



City Research Online

City, University of London Institutional Repository

Citation: Maine, A. (2025). For Women Scotland: an interpretation of equality rooted in biology. *Journal of Social Welfare and Family Law*, doi: 10.1080/09649069.2025.2530887

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/35508/>

Link to published version: <https://doi.org/10.1080/09649069.2025.2530887>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

For Women Scotland: An interpretation of equality rooted in biology

Alexander Maine*¹

City St George's, University of London, London, United Kingdom

Key words: transgender; cisgender; equality; discrimination; gender recognition

Abstract: *This case review discusses the judgement handed down by the Supreme Court in the For Women Scotland case, in which the court was tasked with defining the term 'woman', 'man', and 'sex' for the purposes of the Equality Act 2010. I discuss the reasoning given in the decision and provide some context. I also discuss the wider implications of the case and its legal, political, and constitutional significance in the matters of trans persons' rights.*

For Women Scotland v The Scottish Ministers [2025] UKSC 16 has likely become the most socially significant case to reach the Supreme Court in some years and has arguably had greater reach and consequence this year than any other development for the minority group it affects. The case's implications have spread beyond the words of the judges, and it has taken on a life of its own in the legal imagination of the public and affected stakeholders. Further, the ramifications of the judgment affect service providers, businesses, and education institutions to name but a few. The case concerns equalities law primarily, but also discrimination law and the powers of devolution, and, as such, the case is socially, politically, and constitutionally significant. The case held that the definition of 'woman' for the purposes of the Equality Act 2010 (EA) does not include trans women and exclusively refers to 'biological' women.

The case is a *prima facie* exercise of statutory interpretation, assessing how the EA should be interpreted when determining what is meant by 'woman', 'man', and 'sex'. The case came as a challenge to the Gender Representation on Public Boards (Scotland) Act 2018 (the 2018 Act), which imposed a positive obligation on Scottish public authorities to have an equal gender balance. Crucially, the 2018 Act's section 2 definition of women included transgender women, with or without a gender recognition certificate (GRC). The Scottish legislation came from the Sturgeon administration, of which the then First Minister was a vocal campaigner for trans people's rights and championed the introduction of self-identification for gender certification. For Women Scotland (FWS), a gender critical (the belief that biological sex is immutable, coupled with the rejection of transgender or non-binary identities) organisation challenged this definition and sought a judicial review of the EA's meaning of sex and whether the 2018 Act was compliant with the EA.

In an earlier case on the same issue, FWS challenged the section 2 definition of 'woman' and were successful in the Court of Session, where, in *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4; 2022 SC 150, it was held that the definition used in section 2 was outside of the competences of the devolved Parliament. The Scottish Government responded by issuing fresh guidance in the same year to reiterate their stance that the definition of 'woman' for the purposes of the 50% target included trans women who had been issued a GRC pursuant to the Gender Recognition Act 2004 (GRA), and that this was consistent with guidance from the Equality and Human Rights Commission (EHRC).

*Dr Alexander Maine, Senior Lecturer alexander.maine@citystgeorges.ac.uk

In this second application for judicial review, in the Court of Session Lady Haldane held that section 9(1) of the GRA changed a person's sex for all purposes, stating that the language of the 2004 Act 'could scarcely be clearer' ([2023] CSIH 37, para 44) and rejecting the appellant's argument that the GRA had a narrow purpose and had been superseded by subsequent legislation. She also rejected the argument that the EA and GRA were in conflict. The Supreme Court's decision, however, has put these two Acts at odds.

In the Supreme Court judgment, led by Lord Hodge, Lady Rose and Lady Simler (with whom Lord Reed and Lord Lloyd-Jones agreed), it was decided that the term 'woman' for the purpose of the EA referred to biological sex, and therefore did not include trans women, whether or not they possessed a GRC. First, the Court considered the Sex Discrimination Act 1975 (SDA) as a precursor to the EA, establishing the basis of equality and discrimination law. The Court establishes that in 1975, Parliament, when using the terms 'man' and 'woman', referred to biological sex, and that the GRA did not amend the meaning of those words. Therefore, despite the effect of a GRC being the reregistering of a person's gender 'for all purposes' (section 9(1) GRA), the GRA did not amend the meaning of 'man' and 'woman' within the SDA (para 80).

