

Trans matters in care: The decision in For Women Scotland

08 May 2025  James Arrowsmith

What has changed?

The Supreme Court Decision in *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).

Technically, the Supreme Court interprets the law and so this has always been the correct understanding of the legislation. Practically, because many organisations have developed policies based on a different understanding of the law, this is a significant change.

EHRC guidance

The Equality and Human Rights Commission (EHRC) has committed to update general guidance by the summer, and to work to update 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: [An interim update on the practical implications of the UK Supreme Court judgment](#) (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of the implications of the judgment, and we can expect to see much of what is said reflected in their updated draft guidance.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 expected in mid May which may offer further insight.

Inclusion matters

Care 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 EqA. 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

Policies in relation to use of single sex spaces such as changing and toilet facilities 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.

In relation to single sex spaces, the EHRC update expresses the view that to permit trans women to use biological women's facilities and trans men should not be permitted to use biological men's facilities, as they would then no longer amount to single sex spaces. It goes on to express a view 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 goes on to make 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 services

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 means there will be a significant 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 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, though this may be permissible in some circumstances, and considerations of indirect discrimination may be relevant to this decision.

Public Sector Equality Duty (PSED)

The PSED requires public authorities 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 review relevant decisions to ensure they remain sound.

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

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, strengths-based approach is likely to be important in minimising the potential adverse impact of the decision.

Service users who perceive they may be affected by the decision are likely to be worried, and effective information sharing and engagement (with support from advocates, where relevant) could help ameliorate this.

Data

The topic of social care and gender data alignment is already a live one. Practical considerations in addition to principle are very much in play, as all services will continue to work with the systems they have.

R (VRP by SR) v Royal Borough of Kingston upon Thames [2025] EWHC 504 (Admin) (VRP) offers some reassurance here. One of the issues was that gender but not sex was recorded as standard in the defendant's system. The judge found that where sex was also relevant, then this would be recorded as part of an individual needs assessment and care support plan, which would be available to those involved in care. This personalisation approach ensured compliance with the relevant duties under the Care Act in the circumstances of VRP.

Providers

The impact on providers will vary significantly depending on the nature of the service and demographic of service users. Providers affected in terms of their service or their work with individual service users will need to engage effectively with relevant clients and commissioners to minimise service disruption or adverse impact on individuals. They should be aware that other organisations within the system may also have to adjust, so that careful coordination and planning may be needed to successfully realign.

Commissioners

Viewed at local authority and regional level, the FWS decision may have impact on service requirements and service delivery. Existing concerns in relation to the engagement of trans communities in health and care may be exacerbated, by changes arising from the decision and due to public discourse connected with it. Reduced engagement seems likely while services and attitudes are realigned to the judgment.

Existing disputes

The FWS decision may affect live disputes 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.

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 judgment over coming days and weeks to ensure its impact is fully understood.

How can we help?

With equality, employment, health, and care practices we have wide experience of supporting care organisations in relation to their equality policies and responding to challenges and claims. If you think we can help you, contact us.

Contact

James Arrowsmith

Partner

james.arrowsmith@brownejacobson.com

+44 (0) 330 045 2321

Related expertise

Employment

Employment and pensions for public sector

Employment services for healthcare

Governance for health