
SEX, GENDER, AND THE LAW: THE IMPLICATIONS OF THE UK SUPREME COURT'S RULING IN FOR WOMEN SCOTLAND

A. INTRODUCTION

For *Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 centred on a fundamental legal question with significant social and legislative implications. That question was, *can individuals who possess a Gender Recognition Certificate (a "GRC") legally be classified as "women" in the Equality Act 2010 (the "EA") for the purposes of legislation designed to promote female representation on public boards in Scotland?*

This question arose from the Gender Representation on Public Boards (Scotland) Act 2018 (the "**2018 Act**"), which aimed to tackle gender imbalance by setting a statutory target that at least 50% of non-executive members of Scottish public boards be women.¹ Section 2 of the 2018 Act defined "woman" to include some trans women. Specifically, individuals assigned male at birth who identify as women regardless of whether they had obtained a GRC, provided they were "*living as women*."²

The legal question was whether the word "*woman*" as used in the EA includes trans women with a GRC, allowing them to count towards the 50% female representation target.

The Supreme Court identified four main tasks:

1. to interpret the meaning of "sex" in the EA for its provisions, such as discrimination and harassment.³

¹ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [15] – [26];

² *ibid*, at [17];

³ *ibid*, at [154];

2. to examine first the effect of section 9(1) of the Gender Recognition Act 2004 (the "*GRA*"), stating that a person with a full GRC is their acquired gender "for all purposes".
3. to consider section 9(3) of the *GRA*, which states section 9(1) is "*subject to provision made by this Act or any other enactment or subordinate legislation,*" meaning other laws may take precedence.⁴
4. to assess whether the Scottish Parliament had the competence to legislate or issue guidance that affects protected characteristics (like sex) defined under UK-wide law.

These tasks required statutory interpretation, which the Court explained at length. However, paragraph 11 of the judgment summarises the interpretative method:

The general approach of focussing on the words that Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the Court must resolve, the indicators of the legislature's purpose outside the provision in question [...] must be given significant weight.

This article examines the judgement's reasoning with a non-lawyer reader in mind. I hope its impact on the interpretation of sex-based protections in areas such as single-sex services, pregnancy rights, competitive sports, and lesbian identity can be more easily understood through this article. I also want to emphasise the continuing protection of transgender individuals under the separate characteristic of gender reassignment. This article also aims to make the genuine concerns transparent. These include potential human rights conflicts, the exclusion of intersex and non-binary people, and the tension

⁴ *ibid*, at [156];

between legal clarity and lived realities. Fundamentally, I want to make the judgement understandable and make the consequences accessible to all.

B. SUMMARY

The UK Supreme Court ruled that the term "*sex*" in the *EA* is biological sex, not legal sex gotten through a GRC. The Court found that the Scottish Government had exceeded its powers by redefining "*woman*" in legislation promoting female representation on public boards to include trans women with GRCs. The judgment emphasised legal clarity and consistency, particularly in areas like single-sex services, maternity protections, and competitive sports.

The Court made clear that trans individuals remain protected under the separate characteristic of "*gender reassignment*" in the *EA* and can bring claims based on perception or association without disclosing biological sex. Additionally, the ruling does not permit blanket exclusion of trans people from single-sex spaces. Any exclusion must be proportionate and serve a legitimate aim. Despite this, the judgment has, unfortunately, sparked confusion and debate over its impact on the rights and dignity of trans and intersex individuals.

C. THE COURT'S REASONING

The judgment was written by Lord Hodge, Lady Rose, and Lady Simler with whom Lord Reed and Lord Lloyd-Jones agreed. The judges found that "*sex*," "*man*," and "*woman*" in the *EA* refer to biological sex, not legal gender acquired by a GRC or how people present.⁵ Its conclusion is grounded in that section 9(1) of the *GRA*, providing that a person's acquired gender is their legal gender "*for all purposes*," is qualified by section 9(3), which allows exceptions where another Act of Parliament or enactment provides otherwise.⁶

⁵ *ibid*, at [264];

⁶ *ibid*, at [265];

The Court ruled that the EA does provide otherwise by making a clear distinction between sex and gender reassignment as two separate protected characteristics.⁷

The Court found that the Scottish Parliament lacked the competence to redefine "*woman*" or "*sex*" in a way inconsistent with the EA, which is a reserved matter under UK law. Furthermore, the 2018 Act and related statutory guidance issued by the Scottish Ministers exceeded devolved powers by effectively redefining "*woman*" to include trans women with GRCs. Such an attempt was deemed ultra vires (beyond its legal powers).⁸

In reaching this conclusion, the Court analysed various parts of the EA to demonstrate that interpreting "*woman*" to include trans women with GRCs would cause legal contradictions and absurd outcomes. It concluded that "*it makes no sense for conduct under the EA 2010 concerning sex-based rights and protections to be regulated on a practical day-to-day basis by reference to categories that can only be ascertained by knowledge of who possesses a (confidential) certificate*".⁹

C.1 Lesbians and Lesbian Spaces

One aspect of the EA considered is section 12, which defines the protected characteristic of sexual orientation as orientation towards persons of the same sex, the opposite sex, or either sex.¹⁰ The Court defined "*sex*" as biological sex.

