24 April 2025

EHRCJ.committee@parliament.scot

Dear Members of the EHRCJ Committee,

Thank you for inviting us to write to the Committee regarding the recent UK Supreme Court (UKSC) decision in *For Women Scotland Ltd vs Scottish Ministers*.

Equality Network is a charity that seeks to improve the lives of LGBTI+ people in Scotland. Since 1997, we have campaigned for progress towards LGBTI+ equality and human rights, achieving real, lasting and positive change. Our work is entirely based on the support from, and needs of, our community. We are not lawyers, and this letter should not be read as constituting legal advice or a legal opinion. Instead, this letter should be read as reflective of our wanting to ensure that the rights, dignity, and lives of LGBTI+ people are upheld, considered, and valued. We are an organisation that works with and for diverse LGBTI+ people to ensure their needs and lived experience are reflected in policy and practice.

We would like to emphasise that the UKSC judgment is only a week old. The published views of lawyers on the legal implications of the judgment vary widely. We have so far heard the initial concerns of our community about the judgment but have not yet had time to conduct thorough stakeholder engagement. These concerns have been expressed by trans people, but also a diversity of women from all walks of life who are concerned with elements of the judgment that could impact their lives and relationships. Therefore, this letter constitutes our preliminary view. It does not constitute legal advice or legal opinion in any aspect.

We are deeply concerned at the potential implications of this judgment for trans people's lives, and the narrative around a very broad reading of the judgment that has developed around it.

Below, we will outline our initial thoughts and concerns on the seeming and potential implications of this judgment, and on the alarming, harmful and negative narratives being seen in the media, and the effect this is having on the trans community. The length of this correspondence is directly reflective of the significance of this decision felt within the community.

We start with some reflections on the judgment and its context. We then discuss the possible interpretations of the judgment, most pressingly for the law applying to trans people's use of single-sex spaces. We then discuss the potential impact on trans people and others. We consider the implications of these issues for compliance with the European Convention on Human Rights. We conclude with other related observations.

We emphasize and reiterate that these written discussions of potential ways in which the judgment may or may not be implemented are hypothetical, until statutory and other guidance is issued. We look at the multiple ways this this judgment may be interpreted and how these could affect the community. We ask that all is considered. We advocate for an implementation that protects and upholds the humanity, dignity, equality and human rights of all.

Contents

The UKSC judgment

The UKSC is the highest court in the UK, and their judgments determine the law. It has widely been said that this judgment brings clarity, but for us and for trans people, that is not the case. In particular, interpretations of the meaning of the judgment for trans people, such as for their use of single-sex spaces, are, so far, varying widely. This is a crucial issue for trans people, and is causing great uncertainty, fear and distress.

It has been widely noted that in the hearings on this case, the UKSC heard evidence from a number of gender-critical organisations, but did not hear from any trans people. If they had, perhaps it is possible that their judgment might have directly addressed some of these crucial interpretation issues.

It is clear that the judgment changes the interpretation of the Equality Act 2010 (EA), and its predecessor the Sex Discrimination Act 1975 (SDA), as far as concerns the application of the Gender Recognition Act 2004 (GRA) to those Acts. All authorities, including the regulator for the EA, the Equality and Human Rights Commission (EHRC), previously believed that possession of a gender recognition certificate (GRC) changed a person's sex for the purposes of the EA.

The UKSC acknowledges that the Explanatory Notes to the Gender Recognition Bill stated that to be the case, in relation to the Sex Discrimination Act 1975. We note also that UK Government ministers, David Lammy and Lord Filkin, confirmed this in Parliamentary debates on the bill on the then Gender Recognition Bill in 2004. It is clear what the intention of Government and Parliament was.

The UKSC notes that that clearly stated intention is not decisive – what matters is the wording of the legislation. The fact that the court has concluded that the legislation means the opposite, on this specific issue, to what was intended indicates unsatisfactory drafting. The legislation is insufficiently clear. For example, had the drafters included an explicit provision in the Equality Act to set out that section 9(1) of the GRA applies to the meanings of 'sex', 'man' and 'woman' throughout, except in specific cases like pregnancy and maternity, (clearly their intention), it is entirely possible that the UKSC would have resolved the need to interpret the law consistently and cohesively in a different way.

However, unless and until the UK Parliament amends the EA to clarify these issues, the UKSC judgment stands as the statement of the law.

The key question then is what the law as set out in the judgment means in practice for trans people. Two key points are that the judgment says that a GRC is ineffective for the interpretation of "sex" in the EA, but also says that trans people continue to be protected by the gender reassignment provisions of the EA, including from discrimination and harassment.

Narrower and wider interpretations

We note that there are already a range of interpretations of this judgment, including about what it will mean in practice for trans people's participation in public life and inclusion in services. The Supreme Court set out in paragraph 8 that the judgment's central question was whether or not a trans person with a Gender Recognition Certificate is considered to legally belong to the sex on their GRC (what the judgment calls their 'certificated sex') for the purpose of the Equality Act 2010. The Court has ruled that they do not, and that the meaning of 'sex' in the Equality Act 2010 is 'biological sex' (although this has not been clearly defined).

