

Invisible Identities: How For Women Scotland Unintentionally Argues  
for Legal Decertification of Sex/Gender

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## Introduction

In 2024, the supreme court heard the case For Women Scotland<sup>1</sup>, 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.

In the first and second instances<sup>2</sup>, the judges ruled that the “woman” under the EA 2010 included both “biological” and trans women<sup>3</sup> who had obtained a GRC.

However, this decision was appealed to the supreme court, who reversed the judgement and found the definition of a woman in the EA 2010 to only refer to cisgendered (cis)<sup>4</sup> women, or as they defined them; “biological women”.

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<sup>5</sup>, 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.

This paper looks at the inconsistencies highlighted by the court between the GRA 2004 and the EA 2010 and whether these justify the conclusions of interpretation that were reached, and alternative ways of combatting these inconsistencies outside of statutory interpretation.

This analysis does not attempt to be an exhaustive list of all areas in which the sex/gender distinction is relevant. Instead, the areas referenced in the judgement are used as a base, but those relating to Sport inclusion and Military service are excluded.

The For Women Scotland Case will hereby be referred to as “the judgement”.

## Doctrinal vs Contextual Analysis.

At the beginning of the judgment, the importance of a purposive approach to statutory interpretation is noted. The purpose of the EA 2010 is said to “regulate and condition[s] the relationships and interactions between private individuals and both private and public entities”, intended to “reform and harmonise equality law” from

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<sup>1</sup> For Women Scotland v Scottish Ministers [2025] UKSC 16.

<sup>2</sup> When the case was first heard.

<sup>3</sup> Trans women being a person who was assigned male at birth but identifies as a woman.

<sup>4</sup> A cisgendered or “cis” person is one who’s gender assigned at birth is congruent with the gender they later identify as

<sup>5</sup> Legal sex/gender is the markers that exist on a person’s birth and death certificates, and in a civil partnership/marriage as well as other documents. You do not need to change your legal sex/gender to update a passport or driver’s licence. As will be later discussed, the law currently uses the terms “gender” and “sex” as interchangeable and equivalent. In order to change gender marker, a person must apply to the GRP (Gender Recognition Panel) for a GRC (Gender Recognition Certificate), a confidential certificate that allows these documents to be amended.

the previous Acts<sup>6</sup>, and to “strengthen the law to support greater progress on equality”. Despite this, there was minimal reliance to purpose in the ordinary sense, rather a doctrinal reliance on the previous statutes it aimed to consolidate<sup>7</sup>.

The judgement has been criticized as being inconsistent in its opinions on the relevancy of policy when interpreting legislation, telling us initially that it is not their role to “adjudicate on the arguments in the public domain on the meaning of gender or sex”, but “more limited” and “does not involve making policy”<sup>8</sup>, and later contradicting itself to declare that an interpretation “must be carefully considered in the light of the wording, context and policy of the statute in question”<sup>9</sup>.

By analysing the judgement both doctrinally and contextually, the final conclusions made by the court (such as that a “sex at birth” definition would not harm trans people) can be suitably challenged. This contextual and purposive understanding of the EA 2010 will therefore be held at a higher regard than doctrinal consistency, which will be noted as requiring reform through an act of parliament.

### Difficulties Identified with Certified Definitions of Sex

Many of the points which the judgement raises about the “incoherent” and “heterogenous groupings” formed by following a certified sex definition are valid. The use of GRCs would mean that “man” refers to cis men, trans men with a GRC and trans women without a GRC, and “woman” would refer to cis women, trans women with a GRC and trans men without. These groupings, when considering that not all trans persons have a GRC and, as they are confidential, there is no way for service providers to tell who does and doesn’t possess one, makes the EA 2010’s exemption clauses for direct discrimination of single sex services (paragraph 27 of Schedule 3 “Single Sex Services”), and differential treatment of women and pregnant women for their safety (section 29 of the EA 2010) unworkable. These exceptions allow such services, which would otherwise amount to discrimination, to run lawfully. The criteria such a service would have to meet, outlined in the act, includes “only persons of that sex have need of the service”<sup>10</sup> or “(a) a joint service for persons of both sexes would be less effective, and (b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services”. These criteria are difficult, if not impossible to argue when the definition of each sex refers to the categories above.

