# Law's search for biological truth

## For Women Scotland and the UK Supreme Court

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On 16 April 2025, the UK Supreme Court handed down its judgment in the *For Women Scotland* case (hereafter FWS),[1] a decision that has attracted widespread political and media attention as it sets out to legally define what it means to be a woman for the purposes of the *Equality Act 2010*. To make sense of the FWS decision, it is worth briefly considering the legal background and terrain in which it is situated.

The case concerns three specific pieces of law, namely the *Gender Recognition Act 2004*, the *Equality Act 2010*, and the *Gender Representation on Public Boards (Scotland) Act 2018*. The *Gender Recognition Act 2004* (*GRA 2004*) was introduced in response to a finding against the UK at the European Court of Human Rights.[2] The *GRA 2004* allows a person to change their legal sex marker on their birth certificate as long as they are over 18, have two medical reports attesting to a diagnosis of 'gender dysphoria', have lived in their 'new' gender for two years prior to applying and swear to remain in that gender for the rest of their life.[3] Meanwhile, the *Equality Act 2010* (*EA 2010*) is the main piece of anti-discrimination law in this country (although it does not apply in Northern Ireland) and unified the previous disparate legal frameworks in this area. It covers discrimination and harassment in employment and service provision contexts for the protected characteristics of age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race, religion/belief, sex and sexual orientation. Notably, the framing of 'gender reassignment' is much broader than the *GRA 2004* and covers anyone who is proposing to undergo, is undergoing or has undergone any changes to their gender, including non-medical measures like a change of name.[4] As such it protects both those who have changed their legal sex and those who have not; and lower-tier Tribunals have also included non-binary and gender-fluid people within this.[5]

Importantly for the purpose of the FWS decision, the *EA 2010* does not prevent the creation or maintaining of single-sex spaces or services, which of course *de facto* discriminate as they exclude the 'opposite' sex and therefore would in principle amount to sex discrimination under s.11 of the *EA 2010*. S.27 of the *EA 2010* sets out that the creation of single-sex spaces is permissible where such 'limited provision is a proportionate means of achieving a legitimate aim.' Such spaces can also exclude anyone with the protected characteristic of gender reassignment, i.e. all trans and non-binary people, again, where this is deemed to be a proportionate means of achieving a legitimate aim. [6] However, this provision has been interpreted to only apply to those spaces that cannot effectively run otherwise, with domestic violence services being the classic example of this.[7] Finally, the *Gender Representation on Public Boards (Scotland) Act 2018* only applies to Scotland and is intended to ensure that at least 50% of members of a public board are women and essentially allows for a very limited form of positive discrimination to achieve this outcome. From its inception, the *Public Boards Act 2018* included trans women within its definition of women, by referring to the protected characteristic of gender reassignment in the *EA 2010*.

The group For Women Scotland Ltd sought to challenge this trans inclusive approach through an initial judicial review. The Inner House of the Court of Session agreed with their argument and held that the Scottish government needed to modify the definition of 'woman' in the *Public Boards Act 2018* as the current approach was outside their legislative competence subject to the authority of the Westminster government.[8] The Scottish

government consequently produced guidance in 2022 stating that the amended definition of 'woman' in the *Public Boards Act 2018* did not include trans women unless they had gone through the *GRA 2004* to amend their birth certificate, as at this point they were simply women for almost all legal purposes, including for the definition of 'sex' in the *EA 2010*.

This led to a second judicial review by For Women Scotland Ltd who argued that the *EA 2010* definition of 'sex' was not affected by someone going through the *GRA 2004* process. They further argued that the *GRA 2004* had a very narrow purpose, including allowing trans people to marry, and had been largely superseded by subsequent legislation, including the *EA 2010*. This petition was dismissed by Lady Haldane in the Outer House in December 2022.[9] Lady Haldane held that the *GRA 2004* was clear in changing a person's sex for all purposes with a few exceptions listed specifically, e.g. peerages and trusts, and that this therefore was in line with the amended *Public Boards Act 2018* definition of who counts as a woman.[10] Lady Haldane's decision was confirmed by the Inner House on appeal.[11] For Women Scotland Ltd then appealed this to the Supreme Court where a panel of five judges found unanimously in their favour.