In paragraph 2 of the judgment, the UKSC makes explicitly clear that it is not ruling on the definition of the word 'woman' in a broad, social sense but only on the definition of 'sex' in the Equality Act for legal purposes. Whilst this does have far-reaching consequences for trans people, as the Equality Act applies to a large domain of public services, spaces and contexts, it does not state that trans women do not exist or that they are not women at all.

While the central question considered by the court was about the meaning of sex in the Equality Act 2010, and whether trans people with GRCs were to be treated as their certificated sex for the purposes of that Act, we note with concern that some early interpretations of the ruling emerging in the recent days would mean that the consequences are much wider, and would affect all trans people whether or not they have GRCs. Despite the limited central question at the heart of the judgment, we note with concern the vast coverage in mainstream media and commentary which offers a much more expansive understanding of what this ruling might mean, far from the question of the interaction of the GRA and EA.

Media and political narratives that suggest that this ruling was about the 'definition of a woman' not only perpetuate misinformation in the public domain about what the

judgment said – paragraph 2 emphatically stated that 'It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010' - but also will increase the harm that trans people face. Narratives like this potentially encourage discrimination and abuse towards a small minority of marginalised people, making it more difficult for them to go about their ordinary, day-to-day lives.

A range of different interpretations of the judgment have been published in the past week. Mostly, these focus on whether trans people can lawfully access single-sex spaces in their gender identity. Interpretations range from (a) trans people can continue to access these spaces but can also be lawfully excluded, when that is proportionate and legitimate (we call that the 'narrower' interpretation), to (z) trans people can never lawfully use single-sex spaces matching their gender identity (we call that the 'wider' interpretation). In between are other interpretations, for example that service providers can lawfully choose whether to include or exclude trans people.

The narrower interpretation

The narrower interpretation looks to the UKSC's emphatic statement that their judgment ensures trans people are protected in the Equality Act 2010 under the protected characteristic of gender reassignment. Paragraph 260 of the judgment reads:

> 'transgender people (irrespective of whether they have a GRC) are protected by the indirect discrimination provisions of the EA 2010 without the need for a certificated sex reading of the EA 2010, both in respect of any particular disadvantage suffered by them as a group sharing the characteristic of gender reassignment and, where members of the sex with which they identify are put at a particular disadvantage, insofar as they are also put at that disadvantage.'

This reading would seem to suggest that the ruling in *Authentic Equality Alliance CIC v Equality and Human Rights Commission (AEA)* still applies[1]. *AEA* confirmed that trans people's inclusion in single-sex services appropriate to their gender identity is protected by EA provisions against indirect discrimination and the protected characteristic (PC) of gender reassignment, and is not determined by whether or not the trans person in question has a GRC.

[1] https://oldsquare.co.uk/wp-content/uploads/2021/11/R-on-application-of-AEA-v-EHRC-2021-EWHC-1623-Admin.pdf

This would mean that single-sex services would continue to operate in the manner that they have done for at least the last fifteen years. Single-sex services could include trans people in line with their gender identity. They could also modify, restrict or exclude them from single-sex services where doing so was a proportionate means of achieving a legitimate aim.

The ruling would continue to have impacts on the narrow area to which the judges confined themselves – the question of whether or not a Gender Recognition Certificate changes a person's sex for the purposes of the Equality Act. This would still affect trans people's, but more specifically trans women's, ability to make equal pay claims or benefit from positive action (such as the issue that was originally at question in this case – being included in the 50% quota for women's representation on public boards). However, for most purposes, trans people could continue to go about their daily lives with access to necessities such as public toilets, and thereby continue to participate in public life.

The wider interpretation

In contrast, there is a 'wider' interpretation of this judgment that suggests that trans people should be excluded from single-sex spaces by default. We note with grave concern that the balance of media coverage has tipped toward focusing on this interpretation, rather than taking a balanced approach to differing potential interpretations in the absence of further certainty.

In this reading, rather than being narrowly confined to the question of the interaction of the Gender Recognition Act and the Equality Act, the judgment resets the way that all trans people, whether they have a GRC or not, are dealt with in law. The most significant result of this interpretation is that new and significant restrictions to the way that trans people interact with services and facilities that are typically single-sex may always apply.

Below, we will lay out the implications we think that this wider interpretation would have for the everyday lives of trans people and their ability to be full participants in public life. We will also note the potential impacts on other groups, especially lesbians and non-transgender women.

Implications of a wider interpretation on all trans people's human rights

The wider interpretation of the judgment and the suggestions of its implications for trans people's access to spaces, services and ability to participate in public life would have enormously negative consequences on the human rights of all trans people.

