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Intervention to the Supreme Court on the definition of sex

Briefing on the intervention by Sex Matters

Sex Matters, represented by Ben Cooper KC and David Welsh, is intervening in the appeal in the case of For Women Scotland v Scottish Ministers, which will be heard by the Supreme Court on 26th and 27th November 2024.[1]

The key question

Should the meaning of "sex" (man/woman) in the Equality Act 2010 be read as being modified by section

[1] Full written intervention

9(1) of the Gender Recognition Act, which says that, on obtaining a GRC, *"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"?*

We argue that

The Gender Recognition Act cannot in fact alter a person's biology or their related needs, or the perceptions or beliefs of others, and these remain salient to the purposes of the Equality Act.

In enacting the Equality Act, Parliament chose to protect people from discrimination based on sex and gender reassignment, as separate

characteristics.

A reading of “sex” in the EqA10 as being modified by a gender-recognition certificate:

- is not necessary to meet the legislative purposes of either the Equality Act or the Gender Recognition Act
- would lead to absurd, unjust and irrational results
- would run counter to the legislative purposes of the Equality Act
- would infringe the rights of women and girls under Articles 8 and 11.

Our experience and research highlights how uncertainty and ambiguity about the circumstances in which it is legitimate to treat biological women and girls as a distinct group has the practical effect that many

organisations feel inhibited from doing so at all, or compelled to adopt a “self-ID” approach.

Can man and woman have variable meanings across the Act?

The previous judgment suggested that the meanings of man and woman may vary across the Equality Act. We disagree. **The term “sex” and related expressions must be given a consistent meaning across the whole of the Equality Act.**

Principles of statutory interpretation	In relation to the Equality Act

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- **The context of the statute** as a whole is important.
- **Words should be given a constant and predictable** interpretation.
- **A statutory definition** has the effect that "whenever this expression is used in this Act, this is what it means".
- **The protected characteristics provide the foundations** for the whole architecture of the Equality Act.
- **The protected characteristic of sex is defined** by reference to "man" and "woman", and the Act provides definitions for "man" and "woman".

The purposes of both the Equality Act and the GRA must be considered

We argue that Section 9(1) of the Gender Recognition Act is a "deeming provision". The law on deeming provisions tells us that they should be applied only insofar as is necessary to achieve their purpose and not so as to produce "unjust, absurd or anomalous results".

IS IT NECESSARY to achieve the purposes of either the Gender Recognition Act	**WOULD IT UNDERMINE** the purposes, coherence or effectiveness of the law or

or the Equality Act?	otherwise produce unjust, absurd or anomalous results?

The Gender Recognition Act	The Equality Act 2010
Addresses the “difficulties and anomalies” resulting from a lack of legal recognition for transsexual people in relations with the state such as marriage,	Prevents unfavourable treatment of individuals because of their protected characteristics by employers, service providers and others.

pensions, retirement and social security.	

Clarity about how to identify the relevant groups is crucial for the group-based rights and protections to operate effectively

The group-based rights and protections such as indirect discrimination, positive action, the public-sector equality duty and the exceptions that allow single-sex services, sports, associations and charities recognise that a group who share a particular characteristic have common experiences, needs and

disadvantages. It is a need of both sexes (but particularly women) to have privacy from members of the opposite sex in situations of undressing and bodily contact, unless they consent otherwise.

Our submissions consider how a s9(1) reading of "sex" in the Equality Act, compared with a biological reading, would affect:

1. **the composition and coherence of the relevant groups** in terms of their shared characteristics, interests and needs
2. **the ability of duty-bearers such as employers and service providers** to identify and coherently

analyse the effects of their policies and practices on the relevant groups.

Applying the GRA to the Equality Act produces absurd results

Applying a s9(1) reading of “sex” in the EqA10 would mean that references to a “woman” would include most biological females and some biological males, while references to “man” would include most biological males and some biological females.

There is nothing that the group of some female people plus some male people with certificates have in common beyond state documentation. This leads to absurd results.

Could Parliament have really intended that:

- **Biological women and girls** (or men and boys) are not protected by group-based rights and protections?
- **Duty bearers** are regulated by reference to categories that can be ascertained only by knowledge of a confidential certificate?
- **People with the protected characteristic of gender reassignment** are considered differently depending on whether or not they possess a certificate?