The judgment by Lord Hodge, Lady Rose and Lady Simler, with Lord Reed and Lord Lloyd-Jones concurring, held that the definition of 'woman' and 'man' in all sections of the *EA 2010* is intended to refer to 'biological sex'.[12] Further, they held that this is not affected by the *GRA 2004* and that it is therefore immaterial if a person has changed their legal sex, as for the purpose of the *EA 2010* provision on the protected characteristic of 'sex' they remain the sex they were assigned at birth. The judgment argues that any other interpretation would lead to incoherence across different sections of the *EA 2010*, including the sections on 'sex', 'pregnancy'[13] and 'sexual orientation' and that therefore the Inner House decision was incorrect in saying that the words 'woman' and 'man' can have variable meanings across different parts of the *EA 2010*. Therefore, the *Public Boards Act 2018* should only cover those who were assigned female at birth within its use of 'woman'.

The judgment, however, goes further than just determining the specific issue of the *Public Boards Act 2018*, and additionally notes that while this interpretation of 'sex' does not *require* single-sex spaces to exclude trans people whose sex assigned at birth does not match that of the group the spaces are intended for, failing to do so may amount to indirect discrimination on the grounds of sex as it may lead to people self-excluding from these spaces. Beyond that it may even be possible for service providers to also exclude trans people who are of the 'right' sex for that group if their appearance has been sufficiently changed so that they may be perceived as the 'opposite sex'.[14] Both of these arguments have been reiterated and to some extent expanded by the new draft guidance on the *EA 2010* produced by the Equality and Human Rights Commission, currently under consultation.[15] The judgment has already attracted a high volume of attention for a number of reasons and in what follows I turn to three of these in detail, specifically the question of trans inclusion, the appeal to a presumed biological 'truth' about sex, and finally the attempt to define who legally is a lesbian.

## Whither trans inclusion?

The first and perhaps most well-discussed issue raised by the judgment is its relationship to principles of non-discrimination, and wider principles of trans inclusion, established over the last two decades. From a legal perspective, the relevance of legal sex or gender has been gradually decreasing over this time period, partially because legislation is now increasingly written in gender-neutral terms rather than using the masculine default of old,[16] but also because there are now far fewer instances where a person's legal sex still matters in law.[17] At the same time, more and more institutions are recognising genders beyond the female/male binary in a range of contexts, while legally the presumption had become that trans people should generally be included in spaces that match their gender whether changed through the *GRA 2004* or self-certified, with only some narrow exceptions in areas like sports and prisons that had always been exempted from the workings of the *GRA 2004* and spaces explicitly covered by the *EA 2010* definition of single-sex spaces. The FWS case in many ways reverses this trend, by saying that while trans exclusion is not mandatory, it may well be legally necessary in most single-sex contexts.

This seems to limit the purpose of the non-discrimination provision regarding 'gender reassignment'

very sharply, by reducing its application primarily to not treating someone as the sex they were assigned at birth precisely because they are trans – for instance, excluding a trans man from a women's domestic violence service because he is no longer recognised as a woman – and to obvious acts of harassment against trans people such as the use of slurs in the workplace. It also raises the question of what the purpose of the *GRA 2004* is if its effects can be disregarded in almost all contexts. As others have pointed out, this will likely lead to a new case at the European Court of Human Rights regarding the UK's potential non-compliance with the European Convention on Human Rights in the fairly immediate future.[18]