This interpretation has suggested that trans people will be required, where services and spaces are provided on a separate or single-sex basis, to use those services and spaces that align with their 'biological sex'. This is a drastic change to how Governments and the EHRC have previously said these services and spaces should approach the inclusion of trans people, whether or not they have GRCs. This previous position can be summarised by the guidance provided at paragraph 13.57 of the EHRC's Statutory Code of Practice for Services, Public Functions and Associations:

> "If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate [aim]."[2]

A non-exhaustive list of areas where the wider interpretation might require trans people to access spaces and services that align with their 'biological sex' includes: toilets, changing rooms, hospital wards and gender-based violence and domestic abuse services.

The impact that this change would have on trans people is profound and would clearly result in repeated breaches of trans people's human rights across the UK. (We do not think that the below is a complete analysis of the extent of the human rights breaches that would result from this change.)

Privacy

The wider interpretation would completely strip trans people of their right to privacy. This would happen in two clear and important ways.

[2] https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

The first is that it would force trans people to use spaces and services that do not align with their deeply held gender identity. As the European Court of Human Rights (ECtHR) said in *AP, Garçon and Nicot v France:*

> "The right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals."

Being forced to use spaces that align with their 'biological sex' rather than their gender identity would cause trans people significant harm and distress and interfere with their privacy rights. The likely result of this is that many trans people would choose to avoid using public facilities and services as much as possible – significantly reducing their ability to participate in public life. Our research in 2023 with almost 600 trans people across Scotland found that 61% of trans people had avoided public services due to fear of being harassed, being read as trans or being outed[3]. Of the services that we asked about, this was by far most common when it came to avoiding public toilets.

The ability to access public toilets is essential, and the implementation of the wider reading of the judgment will very likely increase the amount of trans people who feel they must avoid them, which is already high. That is why in her 2024 paper, "*Human rights of trans people: increased visibility and legal recognition contrast with lived experience of discrimination, violence*", the Council of Europe Commissioner on Human Rights stated that:

> *"The Commissioner, like the UN Special Rapporteur on the human rights to safe drinking water and sanitation, stresses that where only gender segregated toilets are in place, states must ensure that everyone is able to use the bathroom that matches their gender identity. Indeed, barring trans people from using toilets that correspond to their gender identity essentially results in preventing them from accessing sanitation altogether in places where only gender- segregated toilets are available."*[4]

The second is that by forcing trans people to use facilities that do not match their gender identity, the result for many trans people will be that they are outed as trans to others. For example, someone having to use the toilet at work that corresponds to their

[3] https://www.scottishtrans.org/wp-content/uploads/2024/07/Scottish-Trans-and-Nonbinary-Experiences-Research-Report.pdf

[4] https://www.coe.int/en/web/commissioner/-/human-rights-of-trans-people-increased-visibility-and-legal-recognition-contrast-with-lived-experience-of-discrimination-violence#:~:text=%E2%80%9CRealising%20the%20rights%20of%20trans,Dunja%20Mijatovi%C4%87%2C%20while%20releasing%20a

‘biological sex’, as opposed to their gender identity, would out them as trans to their colleagues. Or someone who is placed on a hospital ward that corresponds to their ‘biological sex’ as opposed to their gender identity, may be immediately outed as trans to others on that ward, and their visitors. As well as removing trans people’s privacy about their trans status, this could potentially open trans people up to experiences of discrimination, harassment, abuse and violence. We also think it is very likely that trans people would avoid necessary hospital care due to the potential humiliation of being placed in a ward where they clearly do not belong.

Risk to safety and wellbeing

Being forced to use spaces and services that align with their ‘biological sex’ is likely to introduce trans people to risk of significant harm when trying to go about their daily lives.

Our research in 2023 with almost 600 trans people across Scotland found that:

- 18% had experienced verbal harassment, insults or hurtful comments in public toilets
- 12% had experienced threats of physical or sexual harassment or violence in public toilets
- 8% had experienced sexual harassment or violence in public toilets
- 5% had experienced physical harassment or violence in public toilets

Forcing trans people to use the toilets that align with their ‘biological sex’ is likely to substantially increase these experiences or threats of harassment or violence.

A 2019 study based on US survey data with more than three thousand trans young people looked at the risk of sexual assault and whether or not this was impacted by school policies on access to toilets and changing rooms. It found that:

- 26% of trans students had experienced sexual assault in the last year. That compared to 15% of female students who were not trans, and 4% of male students who were not trans.
- Trans pupils who attended schools that restricted their access to toilets and changing rooms (ie, did not allow them to use the facilities that aligned with their gender identity) were at increased risk of sexual assault.
- Where schools had policies that did not allow trans pupils access to toilets and changing rooms that aligned with their gender identity, the increased risk of

sexual assault was experienced across all school settings, not just in toilets and changing rooms.[5]

The UKSC judgment did make clear that, in the case where services were being restricted on a 'biological sex' basis, that trans people could be excluded from both the services aligned with their 'biological sex' and those aligned with their gender identity. The example was given of a trans man who could be excluded from men's spaces (due to being female in the eyes of the Equality Act) but also from women's spaces on grounds of his "masculine appearance or attributes to which reasonable objection might be taken in the context of the women-only service being provided" (paragraph 221).

