

CASE NOTES

Equality – Equality Act 2010 – definition of man, woman and sex

For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16

Supreme Court

Introduction

The case of *For Women Scotland Ltd v The Scottish Ministers* concerned an appeal to the Supreme Court by For Women Scotland, a feminist campaigning organisation, against a decision by the Outer House of Scotland's Court of Session that the meaning of the word "sex" in the Equality Act 2010 (EA 2010) is not limited to biological sex, and the word "woman" may include those in possession of a Gender Recognition Certificate (GRC) issued under the Gender Recognition Act 2004 (GRA 2004) whose "acquired gender" is female.

The legal context

The position at common law is that sex is biological and immutable (*Chief Constable of West Yorkshire Police v A (No 2)* [2004] UKHL 21; *Forstater v CGD Europe* [2022] ICR 1). Section 9 of the GRA 2004 modifies the common law position for individuals who obtain a GRC, so that their sex becomes the "acquired sex", or "acquired gender" in the wording of the Act, which uses the terms "sex" and "gender" interchangeably. The Supreme Court referred to this as "certified sex", which it distinguished from "biological sex".

Section 9(1) of the GRA 2004 states that:

"Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

However, section 9(1) is qualified by section 9(3), which states:

"Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

One of the questions the Supreme Court considered was whether the terms of the EA 2010 constitute "provision made" for the purposes of subsection 9(3) of the GRA 2004, and therefore disapply section 9(1).

The EA 2010 is designed to protect people from discrimination and harassment, and it includes nine protected characteristics, which are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Section 11 of EA 2010 defines "sex" as follows:

"In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.”

Section 7 of the Act defines “gender reassignment” in the following terms:

(1) 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.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment—

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

The EA 2010 allows for services and facilities to be provided on a single-sex basis which exclude members of the other sex provided this pursues a legitimate aim in a proportionate manner. There are exceptions set out in the Act which allow for single sex provisions. Sections 26, 27 and 28 of Schedule 3 allow for the provision of single sex services in a range of circumstances, such as where only one sex needs the service; where it is a more effective way of providing the service; where the service is at a hospital or other care setting; where the service is provided for, or is likely to be used by, two or more persons at the same time, and a person of one sex might reasonably object to the presence of a person of the opposite sex (This could include changing rooms, or women’s refuges for example.); or where there is a high degree of physical contact involved between a person to whom the service is provided (A) and another person (B), and B might reasonably object if A were not of the same sex as B.

Background to the appeal

The case brought by For Women Scotland originated with a challenge to the Scottish government’s guidance promulgated under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018 about the definition of “woman” in that Act, which includes an objective that 50 per cent of non-executive members of public boards should be women. The Scottish government’s guidance defined “woman” as including people with the protected characteristic of gender reassignment, providing they are living as a woman and proposing to undergo, are undergoing, or have undergone a process to become female.

In the Inner House of the Scottish Court of Session, in the case of *For Women Scotland Ltd v (1) The Lord Advocate and (2) the Scottish Ministers* ([2022],] CSIH 4), For Women Scotland successfully challenged this definition by means of judicial review on the basis that it impinged on protected characteristics defined by the EA 2010, which are a matter reserved to the UK Parliament and therefore not within the devolved competence of the Scottish Parliament. Following this decision in the Inner House, the Scottish Government published revised statutory guidance on the definition of “woman” in the 2018 Act, which stated that the definition would include those born male who had obtained a full GRC, in addition to those born female. For Women Scotland judicially reviewed this definition in the Outer House of Scotland’s Court of Session, arguing that a GRC does not alter a person’s sex for the purposes of the EA 2010. The Outer House rejected this argument and concluded that “sex” for the purposes of the EA 2010 is not limited to biological sex and may include those in possession of a GRC (*For Women Scotland Ltd v The Scottish Ministers* ([2022] CSOH 90). For Women Scotland appealed the Outer House’s decision to the Supreme Court.

A number of individuals and organisations applied to intervene in the appeal to the Supreme Court. The Court allowed four organisations to intervene in writing; two of these were also permitted to make oral submission. These were the human rights charity Sex Matters, who argued that the term “sex” in the EA 2010 should be interpreted as referring to biological sex alone, and the Equality and Human Rights Commission (EHRC). The EHRC took the view that the term “sex” includes certified sex, while also stating that this interpretation gives rise to profound difficulties in the operation of the EA 2010. The EHRC suggested that Parliament should urgently resolve these difficulties.