Beyond these precise legal questions, there is a real risk that the FWS decision will be seen by some as *carte blanche* to exclude trans people from public life, particularly when it is seen as possible to legitimately exclude this group from both male *and* female spaces, including bathrooms. The suggestion by the chair of the Equality and Human Rights Commission, Baroness Kishwer Falkner, that trans people should instead request 'third spaces' clearly highlights this problem.[19] Given that disabled people (who are legally entitled to accessible bathrooms under the *EA 2010*) still find themselves routinely without adequate bathroom provision, it seems very plainly unworkable that a group who has no such legal entitlement should rely on this as a solution to being excluded from existing public spaces. This is especially non-feasible in a time of austerity when most public services, including the NHS, face severe financial constraints that make it utterly unlikely that they would have the resources to offer third spaces, such as separate hospital wards for trans people. It also opens the door to potentially malicious litigation against any single-sex spaces potentially deemed not trans exclusionary enough, with domestic and sexual violence services being perhaps most at risk given that they are predominantly single-sex but tend to be trans inclusive.

## 'True' sex

Beyond these immediate practical issues, the judgment also has a troubling relationship to claims of biological truth. Overall, the judgment states that it interprets sex to mean biological sex as determined at birth, compared to the 'certificated sex' of trans people who have applied to change their birth certificate under the *GRA 2004*.[20] It further argues that using this approach will create greater consistency in law by continuously distinguishing between trans and cis people regardless of whether someone has changed their birth certificate. This of course dramatically overstates how straightforward biological sex is, including the fact that it is made up of many different characteristics, such as hormone levels as well as primary and secondary sexual characteristics, not all of which are easily observable. It also ignores the existence of intersex people who may not have, for example, neatly aligned secondary sexual characteristics, hormone levels and karyotype. What the court is actually referring to here by 'biological sex' is really the sex that was recorded at someone's birth on their birth certificate and which for most, but not all, people at that point will generally align with the factors we associate with sex. Why changes through medical procedures that are loosely grouped under the umbrella of 'gender affirmation' are somehow not biological, despite affecting biological factors like primary and secondary sexual characteristics and hormone levels, is never addressed in the judgment. As such, it seems the law presumes that the idea of biology as recorded on an initial birth certificate offers some greater claim to biological truth than anything else, including how a person is perceived. It is notable here that the British Medical Association promptly passed a motion describing the judgment as 'scientifically illiterate' precisely because of its limited reading of the state of biological and scientific knowledge on sex and gender.[21]

The Supreme Court rightly acknowledges the fact that in daily life we rarely ask for someone's birth certificate before assuming their sex or gender, but rather tend to make an assessment based on someone's external appearance. This poses a particular challenge for the FWS case because the *EA 2010*, amongst other things, covers discrimination based on perception, i.e. it does not matter legally whether you are actually Muslim if you are experiencing discrimination because your employer simply assumes that you are. This also applies to the protected characteristic of sex. The Supreme Court on this point notes that some trans people may indeed be falling into the category of 'man' or 'woman' even if that does not align with their sex as assigned at birth, simply because they are perceived as such and experience discrimination in line with this. This means that a trans man, regardless of whether he has changed his legal sex to also be male, who is treated worse by his employer based on the perception that he is a man, has the same legal protections in this instance as someone who was assigned male at birth even though the former is not 'biologically' a man according to the judgment.[22]

This reasoning by the Supreme Court has two effects: a) it immediately highlights how little coherence is actually created by defining 'man' and 'woman' in the *EA 2010* solely through biology at birth, given that the very idea of discrimination by perception promptly undermines the consistency of this rationale; and b) it creates different legal standards for those trans people who pass as a sex other than the one they were assigned at birth. While point a) undermines the internal logic of the judgment, point b) is also deeply problematic given that it is thoroughly documented that visual or aesthetic norms of sex/gender in the West essentialise notions of white masculinity and femininity that predominantly exclude those from ethnic minorities and many people with disabilities, as well as being heavily mediated by class. In countries that have attempted to ban trans people from bathrooms that do not align with their sex assigned at birth, there is at the very least anecdotal evidence that those whose bathroom access is subsequently most policed are in fact non-white cis women.[23] Embedding the idea in law that there is a 'correct' way to present as a certain sex, then, further embeds heavily racialised and ableist norms and assumptions.