This presents the real possibility that if the wider interpretation of the judgment is implemented, there will be circumstances in which trans people are genuinely considered to be legally permitted to be excluded from both male and female spaces, even if such spaces are only provided on a separate or single-sex basis and there is no viable third option. This would seem to present a clear risk to trans people's safety and wellbeing – such as around their placement in hospital wards, or access to gender-based violence and domestic abuse services (which is of particular concern given that evidence shows that trans people experience gender based violence at increased rates to both women and men in the general population, with one systematic review of evidence around the world finding that they were 2.5 times as likely to experience sexual intimate partner violence than the general population[6]).

The suggestion that this could be remedied by the creation of third spaces, solely for trans people, is not only impracticable, but also gets to the heart of the fact that the wider interpretation of this judgment would need to be remedied by primary legislation. Trans people are 0.5% of the population – would it really be feasible to mandate the provision of (and resources required for) third spaces for them, across society? It would be a clear demonstration that our legal framework had created an absurd situation in which a group of people have had their access to spaces that align with their gender identity removed due to the view that 'biological sex' must be the rational basis for the

[5] Murchison, G.R, Agénor, M., Reisner, S.L., Watson, R.J. (2019) "School Restroom/Locker Rooms Restrictions and Sexual Assault Risk Among Transgender Youth" *Paediatrics* 143(6) https://pmc.ncbi.nlm.nih.gov/articles/PMC8849575/

[6] Peitzmeier, S et. Al (2020) "Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates" *American Journal of Public Health* 110(9): e.1-e.14 https://pubmed.ncbi.nlm.nih.gov/32673114/

provision of such spaces, but at the same time are excluded from spaces that match their 'biological sex' because they so clearly cannot be rationally treated as that 'biological sex'.

Non-discrimination

A wider interpretation of the judgment may also result in the UK failing to comply with the right to non-discrimination contained in the ECHR. Whilst the UKSC is adamant that trans people remain protected from discrimination under the protected characteristic of gender reassignment in the Equality Act, if a wider interpretation of the judgment were adopted, this protection would be ineffective if trans people can always be legally excluded from single-sex spaces and services that align with their gender identity. This would place trans people in the position of repeatedly having to access and use spaces and services that conflict with their deeply held gender identity, when the rest of society is not required to do so.

Such a difference in treatment would need to be objectively and reasonably justified, i.e. measures must pursue a legitimate aim and be proportionate and there must be a link between the two. It is hard to envisage how a blanket ban on all trans women from all single-sex spaces would be a proportionate response to achieve a legitimate aim of, for example, ensuring women's safety in single-sex spaces. This is particularly true given that trans people make up only 0.44% of the Scottish population according to the recent 2022 census data. We note that this assessment is absent from the UKSC's judgment and no evidence was put forward to suggest that trans women pose any threat to women's safety in single-sex spaces. As such, a wider interpretation of the judgment may result in trans people's right to non-discrimination being violated.

Effect on the Gender Recognition Act 2004 and the obligation to provide legal gender recognition

All interpretations of the judgment seem to us to fundamentally undermine the key purpose of the Gender Recognition Act 2004, and it is hard to understand how the UK now remains compliant with the European Court of Human Rights (ECtHR) ruling in the case of *Goodwin v United Kingdom*. This, and subsequent rulings of the ECtHR, place a positive obligation on the UK to provide sufficient legal gender recognition, which is supplemented by the Council of Europe Recommendation CM/Rec(2010)5.

The UKSC judgment has fundamentally changed the effect of obtaining a Gender Recognition Certificate on how a trans woman or man will be treated by the Equality Act

2010. This goes to the heart of the purpose of the Gender Recognition Act 2004 and the binding ECtHR ruling in the case of *Goodwin v United Kingdom*.

That case dealt with a trans woman who argued that the UK Government was breaching her rights by not allowing her to be recognised in law as a woman in the spheres of employment, social security, pensions and marriage. The ECtHR ruled in her favour and found that the UK violated Article 8 (respect for private and family life) and Article 12 (right to marry and found a family) of the ECHR by failing to provide legal gender recognition. The *Goodwin* judgment created a positive obligation on the UK to provide a route for trans people to legally change their gender in line with who they truly are and subsequently, the Gender Recognition Act 2004 (GRA) was enacted.

We recognise that when the UK Parliament enacted the GRA, it chose to go further than what was strictly required under Article 8 and the ECtHR's ruling in *Goodwin*. This avoided what would later be ruled as human rights violations by requiring medical intervention or surgery to have access to legal gender recognition, as ruled in the ECtHR case of *AP, Garçon and Nicot v France*. This was noted by the UKSC in its judgment at paragraph 73. Extending protection beyond the minimum level that the Convention affords in this way is entirely permissible under Article 53 ECHR.