The result of this is that "*a person with same-sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females*".¹¹ If Section 9(1) of the GRA were interpreted to change the definition of sex under the EA to certified sex, it would imply that a trans woman (someone assigned male at birth who has obtained a GRC and is legally female) who is attracted to women would be classified as a same-sex attracted

⁷ *ibid*;

⁸ *ibid*, at [266];

⁹ *ibid*, at [173];

¹⁰ *ibid*, at [205];

¹¹ *ibid*, at [206];

female (a lesbian).¹² The Court believed this would undermine the protections afforded to sexual orientation.¹³ Furthermore, it ruled that this approach would lead to *"the inevitable loss of autonomy and dignity for lesbians."*¹⁴ Additionally, *"if a GRC changes a person's sex for the purposes of the EA, a women-only club or a club reserved for lesbians would have to admit trans women with a GRC (legal females who are biologically male and attracted to women)."*¹⁵

C.2 Pregnancy and Parental Protections

A second aspect of the EA considered is its pregnancy and "maternity" protections. The Court found that Sections 17 and 18 of the EA protect biological females against unfavourable treatment due to pregnancy or maternity.¹⁶ If "woman" was interpreted to mean anyone with a GRC stating they were female, then a trans man (biologically female, legally male) could lose protection during pregnancy because, legally, he would be classified as male.¹⁷ The Court described this as unworkable, showing that the law intends "woman" in these protections to mean biological females.

C.3 Single-sex services and Communal Accommodation

A third aspect is single-sex services and communal accommodation. Paragraph 26 of Schedule 3 of the EA *"provides separate services for persons of each sex will not constitute unlawful sex discrimination in the provision of services where joint services for both sexes would be less effective and such provision is a proportionate means of achieving a legitimate aim."*¹⁸ In its judgment, the Court carefully analysed the meaning of "sex" within the EA, particularly in the context of the lawful provision of separate or single-sex services. The Court held that if "sex" is given its biological meaning, then service providers are permitted to distinguish clearly between male and female users based on observable physical

¹² *ibid*;

¹³ *ibid*;

¹⁴ *ibid*, at [207];

¹⁵ *ibid*;

¹⁶ *ibid*, at [186];

¹⁷ *ibid*;

¹⁸ *ibid*, at [212];

characteristics.¹⁹ For example, a homeless shelter could lawfully operate separate hostels for men and women if doing so served a legitimate aim, such as safeguarding the privacy, safety, and dignity of women (or men), and the arrangement was proportionate.²⁰ These provisions, the Court emphasised, are rooted in a clear and workable understanding of sex as a biological category.

The Court identified significant legal and practical difficulties that would arise if "sex" were interpreted to mean legal sex as given by a GRC. Under that interpretation, a trans woman with a GRC (biologically male but legally female) would have to be admitted to female-only services.²¹ The Court noted that this creates substantial problems for service providers. Most notably, trans women with and without a GRC are often visually indistinguishable, making it difficult or impossible for providers to determine who must legally be admitted.²²

The Court found that this interpretation would undermine the coherence of the legal conditions for separate services. Paragraph 26 of Schedule 3 of the Equality Act allows separate services for men and women where a joint service would be less effective, and the separation pursues a legitimate aim.²³ But these justifications become unworkable, the Court reasoned, if each "sex" category includes individuals of both biological sexes, some admitted because they hold a GRC and others excluded for lacking one, even if indistinguishable in practice.²⁴

The Court also explored paragraph 28, which allows exceptions concerning gender reassignment discrimination.²⁵ Here, too, the Court found that if "sex" is defined by certificated sex, it becomes challenging to justify the exclusion of trans individuals on

¹⁹ *ibid*, at [213];

²⁰ *ibid*;

²¹ *ibid*;

²² *ibid*;

²³ *ibid*;

²⁴ *ibid*;

²⁵ *ibid*, at [214];

proportionate grounds.²⁶ For instance, excluding a trans woman without a GRC could be deemed unlawful, even where their inclusion raises legitimate concerns about the privacy or safety of other service users. This issue is magnified by the fact that the presence or absence of a GRC is generally unknown and unknowable to other service users or providers at the point of entry or use.

Turning to paragraph 27, which governs single-sex services, the Court said there are more difficulties when "sex" is interpreted in certificated terms.²⁷ These services, such as rape crisis centres, domestic violence refuges, women-only hospital wards, and changing rooms, are permitted where they satisfy certain legal conditions.²⁸ For example, one of those conditions is that only persons of one sex need the service (paragraph 27(2)).²⁹ But under a certificated sex approach, that logic breaks down. The Court illustrated this with the example of cervical cancer screening.³⁰ A trans man with a GRC (legally male, biologically female) still has a cervix and thus requires screening.³¹

Meanwhile, the same cannot be said for a trans woman with a GRC (legally female, biologically male).³² On a certificated sex basis, the service would need to admit the trans woman but exclude the trans man despite the biological realities being the reverse. Thus, the Court concluded that the statutory condition requiring that only one sex needs the service becomes unachievable.

