. Further, and to address one point raised in my instructions, if a charity's purposes are altered and it has funds – for example as a result of a legacy gift – to be applied only to the furthering of the original purposes (women), there is provision allowing for those funds to be used to further any altered purpose. The CC, OSCR and a court can establish a cy-pres scheme which allows charitable property to be applied to purposes as close as possible to the donors' original charitable intention where the original purposes cannot be carried out or have ceased to be suitable or effective (CA, Part 6,<sup>16</sup> ss.39-43, CTI(S)A). However, the circumstances in which this can occur are narrow and the legal rules and context are very complex. Were this to occur in the case of a particular charity, separate advice would need to be taken. The issue does not lend itself to general advice in the context of a project of the sort MBM are undertaking.

#### *Charities' names*

35. The CC's and OSCR's register of charities contain the name of every charity registered with the CC and OSCR (with some exceptions) (ss. 29-30 CA, s.3, CTI(S)A).

36. A charity will have an official name (its "main name") on the register. It may also have a "working name"; that is, another name it uses (s.42, CA, s.12, CTI(S)A). A main name or working name must not be misleading, for example by suggesting the charity does something it does not. The CC may direct charity trustees to change the name or working name of a charity where in the opinion of the CC, the name is "likely to mislead the public as to the true nature of – (i) the purposes of the charity as set out in its trusts, or (ii) the activities which the charity carries on under its trusts in pursuit of those purposes" (s.42(2)(b), CA; see too, ss.10(1)(b) and 12, CTI(S)A in the case of the OSCR to the same effect).

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<sup>16</sup> "It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-pres, to circulate to secure its effective use for the charity by taking steps to enable it to be so applied" (s.61, CA).

37. It is clear from the register of charities that there need not be an exact match between a charity's name and its purposes. However, sex is binary and it is a biological concept, both under the EqA and under common law (*FWS, Corbett v Corbett* [1970] 2 WLR 1306; *Bellinger v Bellinger* [2003] 2 AC 467, paras 28, 56, 57). One can only be a woman or a man; one cannot be both and this status is immutable. One's sex cannot be changed: "Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction" (*Bellinger v Bellinger* [2003] 2 AC 467, para 28).
38. It follows that where a charity's main or working name indicates that it is for women and/or girls ("Women's Aid", Women's Institute", for example), thereby suggesting that its purposes or activities are restricted to benefiting women and/or girls only, the name is likely to be misleading if the charity's purposes are not so restricted and/or its benefits are extended to men who identify as women. In these circumstances, the CC and OSCR can direct the charity to change its name.

#### *Associations*

39. A membership organisation may be a charity so long as a sufficient section of the public can access those benefits by becoming members (CC Public Benefit: Running a Charity (PB2), (Sept 2013), 9); that is, it is not effectively a private members' club (*ibid.*, 14). Some women's charities are also membership organisations, for example some women's institutes. The EqA will cover these (see below).

#### Duties of Trustees

40. Trustees' "primary and overarching duty is to further the purposes of the charity (*Butler-Sloss and Ors v Charity Commission for England and Wales* [2022] Ch 371 and *Harries v Church Com'rs* [1992] 1 WLR 1241). They are required to act honestly, reasonably (with all due care and skill) and responsibly and in the best interests of

the charity and its purposes (*Butler-Sloss and Ors v Charity Commission for England and Wales* [2022] Ch 371). They must exercise their powers in good faith for the proper purposes for which those powers were given; that is, to advance the charity's purposes, not personal advancement or for other interests. A charity must apply funds and other resources for those charitable purposes only (*Butler-Sloss and Ors v Charity Commission for England and Wales* [2022] Ch 371).

41. A trustee's overriding duty is summarised as follows,<sup>17</sup>

It is axiomatic that charity trustees... are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them the better to discharge that duty, trustees have powers vested in them, these powers must be exercised for the purpose for which they have been given: to further the purposes of the trust.