However, when a State affords a level of protection that exceeds what the Convention requires, it cannot lawfully retract that protection later. Pursuant to a key principle of international human rights law, 'non-regression', States must not take actions which reduce, deliberately weaken or render impractical, the enjoyment of the protection of existing human rights, including in light of economic and social challenges.

One result of the UKSC ruling is that trans women and trans men with GRCs would no longer be recognised as women and men in law in the spheres of employment regulated by the Equality Act 2010, where they were previously understood to do so. Trans women will not be able to take sex discrimination claims recognised as women in law, they will not be able to take equal pay claims where the comparator is a man, and they will not be able to benefit from positive action measures for women.

While we acknowledge the UKSC's reassurances that trans women will still be practically protected from sex discrimination by 'perception' or 'association' (and this is of course important and was the case for trans women without GRCs before the judgment), this only reinforces the fact that the judgment has removed recognition before the law. While trans women may still be able to access remedy where they face sex discrimination, they will have to do so within a legal framework that says they are not women – but have only been 'perceived' as a woman or 'associated' with women.

This is the very opposite of recognition. It also stands in direct contradiction to what the ECtHR's found in *Goodwin* at paragraph 74:

> *"It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory."*

As well as removing recognition before the law, the decision will additionally fundamentally undermine the aspects of the *Goodwin* decision that were about upholding trans people's privacy about their trans status. This is likely to occur at times where trans women and trans men with GRCs need to navigate areas of life regulated by the Equality Act 2010, and where their legal status is at odds with their gender identity and lived reality.

One example of this is to consider the impact on the operation of the Gender Representation on Public Boards (Scotland) Act 2018, guidance for which was the focus of this case. A result of the ruling is that if a trans woman were to apply for a position as a non-executive member of a Board on one of the Scottish Public Authorities regulated by that Act, she would no longer be recognised as a woman if a tie-breaker situation were to occur between her and a candidate who was a man. However, it is not clear whether in addition to losing this recognition and right to benefit from the positive action measure, Scottish Public Authorities will now be required to obtain proof from candidates about their 'biological sex' in order to apply the judgment. This would clearly have the effect of deterring both trans women and trans men from applying for Boards at all, as it would remove any choice they had around maintaining privacy about their trans status, regardless of whether they can benefit from positive action measures.

Another example is where equal pay cases may arise. A trans woman who is approached by a female colleague to join an equal pay case because she, alongside other women workers, is paid less than men in her place of work will likely have to disclose that she is unable to join the case because in law for the purposes of equal pay claims she is not considered a woman. The judgment has the effect of removing the trans woman's ability to be recognised as a woman for the purpose of making an equal pay claim, as well as forcing her to disclose her trans status to others in her place of work.

In this way, the decision has had the dual effect of reducing both the right to recognition in law and the right to privacy that the UK is obliged to meet as part of its membership of the European Convention on Human Rights.

Lesbian relationships

All interpretations of this judgment have potential impacts on the understanding and recognition of lesbian relationships. In paragraphs 206 – 209 of the judgment, the UKSC decided to define, in a restrictive sense, what constitutes a 'lesbian' relationship. In the court's view, a cisgender woman who has a life-long lesbian identity would not be considered a lesbian for the purposes of the Equality Act if she is, or has been, in a relationship with a trans woman.

We understand that the court needed to lay out the implications of its judgment for the purposes of the protected characteristic of sexual orientation under the Equality Act. However, we were surprised to see comments on the social, rather than legal, sexual orientation of both lesbian trans women, and lesbian non-transgender women in relationships with them. The choice to state that the inclusion, presence, or existence of lesbian trans women amounts to an 'inevitable loss of autonomy and dignity for lesbians' (paragraph 207) appears to be a value judgment about the validity of the lesbian identities of both trans lesbian women, and non-trans lesbian women in relationships with them.

Despite the UKSC's view that this interpretation protects trans people from discrimination, it is hard to see how that remains the case when the law will now treat a trans woman in a lesbian relationship as a male in a heterosexual relationship, and would regard any non-transgender woman in a relationship with her as being in a heterosexual relationship. This arbitrary definition not only invalidates those relationships, but it now also classifies a cisgender woman, who is in a relationship with a trans man, as a lesbian, even although she may not identify as a lesbian or see herself as part of the LGBTQIA+ community.

By adopting such an interpretation, the UKSC has failed to recognise the social reality for many trans people and has failed to understand the variety of different relationships that exist within the LGBTQIA+ community.

This also has negative practical implications on how lesbian women, where one of the partners is trans, pursue discrimination cases related to the protected characteristic of sexual orientation. If such a couple were to be discriminated against for their relationship, they would only be able to argue that they were discriminated against due to the *perception* of a lesbian relationship. Being perceived to be in a lesbian relationship is different from being legally recognised as such – perception is not full recognition. This could force life-long lesbians to disavow their own identities in order to seek remedy for discrimination.