The Court made similar findings concerning paragraphs 27(6) and (7), which concern privacy and physical contact.³³ These provisions allow single-sex services where a user might reasonably object to the presence of someone of the opposite sex.³⁴ The Court found that under a certificated sex model, it would be irrational to claim that such an

²⁶ *ibid*;

²⁷ *ibid*, at [215];

²⁸ *ibid*;

²⁹ *ibid*;

³⁰ *ibid*, at [216];

³¹ *ibid*;

³² *ibid*;

³³ *ibid*, at [217];

³⁴ *ibid*;

objection could turn on whether the other person holds a GRC rather than on their biological sex.

A key point the Court stressed is that users do not and cannot know whether another person has a GRC. More importantly, such certification does not change physical presentation.³⁵ For example, a woman in a shared changing room or hospital ward might reasonably object to sharing the space with someone who is biologically male, regardless of their legal sex. The Court noted that it is fanciful to suggest that the reasonableness of the objection should depend on the other person's GRC status, which is something invisible and irrelevant to the immediate concerns of privacy, safety, and bodily autonomy.³⁶

The Court further examined paragraph 28, which offers an exemption for acts that might otherwise amount to gender reassignment discrimination, provided they are proportionate and connected to the provision of separate or single-sex services.³⁷ Again, the Court concluded that this paragraph only operates coherently if "sex" is interpreted biologically.³⁸ If a women-only service includes biological males with a GRC, it becomes difficult to justify excluding biological females with a GRC (i.e., trans men). This creates a contradiction in the legal structure and erodes the foundation on which paragraph 28 is intended to function.

Ultimately, the Court concluded that the entire structure of paragraphs 26, 27, and 28 only functions coherently if "sex" is understood to mean biological sex. Interpreting "sex" as certificated sex creates contradictions, makes practical application unworkable, and undermines the very safeguards that the law is designed to provide for single-sex spaces and services. It is only with a biological understanding of sex that service providers can lawfully, proportionately, and practically protect the privacy, dignity, and safety of service users while complying with anti-discrimination obligations.

³⁵ *ibid*;

³⁶ *ibid*, at [218];

³⁷ *ibid*, at [219];

³⁸ *ibid*, at [220];

C.4 Sport

A fourth consideration was sport. Section 195 of the *EA* deals specifically with sports and competitive activities that are affected by sex and gender reassignment characteristics.³⁹ This section makes clear that, in certain circumstances, it is lawful to restrict participation in some sports based on sex or gender reassignment status, where this is necessary to ensure fairness or safety in competition.

The law begins by stating that a person (which could include an organisation or sporting body) does not breach the *EA*'s provisions on services (section 29), education (section 33), or associations (section 34) simply because they do something concerning a gender-affected activity, even where that action might otherwise constitute gender reassignment discrimination.⁴⁰ This means, for example, that excluding or limiting participation based on gender reassignment status is not unlawful in these cases, provided the conditions of this section are met.

The Act defines a gender-affected activity as one which is:

- A sport, game, or other activity of a competitive nature;
- Regulated by rules set by a relevant sporting body; and
- One where, on average, the physical strength, stamina, or physique of persons of one sex would place them at a disadvantage compared to those of the opposite sex when competing in events involving the activity.⁴¹

The statute further allows that restrictions may be lawfully applied in gender-affected activities where it is reasonable to do so to secure fair competition and/or ensure the safety of competitors.⁴²

³⁹ *ibid*, at [232];

⁴⁰ *ibid*;

⁴¹ *ibid*;

⁴² *ibid*;

Section 195 then reiterates this same legal protection in the context of sex discrimination, confirming that treating people differently based on sex in gender-affected sports does not breach the EA either when the above conditions are met.

The Court considers that Section 195 of the EA is premised on the concept of biological sex and that it may become unworkable if interpreted according to certificated (i.e. legal) sex under the GRA.⁴³ The section creates two key exemptions:

1. A complete exemption from the prohibition on sex discrimination in competitive sport for events defined as "*gender-affected activities*" under section 195(1); and
2. A partial exemption from the prohibition on gender reassignment discrimination, allowing the exclusion of a "*transsexual person*" as a competitor but only where it is necessary for reasons of fairness or safety (under section 195(2)).⁴⁴

In both cases, these exemptions only apply if the sporting activity in question qualifies as a gender-affected activity.⁴⁵ This acts as a gateway condition.⁴⁶

The EA defines a gender-affected activity as one in which, on average, the physical strength, stamina or physique of persons of one sex would place them at a disadvantage compared to persons of the opposite sex.⁴⁷ The Court gives boxing as an example.⁴⁸ On a biological reading of sex, it is straightforward to conclude that women, as a group, are physically disadvantaged compared to men in boxing, making it a gender-affected activity.