42. In furthering the purposes of their charity, trustees must further those purposes for the *public benefit*. This means that where the charity's beneficiaries, as reflected in its purposes, are women (a sufficient section of the public as to meet the public benefit requirement), it is the continuing duty of the trustees to further its purposes for the benefit of women. For example, a women's charity established to relieve the emotional, psychological and/or physical distress of women and girls caused by sexual violence would not be furthering its charitable purposes for the public benefit if it applied its resources to the relieving of such distress in men, whether or not they identify as women.

43. Necessarily trustees will have a discretion in performing their duties as to how to pursue their charity's purposes and apply its resources. However, trustees must exercise any discretion in good faith and in accordance with the charity's purposes, taking account of all relevant considerations and disregarding all irrelevant

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<sup>17</sup> *Harries v Church Com'rs* [1992] 1 WLR 1241, 1246B.

considerations. If they do so, they will be acting lawfully and within the scope of their powers and duties.<sup>18</sup>

44. Since trustees must operate their charity solely in furtherance of its charitable purposes, a charity whose purposes identify women as its beneficiaries must apply its charitable benefits exclusively for the benefit of women.

45. As fiduciaries at common law, trustees who act in breach of their legal duties can be held responsible for the consequences that flow from such a breach and for any losses that a charity incurs as a result (CC The Essential Trustee: What You Need to Know, What You Need to (May 2018)). Additionally, the CC can take action under the CA to have them disqualified from acting as a trustee (s.181(A), CA), including where,

- there was misconduct or mismanagement in the administration of the charity, and the trustee was responsible for misconduct or mismanagement (181(A)D, CA), or
- the trustee knew of misconduct or mismanagement and failed to take any reasonable steps to oppose it, or the person's conduct contributed to or facilitated the misconduct or mismanagement (181(A)D, CA), or
- any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order disqualifying a trustee (181(A)F, CA) and
- That (i) the person is unfit to be a charity trustee, either generally or in relation to the charity or class of charities specified or described in the order and (ii) that the making of the order is desirable in the public interest in order to protect public trust and confidence in charities generally or classes of charity specified or described in the order.

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<sup>18</sup> R (*Independent Schools Council*) v *Charity Commission* [2012] Ch 214, 220.

46. The position as set out above is as it pertains to England and Wales. The same is broadly true of Scotland except that trustees' duties in Scotland are more explicitly defined in statute than in England and Wales (ss.66<sup>19</sup> and 69, CTI(S)A).<sup>20</sup>

### Fundraising

47. Charities are bound by the Code of Fundraising Practice (Nov 2025). This is a UK wide Code. The Fundraising Regulator is responsible for setting, maintaining and promoting the rules under the Code. The Code is not legally binding but as the CC makes clear, a failure to comply with it may result in the CC taking regulatory action since a finding against a charity by the Fundraising Regulator may give rise to governance concerns (CC Guidance, Charity Fundraising: A Guide to Trustee Duties (Oct 2022)).

48. The Code provides that fundraising must be legal, open, honest and respectful. A charity must take all reasonable steps to make sure that their fund raising is carried out in a way that reflects positively on fundraising in general. This includes, not putting on the pressure on a person to donate. A charity must not, when fundraising, unfairly criticise or insult other people or organisations. Charities must not mislead existing or potential donors. This includes by leaving out information, giving inaccurate or unclear information. This means that, for

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<sup>19</sup> "(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee (i) put the interests of the charity before those of the other person, or (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interests to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question".

<sup>20</sup> Charities must set out in their annual report the main or in the case of auditable charities (generally, those with larger funds) (i) significant activities undertaken by the charity to further its charitable purposes for the public (or a sufficient section of the public) benefit (Charities (Accounts and Reports) Regulations 2008) (similar provision is made for Scotland; Charity's Accounts (Scotland) Regulations 2006). There are other requirements, but these do not affect the matters addressed in this Advice.

example, a charity must not claim that a donation will only be used for a particular purpose, if it may be used for another purpose.

49. As the CC's Fundraising Guidance makes clear (CC Guidance, Charity Fundraising: A Guide to Trustee Duties (Oct 2022)), charities should identify and follow any recognised standards that apply to charities' fundraising, and these include the Fundraising Regulator's Code. The CC further recommends that information on the following issues is provided when running appeals; the identity of the charity and what it does, what the funds raised are for and how they will be used.