Broader questions

How is biological sex defined?

The ruling has not provided clarity, and has left more questions than it has provided answers. The question of how 'biological sex' will be defined for the purpose of interpreting the Equality Act and all the aspects of life that it touches has been left open, described only in the following passage:

> *'Although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women are on the face of the definition only differentiated as a grouping by the biology they share with their group.' (paragraph 171)*

When referring to biological sex, it is the case that this is generally understood as far more than the supposed obvious observed genitalia. Sex refers to both primary and secondary sex characteristics. These are the chromosomal, gonadal and anatomical features associated with biological sex. The referral of the judgment to the unambiguous man and woman here is misguided and leaves much to interpretation. It assumes a circular definition – where one is defined by being a member of a group, and where which group you are member of is defined by that group – it does not explicitly define anything.

We would like to point out that, significantly, the Scottish Government recognises variations in sex characteristics (VSC) within its own work, recognising the reality that sex characteristics are not binary. The Scottish Government already recognises that biological sex is far more complex than has been presumed within the UKSC judgment. Variations in sex characteristics is recognised in the Hate Crime and Public Order (Scotland) Act 2021. That Act splits the previous definition of transgender identity, which included the term 'intersexuality', into separate groups. Transgender and variations in sex characteristics are therefore now separate characteristics. The Act recognises that people who have a variation in sex characteristics of course exist, and experience hate based on diversity in their biological sex characteristics.

Section 11(8) of the Hate Crime and Public Order (Scotland) Act 2021 defines VSC as:

> (8) A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither—

(a) those typically associated with males, nor

(b) those typically associated with females,

and references to variations in sex characteristics are to be construed accordingly.

Intersex/ Variations in sex characteristics (I/VSC or VSC) is an umbrella term used for people who are born with variations in biological sex characteristics – this may mean that they have bodies which do not fit society's perceptions of typically male or female bodies. Variations in sex characteristics are vastly diverse. There is no space here to go into the depth and detail of the many variations in biological characteristics, chromosomal patterns, and primary and secondary characteristics that are common across the many variations. However, we will state here categorically that 'biological sex' is not simple, nor as easily definable as binary male and female anatomy.

Intersex people or people with variations in sex characteristics are internationally recognised as facing breaches to their human rights based on the fact that their biological sex characteristics are not binary. This very fact calls into question the notion, stated in the UKSC judgment, that biological sex can be approached without definition, or be assumed to have "ordinary meaning" or be considered "plain and unambiguous", or that biological sex can be considered "self-explanatory" without necessity for further explanation. Intersex people are recognised and protected within the law: in Scotland, in the Hate Crime Act, as well as, for example, in Malta. These protections were celebrated and reaffirmed as the primary human rights aspirations of people with Variations in Sex Characteristics across the UK and Europe by the International Intersex Forum supported by ILGA and ILGA-Europe. This declaration affirmed the existence of intersex persons and demanded an end to discrimination, and called to ensure the right of bodily integrity, autonomy and self-determination. These calls and this recognition are mirrored in the UK by the INIA: Intersex - New Disciplinary Approaches research project, based across Huddersfield University, Dublin City University and European research partnerships (in Brussels, Switzerland, Barcelona, and Spain) and with Equality Network in Scotland. They emphasise the reality that sex/ sex characteristics are not neatly defined or binary, and to suggest so erases a multitude of diversity in humanity.

How would a wider interpretation be enforced?

Given the lack of definition of 'biological sex', the low likelihood that many people of any gender regardless of trans status have a paper copy of their birth certificates, that trans people with GRCs have birth certificates reflecting their 'certificated sex', and that

many trans people without GRCs have other forms of identification – such as passports and driving licences – that reflect their acquired gender, it is very difficult to see how any service would be expected to comply with a wider interpretation of this judgment.

If the wider interpretation of the judgment is implemented across public life – barring trans people from toilets, changing facilities, and other public spaces that are considered to be single-sex – then trans people will face increasing harassment and isolation, as well as limited ability to engage in the public sphere. The increased surveillance and attempts to 'verify' that people are using the 'correct' service will also certainly lead to secondary effects, such as non-transgender people also being challenged when going about their business and interacting with single-sex spaces. This will likely have further adverse impacts on people with intersecting characteristics – for example, it may impact non-transgender women with medical conditions such as PCOS which can cause them to have facial hair, or women who have had mastectomies for breast cancer.

This creates questions of whether untenable responsibilities will be placed on single-sex services of any kind – whether toilets, changing facilities, associations, clubs, or organisations – to somehow verify the 'biological' sex of their service users. What consequences will single-sex service providers face if they fail to adequately screen their service users? What will constitute 'adequate' screening? What form of screening will be consistent with people's privacy?