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<sup>6</sup> Namely the Equal Pay Act 1970, the SDA 1975, and Race Relations Act 1976, and Disability Discrimination act 1995 and other primary and secondary legislation.

<sup>7</sup> For more insight into the importance of a purposive interpretation of legislation, See “the role of purpose in legislative interpretation: inescapable but problematic necessity”, presentation at the oxford University and University of Notre Dame Seminar on Public Law theory: Topics in Legal interpretation, 19 September 2024.

<sup>8</sup> Para 2.

<sup>9</sup> Para 108, for more detailed analysis, see Alex Benn, “Biological Sex’ in the UK Supreme Court: Four Problems with For Women Scotland v Scottish Ministers’ (Oxford Human Rights Hub, 17 April) <<https://ohrh.law.ox.ac.uk/biological-sex-in-the-uk-supreme-court-four-problems-with-for-women-scotland-v-scottish-ministers/>> accessed 29 September 2025 .

<sup>10</sup> Paragraph 27, (2)-(3) of Schedule 3.

Additionally, a trans person must prove that they are trans by meeting an exceedingly specific and in-depth criterion, which has been criticised as “arbitrary”<sup>11</sup> and overly medicalised<sup>12</sup>. The system operates from an initial place of disbelief, which must then be extensively counter argued to a threshold that does not accurately reflect whether a person is actually trans and would benefit from a legal gender change. This can pressure trans persons to trivialise their experiences in order to fit another’s conception of gender and receive the care and support they need.<sup>13</sup>

### How the Court’s Attempt to Reconcile the Legislation Fails to Protect Trans People

The judgement summary notes that their “biological” (sex at birth) definition “does not cause disadvantage to trans people with or without a GRC”. This is not true.

Firstly, trans persons may lose access to medical care, such as (but not limited to) breast cancer screenings, prostate exams, pregnancy support for intersex people who were defined male at birth but potentially capable of pregnancy, nursing support for trans women who breastfeed.

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. Similar positive action measures based on “gender reassignment” would be less effective at combatting the lower acclimation of trans women into specific roles as trans men and women often experience vastly different treatment.

Trans women would lose access to single sex services such as counselling and support for domestic abuse or sexual violence, being given the choice between all-male similar services (which are much less prevalent) or nothing. 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<sup>14</sup>. Trans women forcibly lose the ability to be a part of women only spaces, which can be just as beneficial for them in feeling safe and comfortable and making connections through shared experiences.

The judgement would also negatively impact trans men, who may be excluded from similar services entirely. The women’s service because of their identity, and the men’s space because of being trans.

Additionally, the “sex at birth” definition fails, and in fact worsens, a double standard between different groups of trans persons. The judgement recognises that not all trans people have a GRC, and there is no real way to tell whether a person has or does not have one. This means that the legal category of women in reality refers to cis women, trans women with a GRC and trans men and non-binary AFAB people<sup>15</sup> without a GRC, and men

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<sup>11</sup> Women and equalities committee, 'Oral evidence: Transgender Equality Inquiry, HC 390' (*Parliament Data*), Tuesday 13 October 2015 <<https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.pdf>> accessed 19 August 2025, Q135.

<sup>12</sup> James Morton, of the Scottish Transgender Alliance (Morton, J, Oral Evidence: Transgender Equality Inquiry, HC 390 13<sup>th</sup> October 2015, Q132), found that many trans people had been forced to disclose in detail whether they had undergone, or were planning to undergo various medical treatments despite the GRA 2004 specifying this to not be a requirement, often being pedantic over any perceived inconsistencies (for example a young person, who had not by that point had any sexual relations, being forced to decide and state categorically whether they wanted to have genital surgery).

<sup>13</sup> AN Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishing 2002).

<sup>14</sup> See Peitzmeier SM, Malik M, Kattari SK, et al. Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates. *Am J Public Health*. 2020;110(9):e1-e14. doi:10.2105/AJPH.2020.305774.

