

INVISIBLE IDENTITIES: HOW FOR WOMEN SCOTLAND UNINTENTIONALLY ARGUES FOR LEGAL DECERTIFICATION OF SEX/GENDER

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01 INTRODUCTION

In 2024, the supreme court heard the case For Women Scotland, which was concerned with the definition of "sex" and "woman" in the Equality Act 2010 (EA 2010). The EA 2010 makes specific exceptions to what would otherwise fall under discrimination when said exclusion/discrimination is deemed "a proportionate means of achieving a legitimate aim".

These sex-based exceptions include single-sex services, positive action communal accommodation, sports, associations and educational facilities. The organisation 'For Women Scotland' were challenging the definition of "woman", arguing for a "sex at birth" definition.

The court's job was to interpret legislation, but many of the challenges they faced when doing so evidence the poor drafting of the Gender Recognition Act 2004 (GRA 2004), which first introduced the ability for trans persons to change their legal sex/gender[1], and its incompatibility with the EA 2010. The points discussed and relied upon by the supreme court in For Women Scotland and can therefore be used to update and inform the arguments and suggestions for general reform in the law's approach to gender and sex recognition, when analysed and understood in context, and not merely doctrinally.

04 THE INCOMPATIBILITY NOTED BY THE COURT BETWEEN THE GRA 2004 AND THE EA 2010

- A certified definition of sex in the Equality Act 2010 (EA 2010) creates strange "heterogenous" groupings of each sex. Woman/female becomes cis women, trans women with a GRC and trans men without a GRC, and men/male becomes cis men, trans men with a GRC, and trans women without a GRC
- There are specific provisions in the EA 2010 which make it lawful to exclude members of one sex from a service, group or occupation when deemed to be a "proportionate means of achieving a legitimate aim". Without this exclusion, those services would be illegally discriminating on the basis of sex and would not be allowed to operate.
- The strange groupings of men and women created by a certified definition of sex mean it would be hard if not impossible for a sex-segregated service to meet the requirements set out in the Equality Act to legally operate their space
- This is because GRCs (Gender Recognition Certificates) are confidential certificates and many trans persons do not apply for and get one. Therefore, other than the existence of a certificate, there is no difference between trans persons with and without a GRC
- Further, the process of applying for and receiving a GRC requires meeting an exceedingly specific and in-depth criterion, which has been criticized as "arbitrary" and overly medicalized. This can pressure trans persons to trivialize their experiences in order to fit another's conception of gender and receive the care and support they need.
- These problems are amplified for non-binary trans persons, as in addition to all outlined above, there is not, nor has ever been, legal recognition of non-binary gender identities in the UK.
- Therefore, a certified definition of sex could threaten under the current system of applying for GRCs could threaten the existence of all single sex spaces, services and facilities

02 STYLE OF ANALYSIS

This research output looked at the judgement given from the Supreme Court case "For Women Scotland" and breaks down its reasoning to understand the incompatibility it highlights between the Gender Recognition Act, which first allowed binary trans people in the UK to change their legal sex, and the Equality Act 2010, which protects against (among other things) sex discrimination with exceptions for things such as some single sex services.

The ruling and judgement given in the "For Women Scotland" was analysed in context as well as doctrinally, rather than only doctrinally, with a mixture of other studies and data, lived experiences and gender-critical theory. This style of analysis allows for critique of the later conclusions drawn by the court, such as that a "sex at birth" definition of sex under the EA 2010 doesn't negatively affect Trans persons.

05 WHY THE COURT'S ATTEMPT TO FIX THIS PROBLEM FAILS

Harm Caused to Trans People:

- Trans persons may lose access to medical care, such as breast cancer screenings, prostate exams, and maternity support
- Trans women are excluded from positive action measures that they would have previously benefitted from, despite often facing the same disadvantages due to being perceived as a woman that cis women experience.
- Trans women would lose access to single sex services such as counseling and support for domestic abuse or sexual violence. Those fleeing domestic abuse from their partners would lose access to women's shelters, despite being at even greater risks than cis women for sexual violence and domestic abuse.
- Trans men may be excluded from similar services entirely. The women's service because of their identity, and the men's space because of being trans.
- For all trans persons, the small amount of legal protection that had been previously afforded to those who do not pass when their existence in single-sex spaces was challenged has been removed, leaving a much larger divide between those who can afford/access gender affirming care.
- Trans persons are likely to face an increased amount of violence through the use of public bathrooms and changing rooms. They must choose between either following the law or outing themselves as trans by using the "correct" facility.

Double Standard is Not Avoided

- The court argued that a "sex at birth" definition of sex removes the legal double standard created by GRCs for those who do and do not have access to them
- This problem is not avoided. Instead, the double standard is worsened between those trans persons who can afford affective gender affirming care and those who cannot. The introduction of GRCs, although problematic, helped to even out this double standard by providing legal protection even for those trans persons who did not pass and were "identifiable" as trans and therefore at increased risk of discrimination and violence.

Reasoning for this failure

- Firstly, the EA 2010 is attempting to deal with discrimination related to a person's biology and discrimination relating to a person's gender or perceived gender, and using one definition to cover what in reality are two distinct things.

03 ISSUES OF CONSISTENCY WHEN LEGALLY DEFINING SEX AND GENDER

Much of the court's analysis of the definitions of "sex" and "woman" vs "man", was informed by a need for consistency throughout the act and was an area in which they faced extreme difficulty. This difficulty is unsurprising, as the Act uses the terms "sex" and "gender" interchangeably to cover what in practice are two very distinct things.

Firstly, protections that combat discrimination, direct and indirect, that relate to a person's biology, for example to maternity or single sex services for cervical or prostate cancer screenings.

Secondly, protections aimed to combat discrimination that arise from societal prejudice to a particular gender, for example lower acclamation of women to specific job roles or gendered violence or single sex services which are needed because of shared experiences of persons of the same gender.

Equality law must be able to understand this distinction in order to fulfil its purpose to "support greater progress on equality". One singular definition (such as an entirely biological or gendered definition) will always leave out some group, frequently trans persons.

06 SUMMARY OF SUGGESTED REFORMS

- There should not be an exception to direct discrimination in the relation to services that relate to biological traits. To legally exclude persons from these services, a provider must specifically target those with such traits, when a reasonable method of carrying out a legitimate aim.
- Specifically in relation to maternity, specific anatomical language should be in addition to gendered terms such as "mother" and "woman".
- A more nuanced understanding of the different causes of "sex" discrimination; those that relate to biology and those which relate to gender. Legislation regarding both of these should not place emphasis on the sex at birth of an individual; rather their biology and gender as it exists at the time of the discrimination
- A self-ID approach to both gender and sex should be adopted, which does not have a legal definition and does not require an approved application in order to legally change.
- Lawmakers and courts should move away from the baseline assumption that trans people are just cis people pretending to be trans, looking instead at the lived experiences of those effected and the ways in which trans persons experience gender-based prejudice overlapping with prejudice on the protected characteristic of gender reassignment.