It was held that the context in which the EA was enacted was therefore that the SDA definitions of 'man' and 'woman' referred to biological sex and trans people had the protected characteristic of gender reassignment. The EA, the Court was at pains to explain, enacts group-based protections against discrimination on the separate grounds of sex and gender reassignment. The Court emphasised the significance of making the interpretation of the Act clear and consistent so that those upon whom the Act imposes obligations can identify groups which share a protected characteristic and perform their obligations in a practical way (paras 151-154). Further, the Court stated that Parliament did not substantially change the SDA, which refers to biological sex, coming to the conclusion that for the purposes of anti-discrimination law and equality, sex refers to biological rather than 'certified' sex. References to protections specifically related to pregnancy, maternity, and sex discrimination, and the need for protection from risks specifically affecting cisgender women (Schedule 22, paragraph 2), can only be interpreted as referring to biological sex (paras 172, 177-188). The Court held that if 'sex' was interpreted as including as 'certificated sex' (meaning that sex included the sex of a person holding a GRC), it would cut across the definitions of 'man' and 'woman' and thus the protected characteristic of sex would be applied in an incoherent way, leading to heterogeneous groupings. (para 172, 177-188).

Curiously, the Court then held that this would not be detrimental to trans people because the EA contains distinct protections for the characteristic of gender reassignment, to be relied upon when a transgender person is facing discrimination for being transgender. If trans women, in particular, were to be included in the definition of women, then this would weaken the ability of single-sex spaces and service providers to limit themselves to being single-sex spaces and service providers, and therefore weaken the protections offered by the EA on the basis of sex. The Court went on to discuss the application of such an interpretation on the provision of single-sex spaces in hospitals, changing rooms, communal accommodation, and for single-sex sporting participation.

The Court concluded that their interpretation of the EA (i.e. the biological sex reading), is the only correct one, and does not cause disadvantage to trans people, with or without a GRC. It was held that in the light of case law interpreting the relevant provisions, trans people would

be able to invoke the provisions on direct discrimination and harassment, and indirect discrimination, and that having a GRC is not required to give them those protections (paras 248-263). The Court states that meaning of the terms 'sex', 'man' and 'woman' in the EA is biological and not 'certificated' sex, and that another interpretation would render the EA incoherent and impracticable to operate (para 264).

The Court's ruling was, from the outset, controversial and at odds with over two decades of trans-inclusive policy- and law-making (see Whittle & Simkiss, 2020; Cowan, 2025; Randall, 2025). The ruling does not require services to exclude trans people from all single-sex spaces. It does, however, clarify that if a service operates a single-sex space, for example a gym changing room, then exclusion is based on biological sex and not certified sex. Neither the Court nor the government has said how 'biological sex' would be defined or proven.

The Court made an effort to establish that it was not within their remit to dictate policy, nor did it seek to define who a woman is for any other purposes than the EA. However, following the judgment, the Equality and Human Rights Commission issued interim guidance, dictating that service providers should only allow trans people to access services according to their birth gender. This means that trans women, whether or not they hold a GRC, and however they might appear, e.g. a very feminine woman, would be forced to use male toilets. Similarly, as the Court remained focused on trans women throughout, there is very little discussion in the case of trans men and the issues they may face, particularly if forced to use single-sex female spaces. The capacity for risk of abuse and danger towards trans people in such a situation is high. And, by focusing solely on biology, the judgment relies on an essentialist understanding of sex and gender, with a particular focus on women's reproductive capacity.

But a lack of clarity remains, despite the welcoming of 'clarity' by policy-makers: it is now unclear what the utility of a GRC is, if it does not for all purposes establish a person's gender. Family lawyers will be familiar with the case law that led to the GRA, notably *Goodwin v UK* [2002] 35 EHRR 18, which established that by failing to provide a form of gender recognition, the State was in breach of its obligations under Articles 8 and 12. Questions remain following the judgment whether, if a trans person must use a service that appears at odds with their appearance, their right to privacy is breached once again. Further, a trans person in possession of a GRC is in the curious situation of being recognised as two different sexes at once, under two pieces of legislation. Far from clarity, questions remain about how trans people are included in society, and how trans dignity will be upheld.

References

Cowan, S. (2025) 'Trans rights, queer times: in search of a new hope', *Journal of Social Welfare and Family Law*, pp. 1–22.

Randall, J. (2025) 'The GRA at 20: the development of a binary and permanent legal gender', *Journal of Social Welfare and Family Law*, pp. 1–21.

Whittle S., & Simkiss. (2020) 'A perfect storm: the UK Government's failed consultation on the Gender Recognition Act 2004' in C. Ashford & A. Maine (ed.) *Research Handbook on Gender, Sexuality and Law*. Cheltenham: Edward Elgar.