However, this clarity diminishes if the comparator group of "*average women*" includes trans women with GRC who are legally female but biologically male.⁴⁹ The average physical

⁴³ *ibid*, at [234];

⁴⁴ *ibid*;

⁴⁵ *ibid*;

⁴⁶ *ibid*;

⁴⁷ *ibid*, at [235];

⁴⁸ *ibid*;

⁴⁹ *ibid*;

advantages typically observed between males and females may be obscured if each sex class includes members of the opposite biological sex. This risk, the court notes, could make it difficult to establish whether an activity is gender-affected at all if the comparator groups are defined by legal sex rather than biological sex. Even if the gateway condition is met, the legal consequences will differ irrationally based on GRC status, which the Court finds problematic.

For example, under a certificated sex interpretation, to exclude a trans woman with a GRC (legally female but biologically male) from a women's boxing match, the organisers would need to demonstrate that doing so is necessary for fairness or safety, as required by section 195(2).⁵⁰ However, a trans woman without a GRC (still legally male) could be excluded directly under section 195(1) as a man without needing to meet the fairness or safety test.⁵¹

This, the Court observes, creates a discrepancy that hinges not on physical characteristics or risks but on the possession of a certificate, even though those with and without a GRC may be physically identical and indistinguishable in practice.

By contrast, if biological sex is the operative definition, then the organiser of a women's boxing match can exclude all biological males including trans women, regardless of their GRC status. This would be legally permissible as sex discrimination is exempted in gender-affected sports.⁵²

At the same time, if there is a need to exclude trans men (biological females living as men, possibly having undergone testosterone treatment that gives them increased strength or stamina), their exclusion would not fall under the sex discrimination exemption since they are biologically female.⁵³ Instead, this would be considered gender reassignment

⁵⁰ *ibid*;

⁵¹ *ibid*;

⁵² *ibid*, at [236];

⁵³ *ibid*;

discrimination⁵⁴. However, section 195(2) allows for such exclusion if it is necessary for reasons of fairness or safety, thereby offering a lawful route for this treatment to occur.⁵⁵

The Court concludes that a biological understanding of sex makes the operation of section 195 clear, coherent, and practical, whereas a certificated sex interpretation introduces irrational and unworkable outcomes. The Court's view is that the law, when read in context, intends for biological sex to be the relevant characteristic when applying the exemptions in competitive sport under section 195.

D. THE COURT'S ROLE IN PROTECTING TRANS RIGHTS

The Court emphasised that its role was not to resolve public debates or social disputes regarding gender or the definition of "*woman*" in general.⁵⁶ Instead, it was tasked with interpreting what Parliament meant when enacting the *EA*, ensuring the words bear a coherent, predictable, and legally consistent meaning.⁵⁷

The Court recognised the importance of the *GRA* in respecting transgender rights and dignity but maintained that its provisions must be read in conjunction with other laws. The Court was eager to explain its conclusion that a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the *EA* from trans people, whether with or without a *GRC* (See paragraph 248 and onwards). The Court anticipated and responded to a significant concern raised by the case: Would interpreting "sex" in the Equality Act 2010 as referring exclusively to biological sex amount to discrimination against trans individuals or a regression in their legal protection? The Court's answer was clear: No.

Rather than diminishing trans rights, the Court stated that its interpretation preserves the structure and integrity of the law, including the comprehensive protections already provided to trans people under the protected characteristic of "*gender reassignment*" in the

⁵⁴ *ibid*;

⁵⁵ *ibid*;

⁵⁶ *ibid*, at [2];

⁵⁷ *ibid*;

EA.⁵⁸ The justices began by affirming that the EA does not leave trans people unprotected. On the contrary, the Act provides extensive legal safeguards through a separate protected characteristic: "*gender reassignment*" (EA, s.7).⁵⁹ This provision applies to anyone undergoing, proposing to undergo, or who has undergone a process of transitioning from one sex to another, whether or not they hold a GRC, and regardless of surgical or medical status. This means that trans people cannot be lawfully discriminated against because they are transitioning or have transitioned, are protected in employment, education, service provision, and housing, and are protected whether their gender identity is legally recognised via a GRC.

Additionally, the Court emphasised that trans people are protected by provisions for discrimination by and by perception under the EA. The Court explained how this works as follows:

250. Applied in the context of a discrimination claim made by a trans woman (a biological male with or without a GRC), the claimant can claim sex discrimination because she is perceived as a woman and can compare her treatment with that of a person not perceived to be a woman (whether that is a biological male or a trans man perceived to be male). There is no need for her to declare her true biological sex. There is nothing disadvantageous about this approach. Neither a biological woman nor a trans woman "bring a claim of direct sex discrimination as a woman" (as the EHRC suggests). That is not how the EA 2010 operates: a person brings a claim alleging sex discrimination because of a protected characteristic of sex.

252. The same approach would follow in a claim of discrimination by association: the appropriate comparator is someone not associated with the protected characteristic, so that

⁵⁸ *ibid*, at [3];

⁵⁹ *ibid*;

a trans woman (biologically male) treated less favourably because of her association with women could claim sex discrimination and compare her treatment with someone who was not associated with women in the same way or manner (whether that was a biological male living as a man or a trans man).