<sup>15</sup> Shorthand for “assigned female at birth”.

in reality refers to cis men, trans men with a GRC, and trans women and AMAB people<sup>16</sup> without a GRC. These groupings are criticized as confusing and “heterogenous”. Further, “neither possession of a GRC nor the protected characteristic of gender reassignment require any physiological change or even any change in outward appearance, there is no obvious outward means of distinguishing between a person with the protected characteristic of gender reassignment who has a GRC and a person with that characteristic who does not”<sup>17</sup>. This results in a certified interpretation of sex relating to S9(1) and (2) of the GRA 2004 creating an “odd inequality of status” between the two (where one is afforded legal protection in their affirmed gender and the other not). This is disadvantageous to trans persons, but also for service providers and people generally when there is “no material distinction in their personal characteristics, either as regards gender identity, or appearance, or as to how they are perceived or treated by others or society at large”<sup>18</sup> leading many organisations to already opt for a self ID policy when it comes to sex/gender<sup>19</sup>.

The removal of the GRC’s power to change a person’s sex under the EA 2010 is framed as a remedy to a double standard created. It is not. As noted by the judgement itself, exclusion of trans persons from single-sex spaces and resources is in reality dependent on how well they pass<sup>20</sup>. How well a trans person can pass is dependent on many things, often outside of their control, such as access to medical transition, their genetics, how old they realised they were trans and decided to transition, and many other factors. Although the process of acquiring a GRC is deeply unsatisfactory<sup>21</sup>, it was at least an option that a trans person could chose to take to support them should their right to be in any of the aforementioned spaces be challenged. This gave trans persons some autonomy. Now, a double standard still exists, but instead of being one differentiating those who had a certificate to which all could apply, is one based on access to successful medical care (which, due to long NHS waiting lists, often is a financial double standard for those who can and can’t afford private medical care). The autonomy of trans persons is reduced, as the ability to medically transition to a state of passing in public is less accessible, and much more influenced by factors such as income, familial support, age and genetics than the ability to apply for a GRC.

Outside of direct legal consequences, the judgment also signals a shift in attitude towards trans persons in recent years towards forced exclusion and prejudice. This will likely have an impact on the public opinion of trans persons from cis persons, and also how trans persons feel they are viewed and respected as people by the state. 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, which puts them at risk of hate crime and will directly vary depending on the stage of medical transition that a person has gone through.

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<sup>16</sup> Shorthand for “assigned male at birth”.

<sup>17</sup> Para 202.

<sup>18</sup> Para 203.

<sup>19</sup> See Cooper, D., Emerton, R., Grabham, E., Newman, H.J.H., Peel, E., Renz, F. & Smith, J. (2022) Abolishing legal sex status: The challenge and consequences of gender related law reform. Future of Legal Gender Project. Final Report. King’s College London, UK.

<sup>20</sup> Para 217: “A trans woman with a GRC who presents fully as a woman may feel she is more likely to prompt objections from other users if she enters the men’s changing room or other facilities than if she uses the women’s changing room or facilities.”.

<sup>21</sup> See “The Negative Impact of Certified Sex Definitions”

### Why the court's attempt to reconcile the legislation fails

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 acclimation 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. This is even noted in the judgement<sup>22</sup>; "protections in the EA 2010 recognise that people who share a particular protected characteristic (known or perceived) often have common experiences or needs, whether arising from differences in biology or physiology, or societal expectations or structures affecting their group".

Further, in relation to either type of discrimination, a person's sex defined at birth (the route eventually taken) is rarely relevant. Gender based discrimination relates to how a person is perceived at the present moment, and then treated by another, and not specifically how they were defined as an infant. Biological based discrimination is related to a specific biological attribute, such as the existence of a prostate for those receiving prostate screenings. Cis men, trans women, some intersex people<sup>23</sup>, some non-binary people<sup>24</sup> and some trans men<sup>25</sup> can all have prostates<sup>26</sup>. Relevant only is the current existence of a prostate, and although associated with men, this has nothing to do with gender identity, legally defined or otherwise, even though most trans men/ non-binary people who have undergone HRT<sup>27</sup> will not have been born with a prostate.

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<sup>22</sup> Para 153.

<sup>23</sup> Intersex people are those who have biological traits, including hormonal, genital, chromosomal, gonadal etc that do not neatly fit into the categories of "male" and "female" at birth (a person whose biological characteristics do fit into either male or female at birth, but who then alters one of these, e.g. through genital surgery or hormone replacements, is not normally considered intersex) There are thought to be around 30 different intersex variations affecting an estimated 1.7% (There is some difficulty in determining the exact figure due to disagreement as to what conditions should fall under the category, some studies such as Sax L. How common is intersex? a response to Anne Fausto-Sterling. *J Sex Res.* 2002 Aug;39(3):174-8. doi: 10.1080/00224490209552139. PMID: 12476264., consider only those with Chromosomal variation to be intersex, finding this to be around 0.018% of the population, whereas Anne Fausto-Sterling's (Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. 2000. How sexually dimorphic are we? Review and synthesis. *American Journal of Human Biology* 12:151-166.)'s conclusions consider a wider range of conditions to be included, giving us the number 1.7%.) of the population.

