



For Women Scotland v Scottish Ministers UK Supreme Court 26-27 November 2024

BRIEFING

“The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.”
Lord Hope, Imperial Tobacco v Lord Advocate [2012] UKSC 61, 2013 SC (UKSC) 153 at §14

Background

For Women Scotland is a women’s rights campaign group and we have been seeking clarification on the definitions of “sex” and “woman” in the Gender Representation on Public Boards (Scotland) Act 2018 (GRPBA) and Equality Act 2010 through the Scottish courts since July 2020.

We won a judicial review at appeal in [February 2022](#) where it was ruled that the redefinition of “woman” in the GRPBA – to include males with the protected characteristic of gender reassignment – was unlawful and outwith the competency of the Scottish Parliament who are bound by the Equality Act definitions of protected characteristics. The decision stated that “sex” and “gender reassignment” are separate protected characteristics which should not be confused or conflated and that in light of woman meaning a female of any age, provisions for women, **by definition exclude biological males**. The Gender Representation on Public Boards (Amendment) (Scotland) Act 2024 removed the unlawful definition from the [primary legislation](#).

In a subsequent judicial review the first instance court ruled in [December 2022](#) that the definition of “woman” given in the [revised statutory guidance](#) for the GRPBA – to include males with the protected characteristic of gender reassignment who hold a female Gender Recognition Certificate (GRC) – was lawful and consistent with the Equality Act. This was upheld at appeal in [November 2023](#) and it is this decision which is now under appeal to the [UK Supreme Court](#).

Definitions

The Court of Session ruled that section 9(1) of the Gender Recognition Act 2004 applies “for all purposes” so that sex in the Equality Act means the sex recorded on a person’s current birth certificate (either as originally recorded or as altered by a GRC). This interpretation means that wherever “sex” is referred to in the Equality Act it can be replaced with “certificated sex” and the definition of “woman” means a female of any age, except those who hold a GRC, plus males who hold a GRC.

We think this fails to take account of section 9(3) of the GRA which states 9(1) is “subject to provision made by...any other enactment”, or the rules of statutory construction which give precedence to the Equality Act where there is conflict with an earlier law. The ordinary, biological meaning of sex is necessary to ensure the rights and protections provided to women/females of any age, regardless of whether or not they have a GRC, are realised.

Provisions made by the Equality Act

1. Positive actions

If sex is a matter of biological fact then the historic under-representation to be redressed by the Gender Representation on Public Boards Act is clear and well-evidenced, and 50% female representation is proportionate to the percentage of women within society. However, if sex means certificated sex, then provisions for public boards, all-women shortlists, training programmes and jobs for women can exclude some women (with GRCs) or be composed entirely of men with GRCs and still lawfully meet the objective.

2. Single-sex services

If sex is a factual reality it is straightforward to have single-sex changing rooms, toilets, hospital wards, refuges, sports, etc for reasons of privacy, dignity and safety, with all members of the opposite sex excluded regardless of whether they hold a GRC. If sex means certificated sex, however, a (certificated) woman-only service cannot be confined only to women as a biological class because that is no longer a distinct protected characteristic in the Equality Act but must, by definition, exclude women with a GRC and include men with a GRC. This interpretation says a rapist with a GRC has the same certificated sex as the women for whom a female-only prison was intended. The exceptions in the Act relating to gender reassignment become empty of meaning and unusable.

3. Sexual Orientation

The concept of certificated sex has the potential to undermine the Equality Act's provisions against discrimination by effectively depriving the very concept of sexual orientation of any meaning. Acquiring a GRC does not transform a heterosexual relationship into a homosexual one (or vice versa). People are attracted to sexed bodies not certificate status.

4. Associations

Associations with 25 or more members are predicated on protected characteristics. If sex no longer refers to biology, lesbian groups lose the intended provision of freedom of association and must include males with a GRC who are attracted to women.

5. Pregnancy and Maternity

All the references to pregnancy and maternity throughout the Equality Act are made in relation to, and only to, women. It necessarily involves a reference to female biology and it cannot possibly have been the intention to place female GRC holders, who would be deemed male by their certificated sex, outside these protections. The only way to overcome this is by re-writing the plain words of the statute to include the "pregnant woman or man", which is beyond the role of the courts, or breach statutory interpretation and introduce contradictory meanings for the term "woman" in the same Act, so that it sometimes excludes all men, but, in other contexts, excludes some women.

We think the provisions, structure, overall policy and practical effects of the Equality Act where the ordinary language of sex is consistently and coherently used throughout as a reference to the facts of immutable biological criteria, clearly engages section 9(3) of the GRA 2004. This fully guarantees the protections for women intended by Parliament without detracting from the protections of those with the protected characteristic of gender reassignment, with or without a GRC.