This decision means a trans woman, regardless of whether she has a GRC, can claim sex discrimination if she is treated unfairly because she is perceived as a woman without needing to disclose her biological sex. The *EA* allows claims based on perceived sex, not on declaring oneself as a woman.⁶⁰ Similarly, in cases of discrimination by association, a trans woman can claim sex discrimination if she is treated less favourably due to her association with women, using as a comparator someone not associated with women in the same way.⁶¹

The Court continued its analysis by applying its logic to harassment under the *EA*. To show harassment, the individual must establish a sufficient link between the unwanted conduct and a relevant protected characteristic and that the conduct violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person.⁶² That person does not have to possess the relevant protected characteristic to bring an unlawful harassment claim. Conduct can also be harassment where it is related to a relevant protected characteristic of another person or persons. The Court elaborated by stating:

256. Applied, for example, to the case of a trans woman with a GRC who presents as a woman at work and is perceived as a woman, and whose trans status and GRC are confidential: if a colleague harasses her (by making sexualised references to what she is wearing, or degrading comments about how she looks) she can bring a claim for harassment related to sex. She can also bring

⁶⁰ *ibid*, at [250];

⁶¹ *ibid*, at [252];

⁶² *ibid*, at [255];

a harassment claim related to the protected characteristic of gender reassignment but may not wish to do so.

257. Conversely, if a certificated sex reading were adopted, it would have the effect of removing an important aspect of group protection for men and women in the way that direct discrimination under section 13 has been understood to operate.

The Court makes clear that a trans woman with a GRC who is perceived as a woman at work can bring a harassment claim based on sex if she is subjected to sexist or degrading comments.⁶³ She may also bring a claim based on gender reassignment, though she might choose not to.⁶⁴ However, if legal interpretation only considers the sex on a "*certificated sex reading*", it could undermine protections traditionally afforded to men and women under direct sex discrimination law.⁶⁵

The justices applied their logic to the concept of indirect discrimination. Trans people are protected under the *EA* from indirect discrimination, regardless of whether they have a GRC. This protection applies when they face a disadvantage as a group with the protected characteristic of gender reassignment, as well as when they share a disadvantage with the sex they identify with or their biological sex.⁶⁶ These claims are based on actual shared disadvantages and do not create inconsistencies with the person's social identity.

In conclusion, the Court affirmed that its role was to interpret the *EA* in accordance with parliamentary intent rather than to resolve broader societal debates about gender. It held that interpreting "*sex*" in the *EA* as biological sex does not diminish the rights or protections of transgender individuals.⁶⁷ Instead, it maintains legal coherence and preserves existing protections under the separate protected characteristic of "*gender reassignment*." The Court emphasised that trans people, whether or not they possess a

⁶³ *ibid*, at [256];

⁶⁴ *ibid*;

⁶⁵ *ibid*, at [257];

⁶⁶ *ibid*, at [260];

⁶⁷ *ibid*, at [264];

GRC, remain comprehensively protected under the EA. They can bring claims of discrimination and harassment based on gender reassignment, perceived sex, or association without needing to disclose their biological sex. Importantly, trans women perceived as women are protected against sex-based discrimination and harassment, reinforcing the EA's flexibility and inclusivity. Ultimately, the Court rejected the notion that a biological interpretation of "sex" undermines trans rights. On the contrary, it ensures that all individuals, cisgender and transgender alike, receive appropriate legal protection without eroding the established framework for addressing sex-based and gender reassignment-based discrimination.

E. MOVING FORWARD

E.1 The “Narrow” Interpretation v the “Broad” Interpretation

My view on what the Supreme Court ruled is likely to be viewed as a narrow interpretation staying close to judgement itself and its context. Accordingly, the decision does not mandate the exclusion of trans people from single-sex spaces, but says exclusion is permitted where justified. Under this approach, trans-inclusive policies remain lawful so long as they do not violate other provisions of the EA.

The narrow interpretation sees the ruling as confined to the EA. Other statutes that use the term “sex” would need to be interpreted considering their specific purposes and the context in which they are applied. The GRA would continue to provide legal gender recognition in areas such as pensions, marriage, and birth certificates.

As Professor George Letsas writes, the unfortunate broad interpretation is that trans people, with or without a GRC, must now be excluded from all, or most, single-sex and separate services.⁶⁸ For example, the Equality and Human Rights Commission (the “EHRC”) initially claimed that trans women should not be permitted to use women’s facilities and trans men should not be allowed to use the men’s facilities. The implications

⁶⁸ George Letsas, ‘The UK Supreme Court Judgment Has Brought Much Needed Confusion: Why For Women Scotland Did Not Change UK Discrimination Law’ (*UK Labour Law*, 7 May 2025) <<https://uklabourlawblog.com/2025/05/07/the-uk-supreme-court-judgment-has-brought-much-needed-confusion-why-for-women-scotland-did-not-change-uk-discrimination-law/>> accessed 23 June 2025;

of this broad interpretation will extend beyond the EA because many pieces of UK legislation use the term “sex” without defining it.