## Legal lesbians

A further instance where this incoherent and fundamentally inaccurate notion of biological 'truth' can be seen is in regard to the Supreme Court's choice to not just define what 'sex' means for the purpose of the *EA 2010*, but also to define 'sexual orientation'. The Supreme Court, in an

attempt to elaborate on why 'man' and 'woman' should be defined through the sex someone is assigned at birth, defines lesbians as people assigned female at birth who are attracted to people assigned female at birth.[24] In practice, this means for the purpose of the *EA 2010* that a cis woman dating a trans woman is now in a heterosexual relationship, while a cis woman dating a trans man is now in a lesbian relationship. This erases both the more complex dimensions of sexual orientation – after all, a significant portion of lesbians have at some point dated men – and the way people define their own sexual orientation. Many people assigned female at birth who date trans women would understandably see themselves as lesbians, while a woman dating a trans man might see herself as heterosexual and may well be perceived by others as such. In contrast, the implication of the Supreme Court's ruling is that people are not able to define their own sexual orientation in relation to clubs and associations governed by the relevant *EA 2010* provisions. For example, a cis woman dating a trans woman would be prevented from joining a lesbian swimming group.

This again seems to presume that original birth certificates carry some kind of ultimate legal and biological truth that then shapes the entirety of a person's life, down to their sexual orientation. This kind of biological essentialism for sexual orientation, just like the idea of there being a 'gay gene' and that people's sexual orientation is therefore fixed at birth, is both exclusionary and at its worst feeds into highly concerning ideas of not being heterosexual as some type of genetic defect. It also suggests that one can 'legally' be a true lesbian only in the way that aligns with the FWS definition, which entirely ignores that in almost all settings sexual orientation is something a person determines for themselves.[25]

## Legislating everyday life

Using the examples above, the judgment is evidently problematic in its immediate legal context. However, it's also hard not to read this judgment in a wider context where political discourse seems to be shifting towards at best seeing only 'true' minorities as deserving of rights and protections. The FWS case was about the issue of identifying 'true' biological women who can be subject to limited positive discrimination measures, but in the process also seeks to define 'true' trans people, i.e. those who pass and therefore may have some slightly better protections, and 'true' lesbians and gay men, i.e. those who experience sexual attraction only to people assigned the same sex as them at birth. This turn to a supposedly stable, permanent biological truth to determine group membership for at least three of the protected characteristics in the *EA 2010* could have potentially far-reaching consequences for the remaining protected characteristics in the longer term.

For instance, Wes Streeting, in his role as Health Secretary, recently stated that he believed that mental health conditions are 'over-diagnosed' and this was leading to too many people claiming disability-related benefits.[26] Other parliamentarians have similarly stated that mental health conditions and some other related disabilities are either not real or at a minimum over-diagnosed. Consequently, the proposed changes to welfare legislation would make it disproportionately harder for those with mental health conditions and less 'severe' impairments to claim disability benefits. Overall, the supposed consensus seems to be that protections and rights for minority groups have in some way gone too far and that we should at a minimum limit these to only a few 'true' cases.

The challenge of course is that neither law nor biology is rarely that straightforward. Even by using a heavily abstracted and simplified definition of biological sex, the FWS case immediately creates a series of inconsistencies. It also significantly overstates the relevance of legal status and documents in everyday life. If birth certificates are now the sole arbiter of someone's ability to access men-only or women-only spaces, how is this meant to work on a day-to-day basis? Unless everyone now becomes legally required to carry a birth certificate with them at all times, this is hardly a practical way to determine who should use which bathroom or changing room. It also entirely denies the reality that those who are disproportionately going to be challenged in these spaces are those who do not meet stereotypical norms of what it means to look like a man or a woman, regardless of the sex they were assigned at birth. The notion that anti-discrimination principles demand that in most circumstances we should ignore that trans people are in fact a different gender to the one they were assigned at birth was always going to be a difficult one to sustain. It is therefore perhaps unsurprising that the Supreme Court

sought additional legitimacy for its rationale in claims of biological truth. However, this has meant further tying minority status to forms of biological essentialism that ignore both the complexity of biology, and the crucial role of the material and social world that law operates within.