The two interventions which were in writing only were from Amnesty International UK, who argued that human rights principles demonstrated that the Outer House’s interpretation of the EA 2010 was correct; and a combined submission from three groups whom the Supreme Court referred to as the “lesbian interveners”. They consisted of the groups Scottish Lesbians, the Lesbian Project and the LGB Alliance. The lesbian interveners argued that a man can never be a lesbian as a matter of fact, whether in possession of a GRC or not, and that a definition of “sex” or “woman” which included certified sex would create serious problems for lesbians in relation to the provision of services and the composition of clubs and associations, and would affect claims of direct and indirect discrimination. They also argued that it would interfere with rights under articles 8 (private and family life), 11 (freedom of assembly and association) and 14 (freedom from discrimination in the enjoyment of Convention rights) of the European Convention on Human Rights.

The decision of the Supreme Court

The Supreme Court stated that the principal question it needed to address was a matter of statutory interpretation, and that:

“It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word “woman” other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy. The principal question which the court addresses on this appeal is the meaning of the words which Parliament has used in the EA 2010 in legislating to protect women and members of the trans community against discrimination. Our task is to see if those words can bear a coherent and predictable meaning within the EA 2010 consistently with the Gender Recognition Act 2004 (“the GRA 2004”). (para 2)

After reviewing the legislation relating to sex discrimination, and its interaction with the GRA 2004, the Supreme Court found that the terms “sex”, “woman” and “man” in the EA 2010 refer to biological sex and that a person’s sex for the purposes of the EA 2010 is not modified by possession of a GRC.

The Supreme Court noted that the structure of the Sex Discrimination Act 1975 (SDA 1975), which rendered unlawful certain kinds of sex discrimination and discrimination on the grounds of marriage, established the basis for later legislation relating to sex discrimination. This includes the EA 2010, which is an amending and consolidating statute. It enacts group-based protections against discrimination on the grounds of sex and gender reassignment, amongst other protected characteristics, and imposes duties of positive action.

The Supreme Court stated that Parliament, in using the words “man” and “woman” in the SDA 1975, referred to biological sex (paras 36-51).

The Court noted that neither the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) which introduced the protected characteristic of gender reassignment, nor the GRA 2004, amended the meaning of “man” or “woman” in the SDA 1975.

The Court noted that section 9(3) of the GRA 2004 disapplies the rule in section 9(1) of that Act where the words of legislation, enacted before or after the commencement of the GRA 2004, are inconsistent with that rule. It is not necessary that there are express words disappling the rule. The terms of the EA 2010 constitute “provision made” for the purposes of subsection 9(3), and disapply the rule in section 9(1).

The Court stated that the context in which the EA 2010 was enacted was therefore, that the SDA 1975 definitions of “man” and “woman” referred to biological sex, and trans people had the separate protected characteristic of gender reassignment.

The Court stated that it is important that the EA 2010 is interpreted in a clear and consistent way so that groups which share a protected characteristic can be identified by those on whom the Act imposes obligations (paras 151-154). Interpreting “sex” as certificated sex would cut across the definitions of “man” and “woman” and therefore the protected characteristic of sex, in an incoherent way. It would create heterogeneous groupings.

The Court noted that, as a matter of ordinary language, the provisions in the EA 2010 relating to sex discrimination, and especially those relating to pregnancy and maternity (sections 13(6), 17 and 18), and to protection from risks specifically affecting women (Schedule 22, paragraph 2), can only be interpreted as referring to biological sex (paras 172, 177-188).

The Supreme Court rejected the suggestion of the Inner House that the meaning of the words in the EA 2010 can vary so that the provisions relating to pregnancy and maternity refer to biological sex only, while elsewhere the same words also refer to certificated sex.

The Court stated that gender reassignment and sex are separate bases for discrimination and inequality, and that the interpretation of the Scottish Ministers and the EHRC would create two sub-groups within those who share the protected characteristic of gender reassignment under the EA 2010, giving those who possess a GRC greater rights than those who do not.

The Court also stated that including certified sex within the definition of sex for the purposes of the EA 2010 would seriously weaken the protections given to those with the protected characteristic of sexual orientation. For example, it would interfere with the ability to have lesbian-only spaces and associations.

The Supreme Court noted that there are other provisions whose proper functioning requires a biological interpretation of “sex”. These include separate spaces and single sex services (including changing rooms, hostels and medical services), and communal accommodation.

Interpreting the term “sex” as including certified sex would lead to incoherence and impracticability in a range of areas, including the operations of provisions relating to single-sex associations and charities, women’s fair participation in sport, and the operation of the public sector equality duty (paras 229-246).