The Court did not decide that excluding trans persons from single-sex measures is always lawful. The judgement emphasises that exclusion must be proportionate and/or for a legitimate aim. On single-sex spaces, for example, paragraph 26 of Schedule 3 makes clear that this must only be done where “*joint services for both sexes would be less effective, and such provision is a proportionate means of achieving a legitimate aim.*”⁶⁹ In sports, the provision must be for competition fairness and/or safety. Sex-based exclusions can be legitimate depending on the context and reason. Such exclusions might apply to cis men, cis women, trans men, trans women, or combinations thereof. Legitimate reasons could include genuine occupational requirements like hiring a biological woman for a women’s refuge or an actress for a female role.⁷⁰ A legitimate aim could also be health-related needs, such as inviting only biological women and transgender men for cervical cancer screenings.⁷¹ The debate will continue regarding who should be excluded on a case-by-case basis. The concept of legitimate sex-based exclusions itself is reasonable.

Decision-makers should begin by identifying potential aims, such as protecting the dignity of service users in shared accommodation, ensuring fairness in competitive sports, or delivering anatomy-specific screenings. For each aim, they should gather evidence from experts about the issues involved. They must consider alternatives, such as adding private changing cubicles to address privacy concerns without exclusion or exploring whether other classification schemes in sports offer a fairer approach. The decision-maker should document this process and record the process for any decision to restrict access. The resulting policy is grounded in evidence and no more restrictive than necessary.

Ultimately, the “moving forward” narrative is one of balance and dialogue. Progression acknowledges tensions between privacy, inclusion, fairness, and access but frames them as challenges to be addressed through evidence, empathy, and transparent reasoning. The judgment did not create blanket exclusions. It invited a process of careful assessment,

⁶⁹ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [212];

⁷⁰ George Letsas (n68);

⁷¹ *ibid*;

stakeholder engagement, and respectful communication. By embracing this narrative, organisations can ensure that sex-based measures serve their legitimate aims without undermining the rights and dignity of trans people, weaving coherence and compassion into the evolving legal landscape.

E.2 An Orientation Straitjacket

As *Dr Robert Mullins* explains, the Court treated “same-sex orientation” as necessarily tied to “biological sex,” which leads to odd results.⁷² For example, a lesbian in a relationship with a trans woman would legally count as bisexual. Similarly, straight people attracted to trans individuals might join gay or lesbian groups under the Act. Mullins finds it implausible that Parliament intended to “force a biological straitjacket” on orientation, noting that orientation is partly social/self-identified.⁷³ This causes difficulty in that we now have an absurd outcome whereby social identities, which are deeply personal, having legal meanings. This is particularly problematic for associations and groups that are lesbian-only, gay men-only and bisexual-only and the foundations on which they exclude. This raises questions about the coherence of the definition of “sex” within the EA, which are likely to need answers from the courts.

E.3 A Fallible Binary

The binary of biological sex used by the Court is fallible, and intersex people present challenges to it. *Dr Robert Mullins* argues that under a strict criteria approach, someone assigned female at birth but with XY chromosomes could be excluded from women’s services despite living indistinguishably as a woman. Conversely, similar biological characteristics would allow seemingly inconsistent treatment of trans women.⁷⁴ Mullins argues these outcomes expose the incoherence of a single, context-insensitive biological

⁷² Robert Mullins, ‘For Women Scotland: Fastening the “Biological” Straitjacket’ (*UK Constitutional Law Association*, 22 May 2005) <<https://ukconstitutionallaw.org/2025/05/22/robert-mullins-for-women-scotland-fastening-the-biological-straitjacket/>> accessed 23 June 2025;

⁷³ *ibid*;

⁷⁴ *ibid*;

definition. The rights of intersex people have been muddled and will only be clarified by future cases, which is inadequate for those simply living their lives.

For Robin Allen KC, the problem lies in what he calls the “abstract nature” of the judgment: it was rendered without engagement in a real-life dispute involving actual individuals.⁷⁵ As such, it was unable to account for the complexity and nuance of human identity, dignity, and interpersonal conflict. Allen warns that the Supreme Court’s formal, biological definition of sex does not capture the lived experiences of those who fall outside traditional gender binaries, such as trans and intersex people. Non-binary people also fall out of the binary too. He draws attention to emerging jurisprudence in the European Court of Human Rights (the “*ECtHR*”) on definitions of “intersex” or “differences in sex development” demonstrating that binary sex categories are insufficient. He notes that several European countries now issue passports with “X” markers and that the UN and the ECtHR are increasingly recognising that sex and gender cannot be reduced to anatomical definitions alone.