50. A women's charity that fundraises on the basis that funds will be applied to the benefit of women and/or girls when in fact they are also used to benefit men, may breach the terms of the Code. This may result in the CC or the OSCR taking action in relation to the charity and trustees pursuant to their powers to intervene or taking action against individual trustees, including disqualification.

#### Campaigning and Advertising

51. There are a number of regulatory and legal restrictions on campaigning/political activity arising out of, for example, regulation governing advertising (the Advertising Standards Authority; Broadcast Committee of Advertising Practice), radio and TV etc (Communications Act 2003) and defamation (see CC Guidance: Campaigning and Political Activity Guidance for Charities (Nov 2022)). The CC's guidance indicates that a failure to comply with regulatory guidance addressing advertising and broadcasting may be an indicator of underlying mismanagement or maladministration of the charity's affairs such as to require the CC to take regulatory action.

52. The British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the Code of Broadcast Advertising (BCAP) which are administered by the Advertising Standards Authority, apply to charities. So far as relevant to this

Advice, they are principally concerned with “preventing the abuse of people's charitable impulses. Charity advertisements or advertisements that feature charities should treat with care and discretion any subjects likely to arouse strong emotions” (BCAP Code, Ch 16). Advertisements and broadcasting must not be “misleading”. (CAP Code, Ch 3; BCAP, Ch 3). Typically, in the context of charities, advertisements found to have been misleading concern claims suggesting endorsements from other organisations or where donations are likely to end up (ASA: Third Sector Charity and Public Awareness Advertising (April 2025)). An advertisement that stated that all donations would be used to fund women's services may well be misleading where those services are also provided to men.

### The Equality Act 2010

53. Part 2, EqA identifies and defines the “protected characteristics” under the EqA. These include sex and gender reassignment (ss.4, 7 and 11 EqA 2010).
54. As to sex: Sex is “a reference to a man or to a woman” (s.11, EqA) and man and woman means “male” and “female” respectively (s.212, EqA). Sex is binary, biological and immutable. “Sex”, “woman” and “man” under the EqA, therefore, refer to biological sex, biological woman and biological man (*FWS*, para 264). The same is so in the case of boys and girls. This means that a man or a boy who identifies as a woman or girl is male, and either a man or a boy. How they identify does not change their sex.
55. As to gender reassignment: “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex” (s.7, EqA). A person who has the protected characteristic of gender reassignment is referred to under the EqA as a “transsexual person” (s.7, EqA). As can be seen the characteristic of gender reassignment applies to men and women, boys and girls, including those who have not yet started the process of transition (“proposing to

undergo”) but continue to live their lives in accordance with the social attributes usually associated with members of their sex (for example, in the case of a man who identifies as a woman continuing to use a male name, dress in male clothes, wear his hair, including facial hair, in a way that is usually associated with being male) and with all the physiological characteristics of being male. Having the protected characteristic of gender reassignment (being a transsexual) does not change a person’s sex (*FWS*).

56. The EqA makes it unlawful for a service provider to discriminate or harass a person in the provision of services (s.29, EqA), unless an exception applies. Services include goods and facilities (s.31(2), EqA).<sup>21</sup> This covers a wide range of services and facilities including, for example, medical or counselling services, domestic violence and victim support, and the making of grants,<sup>22</sup> pursuant to the sorts of charitable purposes identified above.

57. The EqA also makes it unlawful for an employer to discriminate or harass an employee or an applicant for employment (s.39, EqA); for an association to discriminate or harass members, or guests, or applicants for membership or as guests (ss.101 and 102, EqA); for a school or further or higher education provider to discriminate against or harass a pupil or student, or an applicant for admission to a school or higher education institute (s. 85 and ss.91 and 92, EqA).

58. There are exceptions to these unlawful acts, and these are discussed below. If a charity seeks to rely upon one of these exceptions, it must treat sex as biological sex otherwise it will act unlawfully. This is because “sex”, “woman” and “man” in

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<sup>21</sup> It also makes discrimination in the exercise of public functions unlawful (s.29(6), EqA). Although charities are not core public authorities, they may exercise public functions for particular purposes (s.31(4)) and so fall within this provision too.