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## Notes

**1.** *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* [2025] UKSC/2024/0042, hereafter 'FWS'.
**2.** *Christine Goodwin v. United Kingdom and I v. United Kingdom Grand Chamber Judgements of July 11*, [2002] (application nos. 28957/95 and 25680/94).
**3.** Ss.1-3 of the *Gender Recognition Act 2004*.
**4.** S.7 of the *Equality Act 2010*.
**5.** *Taylor v Jaguar Land Rover Ltd* [2020] ET 1304471/2018.
**6.** See s.740 of the *EA 2010*, Explanatory Notes, 'gender reassignment: paragraph 28'.
**7.** Flora Renz, 'Gender-based Violence Without a Legal Gender: Imagining Single-sex Services in Conditions of Decertification', *Feminist Legal Studies* 31:1 (2023), 43–66.
**8.** *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4; 2022 SC 150.
**9.** 13 December 2022 ([2022] CSOH 90; 2023 SC 61.
**10.** Ibid., para 45–47.
**11.** [2023] CSIH 37; 2023 SLT 1216.
**12.** Ibid., n.1, para 265.
**13.** Notably here the Supreme Court argued that by accepting that trans people change sex, and reading the terms 'man' and 'woman' in a trans inclusive manner, protections on the basis of pregnancy would not apply to pregnant trans men as the pregnancy provisions talk about 'women'. This is despite the fact that these provisions have to date clearly been interpreted in a trans inclusive manner, including by the government. For instance, the Health and Safety Executive's guidance on pregnant workers to date still states that it also applies to trans men and non-binary people who are pregnant: https://www.hse.gov.uk/mothers/employer/index.htm.
**14.** Ibid., para 221.
**15.** Equality and Human Rights Commission, 'Code of practice for services, public functions and associations: consultation 2025', https://www.equalityhumanrights.com/equality/equality-act-2010/codes-practice/code-practice-services-public-functions-and-associations.
**16.** Emily Graham, 'Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium', *Feminists@ law* 10:2 (2020).
**17.** For some examples, see Davina Cooper and Robyn Emerton, 'Pulling the Thread of Decertification: What Challenges are Raised by the Proposal to Reform Legal Gender Status?'. *Feminists@ law* 10:2 (2020).
**18.** Crash Wigley, 'For Women Scotland: A Case of Significant Silences. UK Constitutional Law Association', 6 May 2025, https://ukconstitutionallaw.org/2025/05/06/crash-wigley-for-women-scotland-a-case-of-significant-silences/.
**19.** PA News Agency, 'Equalities boss outlines changes on toilets, changing rooms and women's sport. The National', 17 April 2025, https://www.thenational.scot/news/national/25097138.equalities-boss-outlines-changes-toilets-changing-rooms-womens-sport/.
**20.** n.1, para 7.
**21.** Millie Cooke, 'Doctors Condemn Supreme Court Ruling on Trans Women as "Scientifically Illiterate"', 29 April 2025, .https://www.independent.co.uk/news/uk/politics/trans-gender-supreme-court-ruling-bma-doctors-b2741304.html.
**22.** n.1, para 250.
**23.** Heath Fogg Davis, 'Why the "Transgender" Bathroom Controversy Should Make Us Rethink Sex-Segregated Public Bathrooms', *Politics, Groups, and Identities* 6:2 (2018), 199–216.
**24.** n.1, para 205–209.
**25.** See also the discussion of the sexual orientation issue here: Robert Mullins, 'For Women Scotland: Fastening the "Biological" Straightjacket', UK Constitutional Law Association, 22 May 2025, .https://ukconstitutionallaw.org/2025/05/22/robert-mullins-for-women-scotland-fastening-the-biological-straitjacket/.
**26.** Joshua Nevett, 'Mental Health Conditions are Overdiagnosed, Streeting Says', *BBC News*, 16 March 2025, https://www.bbc.co.uk/news/articles/cd7ejvr3y0zo.