


Trans matters in health for trusts and acute settings: The decision in For Women Scotland

10 June 2025  Charlotte Harpin, Rebecca Fitzpatrick and Laura Thomas

What has changed?

The Supreme Court decision of *For Women Scotland v The Scottish Ministers* UKSC/2024/0042 (FWS) clarifies the meanings of 'sex', 'man' and 'woman' in the Equality Act 2010 (EqA) as being based on biological sex (sex at birth).

The decision is contrary to the longstanding view of the Equality and Human Rights Commission that sex for the purposes of the EqA could be changed by a Gender Recognition Certificate (GRC). Because many organisations developed policies based on the EHRC view, and on sector-specific guidance that adopted the same approach, the Supreme Court decision is likely to have a considerable practical impact.

EHRC guidance

The Equality and Human Rights Commission (EHRC) has committed to providing full update general guidance by the summer and to work to update other guidance such as that on single-sex services as a matter of urgency. The absence of up-to-date guidance does not alter the legal position determined by the Supreme Court.

EHRC published an 'interim update' on their work on 25 March 2025 and updated this further on 30 March (the EHRC update). The wording of that update makes it clear that it is not updated guidance but states that it is intended to *"highlight the main consequences of the judgment."* The introduction goes on to emphasise the need to follow the law and take advice where necessary. This update offers clarity as to EHRC's interpretation of the implications of the judgment, and we can expect to see much of what is said reflected in their updated draft guidance. A consultation on that guidance is currently open and will close on 30 June 2025.

Inclusion matters

Healthcare organisations have diverse staff and service users. Creating a sense of inclusion for all is important to effective service delivery. FWS will impact on some aspects of how this is done but does not mean that the objective of trans inclusion should not or cannot be pursued. Where policies are revised following the judgment, it will be important to consider what alternative strategies are available to promote inclusion.

Protections continue

The Supreme Court was careful to point out that a range of protections exist for trans and non-binary people under the Equality Act. In this regard, it is important to recall that *Taylor v Jaguar Land Rover Ltd* 1304471/2018 supports an expansive interpretation of the protected characteristic of 'gender reassignment' under EqA. In addition to protection from discrimination in relation to the characteristic, trans and non-binary people benefit from protections from harassment and victimisation, and from discrimination based on perceived sex or association with a sex. Safety, safeguarding and prevention of harm are as important as ever.

In a highly politicised and emotionally charged area such as sex, gender, and trans inclusion it is important organisations are clear that mistreatment in relation to these characteristics or associated protected beliefs is unacceptable.

Employment

We are issuing separate guidance on the employment impact of FWS.

Single sex spaces for patients

Policies in relation to use of single sex spaces such as changing and toilet facilities will require review, considering the judgment. This will need to consider the safety and dignity of service users and visitors, alongside the practical architecture of buildings. Reviews should consider concerns in relation to safety and dignity raised by those affected and seek opportunities to accommodate these.

The guidance from NHS England and NHS Improvement titled 'Delivering same-sex accommodation' which covers this area is from 2019. NHS England has confirmed they are currently reviewing this guidance, and new guidance will include consideration of the FWS judgement.

Once NHS England has released the new guidance, each Trust or organisation will need to consider their own policies in line with this guidance around wards, toilets, showers and changing areas.

Despite this, NHS England has stated that providers should "continue to measure and report breaches of the NHS Constitution on same sex accommodation". There is therefore no change in where financial sanctions apply due to breaches of single sex accommodation. Providers should also ensure they continue to comply with their NHS contract obligations around inequalities are met.

It would be useful to review current policies to consider if an interim policy position is required (or as a minimum recognition of the need for further review and update), in the absence of updated guidance.

In relation to single sex spaces, the EHRC update expresses the view that organisations should not permit trans women to use biological women's facilities and nor should trans men be permitted to use biological men's facilities, as they would then no longer amount to single sex spaces. It goes on to say that in some circumstances the law may permit trans women to be excluded from biological men's facilities, and trans men from biological women's'. It does not set out those circumstances. It makes clear that trans people should not be put in a situation in which they have no facilities available to them, and recognises that some organisations may be able to cater for people with unisex/shared facilities where these provided lockable rooms to be used by one person at a time.