<sup>22</sup> The Sex Discrimination Act 1975 (SDA) gave a list of examples of “facilities” and explicitly referred to “facilities ...for grants, loans, credit or finance” (s.29(2)(c), SDA)). The EqA does not include such a list of examples. However, s.29 EqA replaced the provision in the SDA “and extends protection so that it is generally uniform across all the protected characteristics” (Explanatory Notes, para 113). It is very clear that facilities has the same meaning under the EqA as under the SDA.

the EqA refer only to biological sex (*FWS*; (1) *Good Law Project Ltd* (2) *BOT* (3) *BNW* (4) *BBS* [2026] EWHC 279 (Admin) (*Good Law Project*)).

59. “Discrimination” for these purposes includes direct and indirect discrimination.

60. Direct discrimination is defined as follows; “[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others” (s.13, EqA). Treating a man less favourably than a woman, for example, would constitute sex discrimination. There is no general defence of justification for direct discrimination and as such unless an exception applies, direct discrimination in the areas covered above will be unlawful.

61. Section 19, EqA defines indirect discrimination as follows,

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice [PCP] which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

62. Harassment under the EqA is defined as follows,

(1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of –
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if –
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if –
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to ...sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are –
  - ....
  - sex.

63. In summary, harassment may occur in three ways (i) unwanted conduct related to sex (ii) unwanted conduct of a sexual nature, and (iii) less favourable treatment of a woman because she submits to or rejects sexual harassment or harassment related to sex.

64. Allowing men or boys, whether or not they identify as women or girls, to access services intended for women and girls only may result in indirect discrimination against those women and girls. This is because granting access to men or boys to such services may subject women and girls to a particular disadvantage. Where a PCP (“trans inclusive”) causes a particular disadvantage to women and girls, unless it can be shown to be a proportionate means of achieving a legitimate aim, it will be indirectly discriminatory. Men will not experience the same disadvantage if women who identify as men are permitted entry into men only spaces, for obvious reasons. Those reasons include the increased vulnerability of women, as compared to men, and their safety (*FWS*, paras 213-214). For the same reasons, and others, women may also be subject to harassment if men are permitted to enter women only spaces. Where women and girls use a changing facility at a swimming pool, for example, requiring them to undress in front of men and boys may at the very least be unwanted and have the purpose or effect of violating the dignity of those women and girls and/or create an intimidating, hostile, degrading, humiliating or offensive environment for them.

65. There are exceptions in the EqA that allow charities to restrict benefits to women. The relevant exceptions are those that apply to,

- Charities
- Associations
- Single sex – services
- Sport
- Occupational Requirements
- Education

66. The exceptions do not apply where the conduct amounts to harassment.

67. If any one of these exceptions is to apply, sex must be treated as biological sex. For example, “if...a service provider provided a service to be used both by women and

transsexual women, that service would not be a single sex service” (*Good Law Project*, para 5). If sex is not treated as biological, then a charity will not be able to rely on these exceptions. It is likely to act unlawfully under the EqA if it restricts benefits to women and to men who identify as women only.

### *Charities*

68. On the face of it, a body that restricts the provision of benefits to (biological) women will directly discriminate against (biological) men.

69. However, an exception applies in the case of charities. Section 193, EqA, allows charities to limit the provision of benefits to people who share a particular protected characteristic to the exclusion of those with other protected characteristics. It provides that,

- (1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if –
  - (a) the person acts in pursuance of a charitable instrument<sup>[23]</sup>, and
  - (b) the provision of the benefits is within subsection (2).
- (2) The provision of benefits is within this subsection if it is –
  - (a) a proportionate means of achieving a legitimate aim, or
  - (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic).<sup>24</sup>

70. Where a charity’s governing document (“charitable instrument”) restricts the provision of benefits to women, and those benefits are provided in order to tackle disadvantage linked to being a woman, then this exception will apply. The exception also applies where restricting benefits to women is a proportionate means of achieving a legitimate aim. The aim of any restriction will generally be

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<sup>23</sup> That is the legal document (governing document) setting out the charity’s purposes.

