

# FOR WOMEN SCOTLAND VS THE SCOTTISH MINISTERS BRIEFING NOTE

UK Supreme Court, 26-27 November 2024



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## What will the Supreme Court consider?

1. This case will decide on the lawfulness of statutory guidance issued by the Scottish Government asserting a particular meaning of 'woman' in the Equality Act 2010 (EqA).<sup>i</sup> The case is being brought by the Scotland-based campaign group For Women Scotland (FWS).
2. The UK Supreme Court (UKSC) will determine whether acquiring a Gender Recognition Certificate (GRC) changes what sex a person is under the EqA, and therefore what the terms 'woman' and 'man' mean under that Act, UK-wide.<sup>ii</sup>
3. Under the Gender Recognition Act 2004 (GRA), a person can apply for a GRC, which changes their 'sex' for 'all purposes' in law, except for some specific and general exceptions. This case is about whether the EqA is one of the general exceptions.

## Who counts as a woman?

4. The Court will need to decide whether acquiring a GRC:
  - **Does not change** what sex a person is under the EqA, as argued by FWS, or;
  - **Does change** what sex a person is under the EqA, as argued by Scottish Government. This would mean that a 'woman', for the purposes of the EqA, *includes* those born male who have acquired a GRC deeming them 'female' but *excludes* those born female who have acquired a GRC deeming them 'male'.

## What is the current legal position?

5. An earlier case about the Scottish Government guidance established that 'sex' under the EqA generally means biological sex, and does not mean self-declared gender identity. The only remaining area of doubt in law is about the effect of a GRC.
6. For Women Scotland (FWS) unsuccessfully challenged the Scottish Government's second version of the guidance, which assumed that a GRC *is* relevant to a person's sex under the EqA. In November 2023, Scotland's highest court ruled that a GRC should (mostly) be treated as changing a person's sex under the EqA.

The 2023 ruling means that currently a reference to 'woman' in the EqA normally **includes most people born female** (those who do not have a GRC) **and some people born male** (those who have a GRC), subject to a suggestion that a GRC could be ignored in some situations. But in an unhelpful fudge, the court left open to interpretation, and therefore dispute, when a GRC might be ignored. This decision is binding in Scotland and should be followed elsewhere in the UK, unless and until there is any further decision.

## What are the risks if For Women Scotland lose their appeal?

7. If the UK Supreme Court **upholds** the judgment that acquiring a GRC changes someone's sex under the EqA, but rejects the Scottish Court's attempt to fudge this in an undefined way, the risks below are anticipated.
8. The delivery of single-sex services and spaces will be further threatened. Men who have acquired a GRC deeming them female will have a presumptive right of access to single-sex spaces and services for women, and to apply for female-only jobs.

The EqA permits single-sex services to exclude a person with the protected characteristic of "gender reassignment", *if an additional legal test is met*. In principle, this could be used to exclude men who have acquired a GRC deeming them female from women-only services, spaces, and jobs.

However, previous Commons committee inquiries and government consultations on gender recognition reform have found that providers are already worried about the risk of getting this test wrong and falling foul of the law, making them reluctant to use it, due to the risk of a legal challenge.

A failure to provide reliable single-sex services for survivors of male violence is already putting the UK at risk of breaching its obligations under the Istanbul convention.

9. The legal category 'lesbian' will include some men. The category 'gay men' will include some women.
10. It will not be lawful to exclude men who acquire a GRC from, for example: single-sex associations<sup>iii</sup> for women, such as book groups or walking clubs; lesbian-only clubs and associations; charities whose stated beneficiaries are women; positive action measures such as all women's shortlists; scholarships and bursaries for women and girls.
11. Women who acquire a GRC deeming them male will be excluded from anything designated woman-only, in the same way as men generally are (except those with a 'female' GRC).
12. All the above considerations will apply in reverse for men, including for gay men.
13. Women who acquire a GRC deeming them male will not be covered by pregnancy and maternity protections.

The UK Labour Minister for Women and Equalities recently stated in Parliament that under the EqA, service providers can limit services on the basis of biological sex. *This is currently wrong*. Following the 2023 Scottish judgment, 'women' does *not* include all people born female for the purpose of single-sex spaces under the EqA. As long as the current legal position continues, anyone born female who acquires a 'male' GRC is excluded from these by definition in law, in all circumstances, for life (there is no process to annul a GRC, as it was legislated for as a permanent change).

<sup>i</sup> The case is the fourth and final instalment in For Women Scotland v The Scottish Ministers. In 2022 FWS challenged the interpretation of 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 (GRPBA). This set an objective for public bodies, whereby 50% of non-executive board members should be women. Because it is an example of positive discrimination, the meaning of 'woman' in the GRPBA is determined by the UK-wide Equality Act 2010, which it is outside the power of the Scottish Parliament to alter.

<sup>ii</sup> Obtaining a GRC, a process open to anyone aged 18 or over, requires that a person has a diagnosis of gender dysphoria. Surgery or hormonal treatment is not required. Many men who acquire GRCs will remain discernibly male. Since 2004 the UK Government has granted 8,484 full GRCs. The number has increased annually since 2017/18, with notable increases following the fee reduction in 2021, and move to an online application in 2022. The current government has a commitment to make the application process easier.

<sup>iii</sup> An association under the EqA is any group that has at least 25 members and regulates admission using rules and a selection process. The rules do not have to be written down.