The enforcement of the Supreme Court’s biological definition of “sex” presents significant practical and ethical challenges, particularly in gendered spaces like changing rooms. Under this approach, trans women, who may have undergone full gender-affirming surgery and thus have breasts and a vagina, could be required to use men’s facilities solely based on their birth sex. This is likely to expose them to distress, danger, or humiliation. Conversely, trans men, who may have facial hair, a deep voice, and a penis, would be expected to use women’s spaces, which could cause discomfort or confusion among other users. These scenarios highlight the inherent difficulty in enforcing rigid sex-based classifications, especially when physical appearance and anatomy do not align with biological sex.

Hypothetically, requiring individuals to “prove” their sex through invasive questioning or examination would violate privacy and dignity, and may amount to indirect discrimination or harassment under existing law. This tension underscores the need for

⁷⁵ Robin Allen KC, ‘Self-determination and the limits to segregation: another perspective on For Women Scotland’ (*Discrimination Law Association Briefings*, June 2025) – available through membership, on which information can be found at <https://discriminationlaw.org.uk/membership/how-to-join>;

any implementation of the ruling to be approached with empathy, proportionality, and a recognition of the complex realities of human bodies and identities.

E.4 Human Rights

The Good Law Project believes that the European Convention of Human Rights (the “*ECtHR*”) has been breached.⁷⁶ It takes the view that the Court refused to hear from trans people before handing down a decision with the possible consequences for trans lives. It also refers to *Goodwin v United Kingdom* (Application no. 17488/90).⁷⁷ In that case, the applicant had undergone gender reassignment surgery under the National Health Service but remained legally recorded as male. This mismatch was not a trivial discrepancy: it generated tangible stress and feelings of alienation whenever legal sex mattered in documentation, administrative interactions, or societal recognition. The *ECtHR* found it illogical to accept that surgery, publicly funded and medically recognised, could carry no legal effect. Such a disconnect between the medical reality and the law could not be brushed off as a minor inconvenience, for it struck at the very essence of personal identity and dignity. When considering countervailing public-interest arguments, the *ECtHR* examined and found them unconvincing. It noted that advances in medical science did not furnish any decisive reason to deny legal recognition to post-operative trans people. Although there was no uniform European practice, there was clear evidence of an international trend toward both greater social acceptance and legal acknowledgement of trans identities. Historical precedents, such as amendments for legitimation or adoption, demonstrated that birth registration systems could accommodate exceptions without undermining their integrity or harming third parties. Furthermore, the Government itself had proposed reforms to allow ongoing amendments to civil-status data, signalling practical feasibility. Consequently, potential administrative difficulties confined to post-surgery trans people could be overcome, and no substantial public-interest detriment had been shown.

⁷⁶ Good Law Project, ‘Help us challenge the Supreme Court’s judgment on trans rights’ (*Good Law Project*) <<https://goodlawproject.org/crowdfunder/supreme-court-human-rights-for-trans-people/>> accessed 23 June 2025;

⁷⁷ *Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18;

At the heart of the ECtHR's reasoning lay the Convention's commitment to human dignity and personal development. Even if the applicant's day-to-day interference was not the most extreme conceivable, the principle that individuals should live with legal recognition matching their identity has become indispensable in the twenty-first century. Society could reasonably tolerate minor administrative adjustments to uphold this dignity. The state could no longer claim a wide margin of appreciation to defer or deny recognition when the fair balance between public interests and individual rights tilted decisively in favour of the applicant. Consequently, the ECtHR concluded that maintaining an "intermediate zone" in which post-operative transgender people were legally misclassified was no longer sustainable: denying legal recognition infringed the right to private life and could not be justified by speculative or minor inconveniences.⁷⁸ Jess O'Thompson and Oscar Davies⁷⁹ argue that both interpretations of *For Women Scotland* place trans people in such an intermediate zone, and that this will amount to an interference with their right to private life. The practical reality of trans people being separated into a third space shows that a broad interpretation of *For Women Scotland* treats trans people as the 'third sex'. They add that the practical consequence is also that trans people will be involuntarily outed, which may also interfere with Article 8 rights.

The Good Law Project persuasively argue that the balance of sex and gender assignment rights has gone wrong. The Good Law Project notes that the Equalities Minister, Bridget Phillipson, said "*the ruling was clear that provisions and services should be accessed on the basis of biological sex*", and the Prime Minister, Keir Starmer, said "*A woman is an adult female, and the court has made that absolutely clear.*"⁸⁰ These statements deny the reality of trans existence and will lead to daily humiliation for trans people and for cis people who choose not to dress "*normally*". It rightly notes that imposing strict "*biological sex*" verification for single-sex services could force trans people and even cis individuals who do not conform

⁷⁸ *ibid*, at [90];

⁷⁹ Jess O'Thompson and Oscar Davies, 'A third sex: returning to an intermediate zone?' (*Discrimination Law Association Briefings*, June 2025) – available through membership, on which information can be found at <https://discriminationlaw.org.uk/membership/how-to-join>;

⁸⁰ Good Law Project (n76);

to gender norms to undergo invasive or arbitrary checks to “prove” their sex. This is a process that is inherently unclear and potentially demeaning.