<sup>24</sup> For completeness, s193(7) includes an exception so that it is not for a person, in relation to an activity which is carried on for the purpose of promoting or supporting a charity (i.e. any charity), to restrict participation in the activity to persons of one sex. This is intended to cover, for example, women only fun runs to raise money for charities (the Explanatory Notes give the following example: “Race for Life, a women-only event which raises money for Cancer Research UK, is lawful” (para 611).

identified in the charity's charitable purposes. Assessing proportionality will involve four questions; (i) is the restriction sufficiently important to justify the limitation of a protected right to non-discrimination? (ii) is the restriction rationally connected to the aim? (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the aim? and (iv) whether, balancing the severity of the restriction on the rights of the persons to whom it applies against the importance of the aim, to the extent that the restriction will contribute to its achievement, the former outweighs the latter (*Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para 74). Proportionality, then, requires that a balancing exercise is undertaken.

71. The Supreme Court addressed this exception in *FWS*. It stated that,

Schedule 16 [associations] and section 193(1) plainly intend that single-sex associations and charities should be permitted to exist along with other single-characteristic associations. A certificated sex [ie non-biological] meaning applied to these exceptions would make it impossible for any association or charity—including, for example, a mutual support association for women who are victims of male sexual violence, a lesbian social association, a breast-feeding support charity—to be set up or to pursue a dedicated purpose which is directed at the needs of biological females. To require such associations or charities to reconceive of their objects as targeting a group that does not correspond with their original aims, and to allow trans people with a GRC (of the opposite biological sex) to join would significantly undermine the right to associate on the basis of biological sex... (para 231).

72. It follows that a charitable purpose which provides benefits to women and to some men (those who identify as women) cannot be characterised as restricting benefits to women alone (see too, *Good Law Project*). Section 193, EqA would not then apply because the provision of benefits would not be restricted to those who share the protected characteristic of sex.

73. If s.193, EqA does not apply, unless another exception applies, a charity that provides benefits to women only will unlawfully directly discriminate against men. Even where benefits are provided to women and to men who identify as women, this would still be directly discriminatory against men. This is because men are treated less favourably than women; they are only provided with benefits if they identify as women, whereas all women qualify. Women only charities relying on s.193, EqA, therefore, must treat sex as biological sex if they are not to unlawfully discriminate against men.

74. Section 193, EqA is wide and embraces benefits consisting of both the direct delivery of services and the making of grants to other charities for the delivery of services to women.

#### *Associations*

75. As mentioned above, some charities are also “associations” within the meaning of the EqA (see women’s institute, for example). Section 107(2), EqA defines an association as an association of persons which has at least 25 members and admission to membership of which is regulated by the association's rules and involves a process of selection. A membership organisation may be a charity so long as a sufficient section of the public can access those benefits by becoming members (CC Public Benefit: Running a Charity (PB2), (Sept 2013), 9; that is, it does not effectively turn the charity into a private members’ club, *ibid.*, 14).

76. The EqA allows for an association to restrict membership to those who share a protected characteristic (which would otherwise be unlawful under s.101(1)(b), EqA). This means that an association may restrict membership or associate membership to women only, and/or allow in only female guests (Schedule 16, para 1, EqA). The Supreme Court in *FWS* (para 231 set out above) explicitly stated that sex for the purposes of the associations’ provisions in the EqA, just as with the

other provisions of the EqA, means biological sex. If a women's association allows in men, it will not be able to rely on this exception (*FWS* and *Good Law Project*).

#### *Separate and Single- Sex Services*

77. Section 29, EqA makes it unlawful to discriminate in the provision of a service, including by the provision of goods or facilities. Schedule 3 contains exceptions from this general prohibition. Those exceptions "permit carve-outs from what would otherwise constitute sex discrimination under the EA 2010" (*FWS*, para 211):

These provisions are directed at maintaining the availability of separate or single spaces or services for women ... as a group – for example changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes) or medical or counselling services provided only to women... – for example cervical cancer screening for women..., or counselling for women only as victims of rape or domestic violence" (*FWS*, para 211).

78. Again, sex has its biological meaning for the purposes of these exceptions (*FWS*, paras 211-221 and para 265).

79. Allowing men who identify as women to access single -sex services will mean that the single-sex exceptions do not apply (*Good Law Project*, para 5). Charities should, therefore, ensure that all men are refused access to women only separate and single-sex services.

