

Cabinet Secretary for Social Justice
Shirley-Anne Somerville MSP

F/T: 0300 244 4000
E: scottish.ministers@gov.scot

Karen Adam MSP
Convener
Equalities, Human Rights and Civil Justice
Committee
The Scottish Parliament

By email:

EHRCJ.committee@parliament.scot

25 April 2025

SUPREME COURT JUDGMENT IN FOR WOMEN SCOTLAND LTD v THE SCOTTISH MINISTERS

1. Thank you for your letter of 17 April 2025 to the Minister for Equalities, Kaukab Stewart MSP, seeking the Scottish Government's initial reflections on the implications of this judgment. I am replying as I am taking the lead in this area for the Scottish Government.
2. These are initial reflections as requested. Guidance on these matters is of course for the Equality and Human Rights Commission as the 2010 Act is for the most part reserved, so what I say is necessarily limited to that extent.
3. For convenience, the judgment is at [For Women Scotland Ltd \(Appellant\) v The Scottish Ministers \(Respondent\)](#) and the press summary issued by the Supreme Court is at [For Women Scotland Ltd \(Appellant\) v The Scottish Ministers \(Respondent\)](#). As you know, I made a statement to Parliament on 22 April and the *Official Report* is at <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=16371> (columns 17 to 34).

What the Supreme Court considered

4. In paragraph 2 of their judgment, the Court notes

“the principal question which the court addresses on this appeal is the meaning of words which [the UK] Parliament has used in the EA 2010 [the Equality Act 2010] in

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

INVESTORS IN PEOPLE™
We invest in people Silver



legislating to protect women and members of the trans community against discrimination. Our task is to see if those words can bear a coherent and predictable meaning within the EA 2010 consistently with the Gender Recognition Act 2004 (“the GRA 2004”).”

5. The Court notes in paragraph 75 that “Section 9 of the GRA 2004 is key to the issues in this appeal”.

6. Section 9(1) provides:

“Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).”

7. However, this is subject to section 9(3). This provides:

“Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation”.

8. In paragraph 156, the court says:

“section 9(1) applies unless section 9(3) applies. Section 9(3) will obviously apply where the GRA 2004 or subsequent enactment says so expressly. But express disapplication of section 9(1) is not necessary as we have explained. Section 9(3) will also apply where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1).”

9. In paragraph 161, the court says:

“What is necessary therefore is a close analysis of the EA 2010 to identify whether there are indicators within it that demonstrate that section 9(3) of the GRA 2004 applies and displaces the rule in section 9(1).”

10. In paragraph 264, after carrying out its analysis the Court concludes that:

“notwithstanding that there is no express provision in the EA 2010 addressing the effect which section 9(1) of the GRA 2004 has on the definition of “sex”, we are satisfied that the EA 2010 does make provision within the meaning of section 9(3) that disapplies the rule in section 9(1) of the GRA 2004”.

11. The court further concludes, in paragraph 264, that the words “sex”; “woman” and “man” in sections 11 and 212 of the 2010 Act mean biological sex, biological woman and biological man.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

INVESTORS IN PEOPLE™
We invest in people Silver



Impact on the guidance issued in relation to the Gender Representation on Public Boards (Scotland) Act 2018 (the 2018 Act)

12. In paragraph 266, the Court concludes that the Guidance issued by the Scottish Government is incorrect. The Court notes that the Scottish Government accepted that the definition of “woman” in section 2 of the 2018 Act bears the same meaning as in the 2010 Act and so *“is limited to biological women and does not include trans women with a GRC”*. The Scottish Government is amending the Guidance accordingly to be in line with the Court’s judgment.
13. The Guidance as it stood said that “women” included trans women with a GRC. The judgment discusses points made by interveners in the case. In paragraph 33, the judgment says: “the EHRC explains its longstanding view and policy position that the terms “sex”, “man” and “woman” in the EA 2010 include those whose sex is certified in a GRC.”

Wider effect of the judgment

14. The judgment relates directly to the interaction between the GRA 2004 and the 2010 Act and how “sex” and related terms in the 2010 Act should be interpreted.