The Court stated at para 265:

(xvi) It is striking that the EHRC has advised the UK Government of the problems created by its interpretation of the EA 2010, which include many of the matters which we have discussed above and has called for legislation to amend the Act. The absence of coherence and the practical problems to which that interpretation gives rise are clear pointers that the interpretation is not correct (para 247).

(xvii) The interpretation of the EA 2010 (i.e. the biological sex reading), which we conclude is the only correct one, does not cause disadvantage to trans people, with or without a GRC. In the light of case law interpreting the relevant provisions, they would be able to invoke the provisions on direct discrimination and harassment, and

indirect discrimination. A certificated sex reading is not required to give them those protections (paras 248-263).

(xviii) We therefore conclude that the provisions of the EA 2010 which we have discussed are provisions to which section 9(3) of the GRA 2004 applies. The meaning of the terms “sex”, “man” and “woman” in the EA 2010 is biological and not certificated sex. Any other interpretation would render the EA 2010 incoherent and impracticable to operate (para 265).”

Commentary and conclusion

The Supreme Court’s decision has clarified existing law through a process of statutory interpretation; it has not changed the law.

The Court noted that it is not possible to operate the single-sex exceptions or to identify what constitutes sex discrimination unless the definition of “sex” in the EA 2010 is clear. The Court stated that clarity and consistency about how to identify the groups that share protected characteristics are essential to the practical operation of the Act. The Court took the view that such clarity is not possible if the approach taken is that the definition of “sex” for Equality Act purposes includes certified sex. In relation to the EHRC’s submissions, the Court noted that:

“...the EHRC explains its longstanding view and policy position that the terms “sex”, “man” and “woman” in the EA 2010 include those whose sex is certified in a GRC. The EHRC recognises that the wider definition which it favours causes difficulties and impairs the operation of the EA 2010 in four areas: (i) discrimination on the grounds of pregnancy and maternity (sections 17 and 18); (ii) the protection against sexual orientation discrimination (section 12(1)(a)) and in particular the risk that lesbians and gay men for whom the biological aspect of their same sex attraction is defining, might be precluded from forming associations which exclude trans women and trans men respectively; (iii) single-sex services (paragraphs 26-28 of Schedule 3), and (iv) communal accommodation (paragraph 3 of Schedule 23). The submission describes these difficulties as profound and suggests that Parliament should urgently resolve them.” (para.33)

The Supreme Court took the view that Parliament did not intend the EA 2010 to include definitions which impair its practical operation, and which are not supported by the wording of the legislation itself or of the relevant legislation which preceded it.

Before the Supreme Court’s decision there was considerable confusion and debate about the law in this area. In recent years many public bodies and private organisations have introduced policies which make provision for people who identify as transgender to use single sex facilities and services which were provided for the sex with which they identify. These policies have generally been based on self-identification of “gender”, although self-identification has never been aligned with the law. They seem to have come about largely due to the influence of campaigning groups.

An example of this can be seen in the review carried out in 2020 by barrister (now KC) Akua Reindorf of Essex University’s policy on supporting trans and nonbinary staff, which formed part of a wider review of events involving the “no platforming” of two gender critical academics. Reindorf concluded that the University’s policy was founded on an erroneous understanding of the law in relation to the sex-based exceptions in the EA 2010 (and other provisions of that Act). The University was a member of the Diversity Champions Programme of the organisation Stonewall. Reindorf stated that:

“In my view the policy states the law as Stonewall would prefer it to be, rather than the law as it is. To that extent the policy is misleading.” (Akua Reindorf, ‘University of Essex Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the

Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020, 21 December 2020, 16 September 2021 Publication version of report, updated to mirror the form of report disclosed in response to FOI requests and as required for FOIA compliance purposes', para 243.11

<<https://www.cloisters.com/insights/reindorf-review-on-no-platforming>> Accessed 04 June 2025)

Following the Supreme Court's decision, organisations which are operating policies allowing people to use facilities and services designated as single sex based on the sex they identify as rather than their biological sex will need to review and revise those policies in order to comply with the law.

The EHRC are the regulator of the EA 2010 and are tasked with ensuring that the Act is followed. They are now in the process of updating the relevant sections of their code of practice relating to the EA 2010 for services, public functions and associations. They have conducted a public consultation about the code, which closed on 30 June 2025. The code of practice is statutory and must be approved by Parliament. The EHRC published an interim update giving guidance on the practical implications of the Supreme Court's judgment in April. (Equality and Human Rights Commission, 'An interim update on the practical implications of the UK Supreme Court judgment', 25 April 2025 <<https://www.equalityhumanrights.com/media-centre/interim-update-practical-implications-uk-supreme-court-judgment>> Accessed 27 April 2025)

Maureen O'Hara, Coventry Law School