#### *Sport*

80. Section 195, EqA provides that,

(1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.

...

- (3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.
- (4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.

81. According to *FWS*, this provision is predicated on biological sex (*FWS*, para 234). This means, again, that if a charity wishes to rely on this exception, it must treat sex as biological sex.

#### *Occupational Requirements*

82. Section 39, EqA makes it unlawful for employers to discriminate against their employees or against applicants for employment (s.39, EqA).<sup>25</sup> Schedule 9, para 1, EqA creates an exception. This provides, in summary, that it is not unlawful for an employer to impose a requirement that successful applicants for employment and employees be women, where certain conditions are met.<sup>26</sup>

83. The conditions are that, having regard to the nature or context of the work (i) the requirement is an occupational requirement; (ii) the application of the requirement is a proportionate means of achieving a legitimate aim. There must be a link between the requirement and the job. Where the occupational requirement exception applies in the case of women, jobs must be advertised and filled by biological women. Whereas in the case of other protected characteristics an

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<sup>25</sup> Similar provision is made in relation to contract workers, partners, members of LLPs, personal office holders and public office holders (ss.41, 44, 45, 49, 50 and 51).

<sup>26</sup> Similar provision is made in respect of principals, LLPs, firms or persons who have the power to appoint or remove office holders and a persons who have the power to recommend an appointment to a public office.

employer may refuse to employ a person where it has reasonable grounds for not being satisfied that the applicant or employee has the protected characteristic concerned (for example, disability) (Schedule 9, para 1(1)(c), EqA), in the case of sex an employer is concerned with *actual* sex, not whether there are reasonable grounds for being satisfied that the condition as to sex is met (Schedule 9, para 1(4), EqA). This means that if this exception is to apply in the case of a job that is reserved for women, only biological women must be employed in that job.

84. The Code of Practice<sup>27</sup> issued by the Equality and Human Rights Commission (EHRC) gives the following examples of the circumstances where an occupational requirement may be lawful: “some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. Similarly, a women’s refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women.”<sup>28</sup>

85. The purposes of the occupational requirement exception as it applies to sex mirrors those behind the separate and single - sex service exceptions; for example, privacy, dignity and safety (*FWS*, para 211).

### *Education*

86. Part 6, EqA makes it unlawful for schools and higher and further education institutions to discriminate against or harass a school pupil or student, or an applicant for admission to a school or higher or further education institution (ss. 85, 91 and 92, EqA).

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<sup>27</sup> To which a court or tribunal must take into account in any case in which it appears to the court or tribunal to be relevant; s.15, Equality Act 2006.

<sup>28</sup> Paragraphs 13.7-8. A revised Code of Practice has been sent by EHRC to the Minister pursuant to s.14, EqA 2006 for laying before Parliament or to give reasons why she does not agree with the draft. There has been delay in the Minister acting on this but there have been no changes to the law on this aspect of Schedule 9 and so the examples remain apt.

87. Section 193 (Charities, see above) means that an education provider which is a charity will not breach the EqA by providing benefits only to girls or women if certain conditions are met.

88. Further, Schedule 11, para 1, EqA contains an exception permitting single-sex schools. Single-sex schools are allowed to admit pupils of only one sex without this being unlawful sex discrimination. Sex, again, means biological sex (*FWS*, paras 228 and 265(xviii)). A girls' school will not lose its single-sex status if it admits boys where the admission of boys is exceptional or where their numbers are comparatively small and their admission is confined to particular courses or classes. Typically, this occurs in sixth form where a school needs a minimum number of students to ensure an A' Level course is viable (see, Explanatory Notes para 862 and examples thereunder), or to attract funding.

89. Further, Schedule 12, para 1 contains an exception permitting single-sex further and higher education institutions. Sex, again, means biological sex (*FWS*, paras 228 and 265(xviii)). A women's only institution will not lose its single-sex status if it admits men where the admission of men is exceptional or where their numbers are comparatively small and their admission is confined to particular courses or classes. "Exceptionality" would cover, for example, a "groundskeeper at a women-only college" who "lives with his family in a cottage on the college premises. The groundskeeper's son is permitted to attend the college. It is still regarded as a single-sex institution" (EHRC, Technical Guidance on Further and Higher Education, para 14.31).