Section 9(3) of the GRA

15. As indicated above, the Court held that express disapplication of section 9(1) is not needed and section 9(3) will also apply where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1).
16. The Court analysed how this worked in relation to the 2010 Act (and, by extension, in relation to the Guidance for the 2018 Act). The Scottish Government would intend to discuss with the UK Government any wider implications. We need to discuss with the UK Government as:
- Section 9, as for the rest of the GRA. extends across the UK.
 - Some enactments which might be affected could be reserved in relation to Scotland.
17. The Court does, of course, make clear (paragraph 100) that the GRA *“continues to have relevance and importance in providing for legal recognition of the rights of transgender people”*

Separate and single-sex spaces

18. The judgment considers a number of aspects of the 2010 Act. Paragraphs 211 to 221 consider separate and single sex services.
19. The general position in the 2010 Act is that services should be delivered without discrimination. Schedule 3 of the 2010 Act contains various exceptions, including on the grounds of sex and gender reassignment, and the Supreme Court decision confirms that they are available. When providing a separate or single sex service,

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot



the provider needs to show that limiting the service in that way is a proportionate means of achieving a legitimate aim.

20. This is one of the areas where guidance from the Equality and Human Rights Commission (EHRC) is needed. The Scottish Government welcomes the [statement](#) issued by the EHRC after the judgment. The EHRC said:

“We will take the outcome of this appeal into account in our ongoing work as the regulator of the Equality Act. That includes the development of our revised Code of Practice which, subject to ministerial approval, is expected to be laid before Parliament before the summer recess. We will be working at pace to incorporate the implications of this judgment into the updated Code, which supports service providers, public bodies and associations to understand their duties under the Equality Act and put them into practice.

Where this judgment impacts upon our other advice for duty-bearers, such as our single-sex services guidance, we will review it as a matter of urgency and alert users to where guidance has been withdrawn or needs to be updated.”

In the meantime, the EHRC will continue to exercise its statutory duties to regulate and enforce the Equality Act 2010, ensuring protection for all protected characteristics including those of sex, gender reassignment and sexual orientation. We remain committed to promoting equality and tackling discrimination in all its forms.”

21. The EHRC have carried out a consultation, which closed on 3 January 2025, on an updated Code of Practice for services, public functions and associations: [Equality regulator opens consultation on updated Code of Practice | EHRC](#)

22. Powers in relation to Codes of Practice are contained in the Equality Act 2006: <https://www.legislation.gov.uk/ukpga/2006/3/section/14>

23. The EHRC also said in their statement that:

“In the meantime, the EHRC will continue to exercise its statutory duties to regulate and enforce the Equality Act 2010, ensuring protection for all protected characteristics including those of sex, gender reassignment and sexual orientation. We remain committed to promoting equality and tackling discrimination in all its forms.”

24. The Scottish Government welcomes this.

Meeting the EHRC

25. The Scottish Government’s planned meeting with the EHRC on 24 April has been postponed. In their [statement](#) on this postponed meeting, the EHRC say:

“we have not met or discussed this judgment with the UK Government – to understand their views, its implications and what further UK guidance may be required.”

and

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot



"In these circumstances, we did not consider it appropriate to enter into a discussion with Scottish Government ministers at this stage."

26. Ministers have written to the EHRC to say that we remain ready to meet with them at their earliest availability to discuss the impact of the judgment further. In particular, we indicated in this letter that the Scottish Government is keen to better understand the process the EHRC is undertaking to update their Code of Practice and the stakeholders they are planning to engage with.

Equal Pay

27. Paragraphs 262 and 263 of the judgment discuss this issue.

28. [Section 64\(1\)\(a\)](#) of the 2010 Act relates to equal pay and employment conditions for men and women. Under section 64(1)(a), a person bringing a pay claim must identify an actual comparator of the opposite sex. The Court notes that "on either definition of sex, some trans people will not be able to use the equal pay route because of the express requirement for a comparator of the opposite sex". The provisions in the 2010 Act are a reserved matter and we will discuss with the UK Government.

Conclusion

29. I am happy to provide any further information which the Committee would find useful.

SHIRLEY-ANNE SOMERVILLE

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

INVESTORS IN PEOPLE™
We invest in people Silver