<sup>24</sup> A non-binary person is a person whose sex/gender assigned at birth is incongruent with the gender they later identify with, but whose gender is still either man or woman.

<sup>25</sup> Trans men are those who are assigned female at birth but identify as men.

<sup>26</sup> Xu, R., Diamond, D. A., Borer, J. G., Estrada, C., Yu, R., Anderson, W. J., & Vargas, S. O. (2022). Prostatic metaplasia of the vagina in transmasculine individuals. *World journal of urology*, 40(3), 849–855. <https://doi.org/10.1007/s00345-021-03907-y>.

<sup>27</sup> Hormone Replacement Therapy.

### An Alternative approach

The following is an outline of a general alternative approach to gender recognition and Equality law, based around the distinction between biologically relevant services/functions and gendered ones.

### Biologically Specific Services and Provisions

Part 3 of the EA 2010 is concerned with public functions and the provision of services. Schedule 3 provides exemptions to the terms of section 29 (which make it otherwise unlawful to discriminate in the provision of services or public functions).

The following is a breakdown of key biological based services/provisions:

#### Maternity

As the judgement notes in its analysis, the range of provisions which catch the EA 2010's definition of women can be disadvantageous to trans men with a GRC under a certified definition of sex who go through pregnancy/breastfeeding.

For example, under the Human Fertilisation and Embryology Act 1990 ("HFEA") which governs the administration of fertility treatments defined in Section 2 as services provided "for the purpose of assisting women to carry children", a certified sex definition of woman could exclude trans men with a GRC from receiving treatments. Additionally, in relation to pregnancy, the EA 2010 allows differential treatment afforded by service providers and others to protect health/safety of women generally and pregnant women<sup>28</sup>. A certified definition of women could similarly exclude trans men with a GRC from receiving this care<sup>29</sup>.

This is because these provisions are clearly meant to support those experiencing pregnancy, not only in those with a specific gender identity. Therefore, this language should be updated to reference the specific biological features relevant, which would allow not only trans men to access care, but trans women and intersex people assigned male capable of lactation and (in the instance of the latter) pregnancy.

As a final note, an objection is often made in relation to more inclusive language which tends to erase only women and mothers in a society where women and their experiences are often overlooked. Therefore, it is submitted that language should be inclusive by referencing "women *and* those potentially capable of pregnancy" or similar, focusing on the addition of a biological specification rather than the replacement of "woman" and "mother". The retainment of "woman", under a trans-inclusive definition would not result in any adverse consequences. For example, it would be difficult to argue that a fertility treatment administered to a trans woman was done "for the purpose of assisting" her "to carry children" when she does not have a uterus.

### Occupational and Service Denial under Paragraph 14

As mentioned, in paragraph 14 of the EA 2010 the reasonable exclusion of women from a particular occupation or service due to concerns for their safety is lawful when it can be shown that only one sex would benefit from the service (such as prostate cancer screenings). This rationale for exclusion is a biological one,

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<sup>28</sup> EA 2010 Paragraph 14.

<sup>29</sup> See R (McConnell) v Registrar General for England and Wales [2020] EWCA Civ 559, [2021] Fam 77.

and different from say the exclusion of men from working at a women's domestic abuse shelter (which addresses a gender-based problem and will be therefore discussed later).

Exclusions in the EA 2010 therefore make it lawful for services and jobs to be denied to "women", "men" or "pregnant women" when it can be shown to be reasonable to achieve a legitimate aim. These services/denials of services are therefore related to specific biological features, be it the average height/strength differences between men and women, or the presence of a specific body part, such as a prostate or breasts. Although associated with specific genders, (for example prostates being associated with men), a person's gender identity (legally defined or otherwise) is irrelevant. Likewise, is the sex defined at birth, (the approach taken by the supreme court). For example, some trans men have prostates and can therefore develop prostate cancer, despite not being born with them. Likewise, trans women who have undergone HRT and developed breasts are at an increased risk of breast cancer. Either a "sex at birth" or a "certified sex" definition would exclude groups of people to accessing the services they require.