90. In the case of a single-sex female school or further or higher education institution, it does not seem to me that the "exceptionality" criterion would be met where the reason for the admission of boys or men was solely that they identify as girls or women. This is because the exception plainly anticipates that it is something other than sex that creates the exceptional circumstance. This is apparent from *FWS*, para 228 in which the Supreme Court said: "It was plainly Parliament's intention to

allow for single-sex higher education institutions. That much is plain from the express terms of Schedule 12, paragraph 1. However, if sex means certificated [non-biological] sex, the exception from the sex discrimination provisions for single-sex higher education institutions would not allow such institutions to be limited to girls and women, given the absence of any separate exception for gender reassignment discrimination. We can see no rational basis for a certificated sex reading that would oblige such institutions to admit transsexual members of the opposite (biological) sex with a GRC, whose biological sex is likely to be readily identifiable, whilst excluding others without a GRC, whose circumstances may be materially indistinguishable." In other words, there is nothing exceptional about transsexual boys or men (whether they have a GRC or not) that justifies them being treated differently from non-transsexual boys or men.

91. Schedule 12(3)(b) is concerned with courses and classes. The Explanatory Notes give the following example: "If the college admits a small number of men to make up the numbers on a particular course of study, it is still regarded as a single-sex college. It is not discriminating unlawfully by refusing to admit men to other courses." (para 877). This is not concerned with the admission of men generally, whether or not they identify as women.

92. Schedule 12, paragraph 2(4) provides that a further or higher education institution can restrict access to courses which prepare people for a particular job or profession, where that job or profession is lawfully restricted to people of a particular sex. This covers those jobs where occupational requirements apply (see, Schedule 9, EqA above). This means that a college could, for example, run a course on women's sports massage (addressing issues such as pregnancy, pelvic and hip tension etc) and admit women only on to the course. Again, sex would have to be defined by reference to biological sex.

93. A school or further or higher education institution which is a charity the stated beneficiaries of which are girls and/or women only, is unlikely to be acting outside

its purposes if it admits boys or men where the conditions in Schedules 11 or 12 are met. This is because any benefits to boys or men would be small in number and incidental. For the conditions in Schedules 11 and 12 to be met, sex must be treated as biological sex.

### Liability of Trustees

94. Under the EqA, trustees who are responsible for making decisions that result in unlawfully discriminatory acts may be legally liable for those acts. This is because the EqA fixes liability on a principal (the charity) and the agent (the trustees), where the agent has done the unlawfully discriminatory act (s.110, EqA). This means that where trustees introduce policies or do acts that are unlawfully directly or indirectly discriminatory, or which result in harassment, they may - if proceedings are brought against them - have a finding of unlawful discrimination or harassment made against them and may be made to pay compensation.<sup>29</sup>

95. Charities are also vicariously liable for the acts of their employees where those acts are done in the course of their employment (s.109(1), EqA). A charity may escape liability for an employee's act if it can show that it took all reasonable steps to prevent the employee from doing the act in question or from doing acts of that description (s.109(4), EqA).

96. Charities should, therefore, give clear guidance to their employees on the law as it affects their charity's functions and on its effect on services to women.

### The Questions

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<sup>29</sup> An exception applies in a case where a trustee has relied upon a statement by the charity that doing the act in question is not a contravention of the EqA and it was reasonable for them to rely upon that statement (s.110(3), EqA). It is difficult to see how that exception could ever apply in the case of trustees since they would not be relying on a statement by the charity but would be making the decisions themselves.

My instructions include a number of specific questions. The answers to those questions have been substantively addressed above. However, I address them below in summary.

