

# Understanding the judgment in For Women Scotland Ltd v The Scottish Ministers: what is the meaning of “sex” in the Equality Act 2010?

In the case of For Women Scotland Ltd v The Scottish Ministers the Supreme Court was tasked with determining the interpretation of “woman” in the Equality Act 2010 and whether this definition includes a trans woman with a Gender Recognition Certificate. In this briefing, we consider the decision and what it means for employers.

## What happened in this case?

In determining this question, the Supreme Court recognised that women have historically suffered from discrimination and that the trans community has historically been, and remains, a vulnerable community. It also confirmed that it was not the job of the Supreme Court to determine the meaning of the word “woman” in any other context than the specific context of the Equality Act 2010 (**the Act**), nor *“to adjudicate on the arguments in the public domain on the meaning of gender or sex.”* Instead, the Court’s task was to interpret the words used by Parliament in the Act, considering the context and purpose of the legislation.

The Act defines “sex” as binary, referring to “man” and “woman”. The Gender Recognition Act 2004 states that a

person's gender becomes the acquired gender for all purposes upon receiving a full Gender Recognition Certificate (**GRC**), however, this remains subject to other legislation. Therefore, the Court had to decide whether "sex" in the Act excluded this effect of the Gender Recognition Act 2004.

### **What was decided?**

The Supreme Court considered various provisions throughout the Act to decide what Parliament had intended "woman" to mean.

It did not accept that there could be different definitions in relation to different parts of the Act, unless this had been specifically stated within the Act itself, which it was not. The Court emphasised the importance of a clear and predictable interpretation of statutory provisions, which could apply throughout the Act. It therefore found that because some provisions cannot mean anything other than biological sex (the sex assigned at birth), this must be true throughout the Act.

For example, the Court considered the provisions in relation to pregnancy, sex and maternity discrimination. It concluded the word "woman" within these provisions could only relate to *biological* women (which could include trans men), because it was not possible for a man or a trans woman to become pregnant, give birth, take statutory maternity leave or breastfeed. If a certificated sex meaning were used, this would exclude trans men, who may still be able to become pregnant, give birth and breastfeed, from protection.

The Court went on to consider single sex spaces and other provisions which allow for services to be provided only to one sex. It found that it could not include trans people with a

GRC because, in some cases, such as providing cervical screening to women and prostate checks to men, including trans people with their certificated sex would be illogical because they would require the test for their biological sex.

It also found that single sex spaces would no longer be single sex spaces, within the context of the Act, because allowing someone to enter based on their certificated sex would then mean that there were *both* sexes present (according to biological sex) and it could no longer be a single sex space. It also held that including those with a GRC was not workable because organisations were not permitted to ask for a GRC, which is a confidential document, and therefore could not have the information required to determine who should be allowed and who should not. This would also create a two-tier system in that one trans woman who for whatever reason did not hold a GRC would not be admitted but another who did would.

The Court noted that trans people still have protection under the Act by both the protected characteristic of gender reassignment and also sex, through perceived discrimination (where someone is discriminated against because they are believed to have a protected characteristic) or associative discrimination (where someone is discriminated against because they are associated with someone who has a particular protected characteristic).

### **What does this mean for employers?**

The Equality and Human Rights Commission has issued [updated interim guidance](#) in light of this case and is due to consult on updating its Code of Practice (the consultation will take place in the final two weeks of May). In the meantime,

employers should consider taking the steps below.

- **Review policies and procedures:** review policies and procedures to ensure they align with the Court's interpretation of "sex" as biological sex, particularly if there are policies regarding single sex changing rooms and toilets. It may also affect policies related to maternity leave, pregnancy, gender identity and menopause.
- **Training and awareness:** provide training to staff on the implications of the judgment. Ensure that employees understand the distinction between biological sex and gender reassignment and how this affects workplace policies and practices. All staff should be treated with dignity and fairness and employers should ensure that employees are protected from discrimination and harassment.
- **Data collection and analysis:** if subject to the Public Sector Equality Duty, ensure that data collection and analysis are based on biological sex.

- **Communication and support:** communicate workplace changes and their implications clearly to all employees. Provide support to those who may be affected by the changes, ensuring a respectful and inclusive workplace environment.

[For Women Scotland Ltd \(Appellant\) v The Scottish Ministers \(Respondent\) – UK Supreme Court](#)

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