Therefore, this general exception to direct discrimination is unsatisfactory and should not be lawful. Instead, such biologically relevant "discrimination" should only be permitted through indirect discrimination (which would require a service provider/employer to specify a reasonable criterion that any person must meet to use the service/do the job, even if this disproportionately effects more men or women). This would not only protect say cis men who are physically weaker or (in the example provided) shorter and likely to be at risk but helps to prevent a gender-based exclusion rooted in prejudice masquerading as a "protection" of women (which is harmful to all women).

### Gender Based Services/Provisions

On the other side, there are specific provisions within the EA 2010 and similar legislation which aim to combat inequality that stems from gender discrimination; violence, prejudice and unfair treatment of those of a specific gender (usually women) because of external expectations/beliefs that the discriminator may hold/act upon towards the victim.

Discrimination and disadvantage associated with gender can both relate to specific instances or a defined period of discrimination or harassment with a clear perpetrator or can be a result of systemic disadvantage resulting in (for example) lower acclimation of women to certain jobs.

This type of discrimination has little to do with the actual biology of the person affected, and much more with how they are perceived by the discriminator. This is accounted for generally by section 13 of the EA 2010, which allows a person to claim for discrimination "by association" and "by perception"<sup>30</sup>. However, these measures only cover instances of direct and indirect discrimination and harassment, excluding other measures such as positive action, as well as gendered services and public functions.

The following is a breakdown of key Gender based services/provisions and how such a reform would impact them:

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<sup>30</sup> Discrimination by association or perception covers when a person is discriminated against because they are not themselves part of a protected group but are either associated with said group or incorrectly perceived to be part of that group and subsequently treated differently.

## Positive Action Measures

Paragraph 147 of the judgement references “provisions which allow for positive action to address disadvantages faced by groups of people with a shared protected characteristic.” Including “measures to improve opportunities for underrepresented groups, provided those measures are proportionate”<sup>31</sup>.

Positive action is usually an attempt to combat systemic underprivilege of certain groups, focusing on improving outcomes rather than looking to combat the original root cause of the inequality.

In the summary of the “EHRC’s recognition of problems in their interpretation of sex as certified sex”<sup>32</sup>, positive action is included, noting “currently trans women with a GRC could benefit from ‘women-only’ shortlists and other measures aimed at increasing female participation. Trans men with a GRC could not. A biological definition of sex would correct this perceived anomaly”.

The distinction between a trans person with and without a GRC is indeed an arbitrary one. They are confidential certificates, and many trans persons chose not to apply for one, meaning there is no way to distinguish between the two groups. However, the re-definition of sex in this instance to sex at birth is not preferred. Firstly, it assumes that trans men would (on the whole) benefit from and chose to receive positive action measures aimed at women. For many, this would mean being outed<sup>33</sup> as trans or may make them uncomfortable for being perceived and treated as a “woman”. Even within the system of GRCs, applying for and receiving a GRC is a choice that trans people take, and (for the most part as with any legal engagement a person makes) it is fair to assume they are informed about and consent to the consequences of such a change, such as losing out on positive action measures aimed at women. It is important to protect and recognise that autonomy.

Secondly, it assumes that trans women should not or would not benefit from these measures. This is not true. Trans women also exist within a society that treats men and women very differently, and regardless of the age in which she medically transitions (if at all) will have constantly been witness to and likely internalised societal gender roles, perhaps even to a greater extent in response to trans persons often being held to a higher “standard” of gender conformity than Cis persons. Additionally, if she is, for any length of time by any person, perceived as a woman, she will also have been just as likely as a cis woman to experience discrimination which may limit her.

An argument has been suggested that trans people are protected and given positive action measures through the protected characteristic of “gender reassignment”. However, this characteristic does not differentiate between trans women and trans men<sup>34</sup>, who often face very different types of exclusion to one another outside of the fact that they are trans, based on their gender identity. This combatted in cases of direct/indirect discrimination through the “perception” claim, but not in positive action.

## Gender Based Single Sex Services, Spaces and Public Functions

Gender specific services such as counselling services, public bathrooms, prisons, schools, changing rooms, single-sex associations and communal accommodation have been classed in this paper as gender rather than

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<sup>31</sup> See Sections 158 and 159 of the EA 2010.