How is single-sex space being defined and which ones are and are not impacted by the judgment?

There is also a question of how exactly a single-sex service or space is defined. Clearly, the Equality Act 2010, which this judgment relates to, does not regulate all spaces that may be commonly understood by the general public as being 'single-sex'. There is already a narrative emerging that this judgment will impact every one of these kinds of spaces, including, for example, toilets provided for customers in private businesses. We do not agree that this is the case but are concerned that this narrative is taking hold and will mean that if the wider interpretation of the judgment is implemented, this may result in it having an even more negative impact than we have outlined above.

How can services, spaces and associations that want to continue to welcome trans people operate?

Under the wider interpretation, services, spaces, associations, clubs, and other organisations that are currently single-sex but trans inclusive will face uncertainty as to how they can continue to operate within the law in a way that includes all of the people

they have chosen to serve. A wider interpretation of the ruling that affects services, spaces, and associations as described above also has implications for the free association rights of women who wish to, for example, associate with both trans and non-trans women, but not men.

They may also face enforcement measures if they get this wrong (as has been stated publicly by Baroness Falkner, the Chair of the Equality and Human Rights Commission, since the judgment). Very little reassurance has been provided by either the EHRC, or the UK or Scottish Governments, that equal effort will be dedicated to helping these services, spaces and associations understand how to include trans people, rather than exclude them.

A departure from the current understanding and operation of the law

Whatever interpretation is taken, the judgment has fundamentally changed the understanding of the interaction between the Gender Recognition Act 2004 and the Equality Act 2010. Additionally, adopting a wider interpretation of the UKSC's judgment would be a departure from, and fundamental change to, what was a settled understanding of the law on trans people's ability to access single-sex services in line with their gender identity, regardless of whether they had a GRC.

This is contrary to some recent commentary that the Gender Recognition Act never intended to change a trans person's sex for the Equality Act 2010, and that all trans people regardless of whether they have a GRC or not have always been allowed to be excluded from single-sex spaces that align with their gender identity as the default. That is simply not true and not how services have been operating for 15 years.

As we have already stated, the EHRC's Statutory Code of Practice for Services, Associations and Public Functions provided clear guidance that trans people, whether they had GRCs or not, should generally be included in single-sex services that aligned with their gender identity, and that modifying their access to such services or excluding them from such services had to be a proportionate means of achieving a legitimate aim to be lawful.

That guidance was the target of an attempted judicial review, in the case of *Authentic Equity Alliance v EHRC*. The English High Court was clear in 2021 that the guidance was a lawful description of the operation of the Equality Act[7].

The EHRC also repeated this interpretation in the draft update to the Statutory Code of Practice that they consulted on at the end of 2024, with the relevant section stating:

> "13.113 There are circumstances where a separate or single-sex service provider can prevent, limit, or modify trans people's access to the service. This is allowed under the Act. However, limiting or modifying access to, or excluding a trans person from, the separate or single-sex service of the gender in which they present might be unlawful if the service provider cannot show such action is a proportionate means of achieving a legitimate aim. This applies whether the person has a GRC or not."

This was the settled interpretation of the treatment of all trans people in single-sex services or spaces regardless of whether or not they had a GRC, since the Equality Act was passed, until last Wednesday.

We note also that this interpretation of the effect of a GRC was set out in the Explanatory Notes to the Gender Recognition Bill in 2004, and also in debates on that bill in the Commons and Lords. Additionally, these discussions included the view that trans people should be included in single-sex services, and not forced to use separate spaces.

In the Commons:

> "**David Lammy (Labour Government Minister):** I am grateful for that intervention from the hon. Gentleman, who has drawn the natural conclusion from the debate. Frankly, new clause 6 would warrant the exclusion of transsexual people from changing and washing facilities, and the creation of separate facilities for their use.
>
> **Andrew Selous (Conservative):** If the Minister is fair, he will acknowledge that at the start of my remarks about new clause 6, I said that I hope, expect and believe that the vast majority of transsexual people—if not all of them—will use the facilities appropriate to their acquired gender. I am discussing a reserve power to cover serious

[7] https://oldsquare.co.uk/wp-content/uploads/2021/11/R-on-application-of-AEA-v-EHRC-2021-EWHC-1623-Admin.pdf

> difficulties, and we all accept that such circumstances are a remote possibility.
>
> **Mr. Lammy:** The hon. Gentleman may well approach the issue on the basis of separate-but-equal treatment, but the Government entirely reject the implication of the new clause that transsexuals might set out to cause offence to others. That is not the Government's experience, and we therefore reject the new clause.
>
> The Government also believe that separate facilities for minority groups are objectionable, and we urge the House to reject the proposal. For obvious reasons, many hon. Members fought to ensure that separate signs for minorities became a thing of the past in South Africa, and we did not engage in that fight in order to set up such prejudice over here."[8]

In the Lords:

> "**Lord Filkin (Labour Government Minister):** On the important issue of discrimination, Clause 9 makes it clear that a transsexual person would have protection under the Sex Discrimination Act as a person of the acquired sex or gender. Once recognition has been granted, they will be able to claim the rights appropriate to that gender."[9]

The settled view on the approach to all trans people's inclusion in single-sex services, regardless of whether or not they have a GRC, has been confirmed by successive UK Governments:

Theresa May's Government, in a factsheet produced by the Government Equalities Office on their consultation in 2018 for reforming the Gender Recognition Act 2004: *"The Government is clear that there will be no change to the Equality Act 2010, which allows service providers to offer separate services to males and females, or to one sex only, subject to certain criteria. These services can treat people with the protected characteristic of gender reassignment differently, or exclude them completely, but only where the action taken is a proportionate means of achieving a legitimate aim. Importantly, a service provider's starting point should be to treat a trans person in the gender they identify with, and to allow them to access services for that gender unless by*

[8] https://publications.parliament.uk/pa/cm200304/cmhansrd/vo040525/debtext/40525-25.htm

[9] https://publications.parliament.uk/pa/ld200304/ldhansrd/vo031218/text/31218-07.htm

doing so they would be unable to provide that service to other service users. This means it can't be a blanket ban, or done on a whim. It has to be for a real reason, on a case by case basis. For example a female only domestic violence refuge may provide a separate service to a trans woman if it can be shown there is a detriment to other service users from including the trans woman as part of the regular service. If they then have to exclude that trans person, they ought to consider what alternatives they can offer to the trans person. This has been the law since 2010 and will not change."

Keir Starmer's Government – Office for Equality and Opportunity response to a call for input on single-sex spaces guidance, in 2024: *"Overall, 404 individual pieces of guidance which fit the response criteria outlined on the call for input gov.uk page were submitted. After reviewing these examples, we found that the majority seem to correctly interpret the Equality Act's single-sex spaces provisions. In some cases, guidance reflected the organisation's own policy to allow those with the 'gender reassignment' protected characteristic access to single-sex spaces that correspond with their self-identified gender, but did not incorrectly suggest that this is mandated by the Act."*

Recommendations to the Committee

The Equality Act is reserved legislation and any changes to it are required to be made by the UK Parliament.

The decision about how to interpret the UKSC ruling is therefore primarily one for the UK Government and Parliament (and potentially future court cases). However, the implications of that interpretation are so significant that we ask the Committee to:

- Make a representation to the EHRC that it considers very carefully the correct interpretation of the judgment, including in the light of its responsibility to promote compliance with the European Convention on Human Rights, before drafting its new codes of practice;
- Make a representation to the EHRC that when it consults on drafts of any new codes of practice, it ensures that trans organisations and people have an opportunity to respond fully in a meaningful way and that this engagement will be approached in good faith;
- Make a representation to the EHRC that when it produces its new code of practice, it dedicates equal time to explaining how to include trans people in spaces, services and associations as it does to explaining how to exclude them;
- Engage with the EHRC's consultation on its draft new codes of practice;

- Urge the Scottish Government not to make premature statements about the implications of the judgment, but to wait until the EHRC's drafting and consultation have taken place;
- Whatever the ultimate interpretation of the judgment, continue to hold public bodies and others accountable for their treatment of trans people in a way that maximises their wellbeing and human rights, consistent with the UK reserved legislation.

Conclusion

Whilst the Supreme Court judgment has been praised by some for providing 'clarity', this is certainly not the case for our organisation, trans people, and many in the wider LGBTI+ community and our allies. For us, it raises far more questions than it answers.

All readings of the judgment would seem to have clearly removed rights from trans women and men with gender recognition certificates that they may have held for twenty years, and which the UK is required to provide due a ruling of the European Court of Human Rights. In addition, two diverging interpretations of the further impacts of the judgments have emerged since last week (with of course further interpretations that may sit somewhere between them).

Some have outlined an interpretation (which we have called the "narrower" interpretation), which would imply that trans people would still be able to access single-sex spaces that align with their gender identity but could lawfully be excluded where that is a proportionate means of achieving a legitimate aim. This is in line with how the law has been understood, interpreted and has operated for the last two decades across successive governments, political parties and public authorities without issue or evidence that this poses risk or harm.

Others have outlined a "wider" interpretation: that trans people should always be excluded from single-sex services that align with their gender identity. That would have significant negative impacts on trans people's lives, their privacy and their ability to participate in ordinary life, and potentially on other people also. It would in our view constitute the undoing of decades of progress towards trans equality. Again, in our view, it would fundamentally breach trans people's rights under the European Convention on Human Rights, constituting a dark mark in the UK's history of protecting the human rights of those most vulnerable in our society.

Again, we thank you for the invitation to write to you with our opinion on the implications of the judgment, and we welcome the opportunity to engage further on this.

Kind regards,

Dr Rebecca Don Kennedy

and

Vic Valentine, Manger, Scottish Trans