Single sex spaces for visitors

Single sex spaces such as toilets will continue to be accessed by those accompanying patients, visiting patients etc. It is likely not to be known by staff if an individual who is not a patient is trans, unless openly shared by the individual. As with patients, safety and dignity of people remains paramount and legal protections continue to exist under the Equality Act 2010, as commented on above.

As with patients, a review of current policies would be recommended to consider if an interim policy position is required in the absence of further guidance.

Single sex services

Trans individuals will continue to require treatment in what are traditionally single sex services e.g. a trans man accessing maternity care. Staff have on going experience with management of this and until further guidance, should continue to comply with relevant policies.

For those offering or considering provision of single sex services or segregating by sex in the way services are provided, the judgment will impact on what is meant by 'single sex' and how such services need to be considered under the EqA. This may mean different arrangements are required for some trans individuals. Single sex services may arise from considerations of sex-based need, but also from considerations of privacy, dignity, and ability to engage. This may mean there could be a risk of a gap in services for trans people if alternative approaches to service delivery are not carefully considered. Additional support may be required to deal with the impact of a change to service arrangements. While the position will vary according to the service and basis for its single sex status, an interim policy may be needed in some cases, while updated statutory guidance and NHS England guidance is awaited.

The EHRC update says little in relation to single sex services, save to note services open to the public are not generally required to be on a single sex basis. The update states that this may be permissible in some circumstances, and considerations of indirect discrimination may be relevant to the decision of whether to provide a single sex service.

Person-centred care

While aspects of service delivery may change, the importance of person-centred care will not. Trans service users may require revisions to some aspects of their care plans following FWS and a person-centred approach is likely to be important in minimising the potential adverse impact of the decision.

Some trans patients may not wish to disclose their details, through fear of being identified as trans. It is important to continue to deliver person-centred care for all patients and, as part of that so far as possible, work with trans patients to alleviate fears and access relevant past medical history with informed consent.

Public Sector Equality Duty (PSED)

The PSED requires the NHS to have regard to equality considerations when carrying out their functions, including considering how policies and decisions will impact on those with protected characteristics.

Past decisions may have been based on an incorrect understanding of the definition of sex. Often the impact on decisions may be negligible, but for decisions in relation to single sex or trans care provision it may be appropriate for organisations subject to PSED to ensure they remain sound.

Decisions as to how to respond to the FWS judgment are also likely to need to be taken with regard to the PSED.

Clearly documented impact assessments, using an Equality Impact Assessment or similar, is a good way of ensuring that the decision-making process and balance of interests is recorded, as well as helping to highlight where further information is needed or where more work is needed to address inequalities and adverse impact.

Existing disputes

The FWS decision may affect live disputes with employees and participants in relation to individual incidents or policies. Review of these cases to assess impact and adjust strategy is essential, with stays and extensions worth considering, to ensure this can be done well.

New disputes

It is likely that FWS will give rise to disputes based on alleged past discrimination, where it is said the law was incorrectly interpreted. Where organisations are perceived not to have responded to FWS in a timely and appropriate way, disputes may result. Clear decision-making processes that are adequately recorded will be essential in managing litigation risk.

Managed change

Given the attention received by FWS, we know that internal and external stakeholders are likely to already be asking organisations how they will respond, questioning policy decisions and so on. Some may present robust demands and threaten legal challenge.

The need for prompt review and action is clear, but it is critical that organisations take the time to get their response right. All stakeholders deserve the certainty that this can bring.

Organisations in many sectors and their lawyers will be considering and digesting the FWS Scotland over coming days and weeks, to ensure its impact is fully understood.

How can we help?

With [public law](#), equality and [employment](#) specialists in our sector-leading health and life sciences practice, we have wide experience of supporting health and care organisations in relation to their equality policies and responding to challenges and claims, as well as providing training to staff. If you think we can help you, contact us.

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