<sup>32</sup> Section 19 of the judgement.

<sup>33</sup> When a person’s sexuality or gender identity is forcibly revealed to another or people at large against their will.

<sup>34</sup> Para 199 of the judgement and s7(3)(a) of the EA 2010.

biology-specific measures for two reasons. Firstly, the benefit of access to these services is not related to having a specific biological feature. (For example, the presence/absence of specific genitalia does not mean a person themselves would benefit more/less from a specific changing room and although correlated with, is not the reason for violence against women<sup>35</sup>). Secondly, the objection that another person may have to sharing such a space with a trans person is based on their perception of that person's sex/trans status. For example, a trans person who perfectly passes<sup>36</sup> is likely to not attract any objection when existing in any of those spaces, whereas a trans person who does not pass, or a cis person who appears to look more like the opposite sex, would. This is concerned with an external perception rather than the actual features of the person.

The two main arguments presented by the judgement against a trans-inclusive definition of sex in relation to such gender-based services and public functions are as follows:

First, as a general note about gender-specific services and public functions, the judgement recognises a key compatibility issue between the system of recognising a trans person "acquired sex" and existing law. Specifically, the conditions set out in paragraph 26 of the EA 2010 that a single sex service would need to meet in order to be excluded from a discrimination case (for example paragraph 26(2)(a): a joint service for persons of both sexes would be less effective) "could ever be fulfilled when each sex includes members of the opposite biological sex in possession of a GRC and excludes members of the same biological sex with a GRC"<sup>37</sup>. It uses this incompatibility to support its conclusion that GRCs cannot have impact on the definition of sex in the EA 2010. However, this conclusion harmfully excludes trans persons from the support they need. What about the trans Woman who has experienced domestic abuse and would benefit from counselling? Being excluded from the Women-specific service, her options may be only to access either a gender neutral or male-specific service (which she may possibly be denied from) which does not meet her needs.

Further, by triggering paragraph 27, a (for example) counselling group for women who have suffered sexual assault could lawfully exclude trans women with/without a GRC and exclude trans men where "reasonable objection is taken to their presence" without amounting to gender reassignment discrimination<sup>38</sup>

In replacement, a self ID system would allow all trans persons who would benefit from such spaces to access those that they need, without an artificial "double standard" created between those with/without a GRC. When the distinction of "male" and "female" is made in this way, the concerns about provisions in paragraph 26 are avoided whilst not excluding trans people from support.

The second argument presented is that inclusion of trans persons within those spaces produces a "reasonable objection" by the cis persons who use the space, making it less effective by making those persons less likely to attend. For example, women who have experienced male-perpetrated domestic violence may be less likely to attend a support group which contains a trans woman because of her "masculine" appearance. There are a few reasons this argument is unsatisfactory.

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<sup>35</sup> Specifically in relation to services supporting violence against women, especially sexual violence, there may be an argument made that a trans woman who has not undergone a vaginoplasty (surgical vaginal construction) is less likely to experience the same sexual trauma which results in benefit from targeted counselling services. This is irrelevant, as the sign up for such services has the pre-requisite of experience of sexual violence or domestic abuse. The precise mechanisms of such abuse are largely irrelevant and will vary among both trans and cis women.

<sup>36</sup> Passing is when a trans person is not perceived to be trans by another person.

<sup>37</sup> Para 213.

<sup>38</sup> Para 221.

First of all, the sex that a person was assigned at birth is not something you can know by simply looking at or talking to a person. Whether a woman who appears to be more masculine is in fact a trans woman, a cis woman who presents more masculine (for example a butch lesbian) is not something that can be identified by interacting with her. If a person is less likely to come access a space because of another she perceives to be masculine also using it, should that mean that any woman who is too masculine should be excluded from those spaces? On the other hand, a trans woman who passes as sufficiently feminine would unlikely cause aversion from the same cis woman. This is because the objection is with perceived masculinity rather than a person's gender history. Forcibly excluding all trans persons on this ground but not cis women who may look exactly the same and therefore cause the same distress is clearly unfair and unreasonable.

In terms of gender specific spaces which may involve nudity, such as public changing rooms, the same rules apply. Although the number is fewer, not all trans persons are recognisably trans even when completely naked. Similarly, cis persons may have variations in sexual characteristics, such as men who have developed breasts (Gyno) or women that have undergone mastectomies for breast cancer. Further, there are close to no spaces in which a person is required to fully change among others. The issue again is with perceived gender, not specific body parts. In public changing rooms, most of the time there will be private cubicles for those with, for example, religious objections to being seen by those the deem to be of the opposite sex.