However, there is no clear potential outcome at this stage. Michael Foran explains that *ECtHR* jurisprudence grants States a wide margin in structuring legal gender recognition if it is proportionate.⁸¹ He explains that no case has held that Article 8 requires a GRC to change legal sex for all purposes, with no exceptions. Article 8 protects “the right to respect for his private and family life, his home and his correspondence”. Where recognition in one area might impose substantial detriment on others, a balancing exercise takes place. Proportionality is substantial because Article 8 is qualified, meaning it permits interference where proportionate and pursuing legitimate aims, including protecting the rights of others. Forlan argues that no *ECtHR* authority establishes a right to use opposite-sex single-sex spaces, so arguments to that effect were never advanced before the Court. He continues by saying the Court also considered the rights of sexual minorities to associate free from the presence of biological males or females; a GRC-based definition would nullify those protections, another justification for the biological reading.

Robin Allen KC raises separate points on the *EA*’s protected characteristics failing to comply with the *ECHR*’s personal characteristics.⁸² The *EA* defines a limited number of “protected characteristics” in broad, general terms such as sex, race, disability, and gender reassignment. He argues that these definitions are generic and impersonal, and often fail to capture the complex, nuanced reality of individual identity. For example, defining someone solely as “male” or “female” may overlook important aspects of their lived experience, such as being intersex or non-binary. Allan suggests the *EA*’s binary approach to sex is increasingly outdated and may not stand up to scrutiny under *ECtHR* jurisprudence, especially in real-life disputes involving detailed personal circumstances. The rigid categories of the *EA* may be ill-equipped to deal with the fluidity and

⁸¹ Michael Foran, ‘For Women Scotland: Is legal recognition of biological sex a violation of human rights?’ (UK Constitutional Law Association, 15 May 2025) <<https://ukconstitutionallaw.org/2025/05/15/michael-foran-for-women-scotland-is-legal-recognition-of-biological-sex-a-violation-of-human-rights>> accessed 23 June 2025;

⁸² Robin Allen KC (n75); and

individuality that *ECHR* protections are designed to safeguard. This is because it has broader and more flexible notion of “personal characteristics”, which includes but is not limited to the categories found in the *EA*. These are understood not as fixed types, but as contextual and layered traits, varying in how central they are to an individual’s identity. Lord Walker, in *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] HL 63,⁸³ described these as concentric circles, with the innermost traits like gender, sexual orientation, or congenital disability being most innate and hardest to change. Traits like religion, language, or nationality may be partially acquired but still deeply tied to a person’s identity. More peripheral traits, such as past employment or homelessness, might also be protected, depending on context.

The Good Law Project, Robin Allen KC, Jess O’Thomson and Oscar Davies highlight real harm from treating “sex” strictly biologically, echoing *Goodwin*’s warning that legal non-recognition of gender identity causes alienation and breaches dignity. However, any Article 8 challenge must address the Court’s margin of appreciation and balance privacy or safety in single-sex spaces against trans rights. To succeed, it must show that less intrusive, dignity-preserving measures could achieve those aims without forcing invasive proof of sex or outing individuals. If such proportionality arguments are supported by concrete evidence of harm and feasible alternatives, a court may find strict biological-only rules incompatible with Convention values and prompt revised guidance or declarations.

F. CONCLUSION

For *Women Scotland Ltd v The Scottish Ministers* marks a pivotal moment in the legal interpretation of “sex” under the *EA*. The Supreme Court unanimously concluded that “sex” refers to biological sex, not legal sex acquired via a GRC. This determination was rooted in the necessity for legal clarity and coherence across a wide range of statutory provisions, including protections for pregnancy and maternity, single-sex services, and competitive sports. The judgment emphasises that legal sex must be defined consistently to avoid absurdities, contradictions, and impractical application in real-world contexts.

⁸³ At [5].

The Court underscored that this biological interpretation does not strip transgender individuals of their rights. Instead, it preserves the structural integrity of the law by maintaining distinct protections for both sex and gender reassignment. Trans people remain fully protected under the *EA*'s provisions on gender reassignment, perception-based discrimination, and harassment without needing to disclose biological sex.

The ruling does not grant blanket authority to exclude trans people from single-sex services. Legitimate aims must justify any exclusion and must be proportionate. Moving forward, decision-makers must carefully assess such aims with evidence, consider alternatives, and ensure that policies do not impose unnecessary harm or humiliation.

The judgment has sparked broader debates about sexual orientation, intersex recognition, and human dignity despite its emphasis on legal coherence. Critics argue that biological framing may marginalise trans and intersex individuals and clash with rights under the *ECHR*. While the Court acknowledges these concerns, it maintains that any deviation from biological sex must be proportionately justified and not undermine existing legal protections for other groups.

Ultimately, the judgment represents a reaffirmation of legal boundaries while opening the door to ongoing human rights discourse. It is now incumbent upon legislators, public bodies, and service providers to apply the ruling in a way that balances privacy, dignity, inclusion, and fairness, ensuring all individuals, cisgender and transgender alike, are treated with respect under the law.