1. *What duties do the relevant charities and their trustees have to ensure that they are acting to ensure that services or other benefits are provided to their stated beneficiaries? What action would be required to fulfil these duties and what risks would trustees be taking in not doing so?*
2. Trustees' primary and overarching duty is to further the purposes of the charity. In so doing they are required to act honestly, reasonably, and responsibly and in the best interests of the charity and its purposes only. This requires them to exercise their powers in good faith and apply their funds and other resources to their charitable purposes only.
3. It goes without saying that charities should also comply with the law more widely and that includes the law as it is set out in this Advice.
4. *What is the legal position of charities that have women and/or girls named as sole beneficiaries in their charitable objects, which have taken steps to stop men and boys who identify as women and girls from becoming new beneficiaries, but allow existing male beneficiaries to continue being beneficiaries?*
5. Where a charity's purposes are restricted to benefitting women, they are not permitted to extend those charitable benefits to men or boys whether or not they have done so in the past; that is, if they have been providing charitable benefits to men or boys, they must stop doing so (unless the law explicitly allows it as with the very limited exception applicable in the field of education).
6. *Is there any element of financial impropriety if a charity uses any money it has raised, explicitly or implicitly for the benefit of women and/or girls, for the benefit of men and/or*

*boys who identify as women and girls? This should include current and past donations as well as historic legacies set out in a will.*

7. A charity must only apply its resources to further its charitable purposes. A charity that applies its funds to activities which do not further its charitable purposes is acting improperly and, in some circumstances, trustees may be liable for any financial losses that result.
8. A charity may be acting in a misleading way if it suggests to donors that it will be applying funds exclusively to the benefit of women and girls when it intends to use those funds to benefit men instead or additionally. Where a charity does act in that way, it may breach the CC's guidance on fundraising and the UK-wide Code of Fundraising Practice, and this may result in regulatory action being taken against them by CC or the OSCR.
9. A charity may alter its charitable purposes, and apply funds donated to it for different purposes, but only in narrow circumstances. This area of the law is complex and cannot be dealt with in a general advice such as this.
10. *Specifically, are the relevant charities able to lawfully devote their resources to supporting new associated "sisterhood" groups whose beneficiaries will include men and/or boys who identify as women and/or girls (whether or not such groups will include men who do not identify as women).*<sup>30</sup>
11. Again, a charity must only apply its resources to further its charitable purposes. It is not clear how "sisterhood groups" of the sort described by the National Federation of Women's Institutes (Briefing Note, 11) could further the purposes of the women's institutes which are concerned with advancing the interests of women and girls. The Federation could be asked this question but presently such

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<sup>30</sup> See for example the Women's Institute's plan to launch such groups as detailed in the Briefing Note (pages 11-13).

groups do not appear to further the purposes of the women's institutes and if that is right, the Federation and women's institutes, where they are charities, should not be applying their resources to them.

12. Such groups may also directly discriminate against men where men who do not identify as women are denied access (depending on the nature of the groups).
13. *Do the relevant charities which have "women" or "girls" in their in their name have any further obligations arising from that? For example, does it mean a donor more clearly has a legitimate expectation that that is what money given to them will solely be used for? Is there any element of a concept akin to "false advertising"?*
14. A charity's main or working name must not be misleading. A charity that includes within its main or working name "women" and/or "girls" only (Women's Aid, Women's Institute, for example) thereby suggests that its purposes or activities are restricted to benefiting women and/or girls. If the charity's purposes are not so restricted, then the name of the charity is misleading and in those circumstances the CC and the OSCR can direct the charity to change its name.
15. *Are the relevant charities able to lawfully accept funding which comes with a condition that requires them to provide services that benefit men or boys who identify as women or girls? Would commissioning bodies which require charities, whose sole beneficiaries are women and girls, to include men and boys who identify as women and girls, be culpable of asking them to act unlawfully?*
16. Since a charity can only apply its resources in furtherance of its charitable purposes, a charity whose beneficiaries are women and/or girls will not be acting within the scope of its powers if it enters into an agreement which requires it to undertake activities for the benefit of men and boys.

17. *Are the relevant charities which provide single-sex services more clearly affected than those which have a general advocacy role. ?*

18. No. All charities are affected by the law as it is stated above. Different forms of discrimination and different unlawful acts may apply in respect of certain aspects of a charity's activities, but it is difficult to state as a generality that some will be affected more than others.

KARON MONAGHAN KC

8 MARCH 2026