Additionally, it is relevant to note that the similar provisions do not exist, for example, to permit racial, disability or any other protected characteristic segregated service. For example, a counselling group that focused on experiences of racial abuse could not legally exclude white persons, even though it could be foreseeable that people may pose a similar objection or disengagement with the service if those persons were present. The different approach when it comes to sex is not one that is justified or explained by any judgement.

The safety of all trans persons, but especially trans women, is important and cannot be overlooked. As a group which experiences both gendered violence through being and being perceived as a woman, and through being trans, they should be able to expect the same level of safety using public services and gendered spaces as anyone else, "A trans woman with a GRC who presents fully as a woman may feel she is more likely to prompt objections from other users if she enters the men's changing room or other facilities than if she uses the women's changing room or facilities."<sup>39</sup>.

### Lesbian only spaces and associations

A special note is given to the reference to the need for specifically lesbian only spaces in the judgement. Section 12 EA 2010 defines protected characteristic of sexual orientation and is framed by reference to persons of the same sex, the opposite sex, or either sex. The inclusion of trans women in these spaces was described as having "chilling effect on lesbians who are no longer using lesbian-only spaces because of the presence of trans women", and the idea that trans women could not be lesbians was not justified other than with "people are not sexually oriented towards those in possession of a certificate". Whilst this statement is true, it does not follow that a lesbian would not be able to fall in love and be attracted to a trans lesbian. Whilst having nothing to do with the possession of a certificate, as described previously, a person's gender (whether or not they are trans) is not something that can be judged by looking at someone. Additionally, lesbians, especially Butch lesbians have a long history with non-heteronormative conceptions of both gender and gender expression. Although there exist Lesbians who object to the inclusion of trans persons within lesbian spaces, this sentiment is not one shared by the entire community, in fact lesbians have been reported to be one of the most trans

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<sup>39</sup> Para 217.

positive groups<sup>40</sup>. The definition of a lesbian is unworkable and incorrect on a certified sex definition but is also unworkable on a “sex-at-birth” definition.

Further, when it comes to Lesbian only spaces, there is hypocrisy in the exclusion of trans persons because they haven’t always identified as/ been perceived and treated as women. Lesbian identity has two parts: being a woman, and only being attracted to other women<sup>41</sup>. The being attracted to only women portion is taken at the word of the person (Self-ID). There is no way to tell if another person is solely attracted to any specific gender at all. Many lesbians have had/currently have male partners and/or have identified previously as bisexual or straight (not a lesbian). But when it comes to attraction, a person’s past is not seen as relevant. It does not matter if a cis lesbian has only herself identified and been perceived and treated as a lesbian more recently, all that is cared about is how she identifies in the present moment. On the other hand, a person’s gender is treated as something which must have always been constant, like trans persons don’t similarly come into Lesbianism as they learn about themselves and their identity alongside cis queer women.

### Summary of Suggestions of Reform

In summary, these are the reforms that are suggested should be made by an act of parliament to simplify existing law without compromising the rights of trans and cis persons to both access the resources they need and to be recognised as their preferred gender.

These suggestions are non-specific and general.

1. 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.
2. Specifically in relation to maternity, specific anatomical language should be in addition to gendered terms such as “mother” and “woman”.
3. 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
4. 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.
5. 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.

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<sup>40</sup> See Matthew Smith, 'What do lesbian, gay, bisexual and transgender Britons think the British public thinks of them?' (*YouGov*, 11 August 2023) <<https://yougov.co.uk/society/articles/45983-what-do-lesbian-gay-bisexual-and-transgender-brito>> accessed 19 August 2025 and Rachael Milsom, 'Growing up LGBTQ+ The impact of School, home and coronavirus on LGBTQ+ young people' (*Just Like Us*, June 2021) <<https://justlikeus.org/wp-content/uploads/2021/11/Just-Like-Us-2021-report-Growing-Up-LGBT.pdf>> accessed 19 August 2025.

<sup>41</sup> This definition is based on traditional conceptions of Lesbianism. In reality many people who identify as lesbians may not identify as women nor be solely attracted to other people who identify as women.