It is not necessary for the GRA to apply to the Equality Act to protect trans people's rights. And to do so undermines its operation

- **Direct discrimination and harassment.** Both direct discrimination and harassment already encompass cases where the discriminator thinks that the victim has the characteristic, or associates them with it. Transgender people (with or without a GRC) are thus already protected if they are treated less favourably or harassed on this basis. But changing the underlying definition of sex would remove an important aspect of group protection for men

or women. It is well established that where a policy or rule is applied which applies a criterion that is "indissociable" from a characteristic in order to determine entitlement to some benefit, that will necessarily constitute unlawful direct discrimination. A s9(1) GRA reading of "sex" would mean that criteria which relate to biological sex (such as menstruation, menopause or having been born with testes) do not directly apply to a person's "sex" for the purposes of sex discrimination. Discrimination on the basis of a biological criterion would be switched into indirect

discrimination, where there is the potential for a justification defence.

- **Indirect discrimination.** Unlawful indirect discrimination occurs where the discriminator applies a provision, criterion or practice (PCP) that places people who share the same protected characteristic at a particular disadvantage, and the treatment cannot be justified. That protection is already extended to those who do not share the same protected characteristic but suffer the same disadvantage. So transgender people (with or without a GRC) are already protected. Conversely, if "sex" does not mean biological sex, that would

undermine the ability to conduct clear and robust analysis of biological women (or men) as a class with a shared characteristic.

- **Sexual orientation.** There is a separate intervention on this by the lesbians' group. Definition of "sexual orientation" is framed by reference to orientation towards persons of the same sex, the opposite sex, or either sex. If "sex" is based on a certificate, the coherence of that definition and the rights and protections built upon it would be undermined and may be rendered meaningless. This is not required in order to achieve the relevant legislative purposes: if a

transsexual is discriminated against because they are perceived as gay (or any other sexual orientation) they will already be protected by the principles of perceived or associative discrimination.

- **Pregnancy discrimination.** Pregnancy and maternity discrimination are expressly confined to "women" in the Act. Since Parliament has provided a single definition of "woman" for the purposes of the EqA10, if the deeming effect of s9(1) GRA were taken to apply to that definition, then this must mean that Parliament intended to provide protection only for pregnancies of women who do

not have GRCs and to exclude transmen (i.e. biological women) with a GRC who may become pregnant. This is a strong indicator that Parliament intended that the definitions of “woman” and “man” have their natural, biological meanings.

- **Public-sector equality duty.** Organisations subject to the PSED must undertake impact assessments of their rules, policies and practices. That requires them to consider the question of social groups and protected categories. If biological males who identify as women and have GRCs are considered as part of the group that

share the protected characteristic of being “women” there is no possibility of considering the needs and interests of biological females separately. This approach would involve obvious absurdity.

- **Positive action.** The Equality Act permits “positive action” to address particular disadvantages, needs or underrepresentation of people who share a protected characteristic. Can an organisation consider the needs of biological women separately from biological males, and if it identifies a need for positive action must it include biological males with GRCs (but not those without) within that action, and

exclude biological females with GRCs?

- **Single-sex services and accommodation.** The Equality Act provides exceptions from both sex discrimination and gender-reassignment discrimination where one or more of the conditions justifying the provision of separate or single-sex services to the public is met. However, the gateway conditions about services needed only by members of one sex, or where privacy from the other sex is important, cannot be coherently applied if "sex" itself does not mean biological sex.

- **Single-sex higher-education institutions.** The exception from sex discrimination provisions for single-sex higher colleges would not allow such institutions to be limited to biological women if “sex” does not mean biological sex. It was plainly Parliament’s intention to allow single-sex colleges and there can be no rational basis to oblige such institutions to admit transsexual members of the opposite (biological) sex with a GRC, while excluding others without a GRC.
- **Single-characteristic associations and charities.** A s9(1) reading would mean that

“single sex” associations with 25 or more members would not be able to operate on the basis of biological sex. Single-sex charities would not be able to use the exception which allows them to restrict the provision of benefits to persons who share a protected characteristic in pursuance of their charitable objects. This would make it impossible for any women’s association or charity – including, for example, a mutual support association for women who are victims of male sexual violence, a lesbian social association, or a non-competitive women’s sporting association to be set up or to

pursue a dedicated purpose which is directed at the needs of biological females. That cannot have been Parliament's intention.

Applying the Gender Recognition Act to the protected characteristic of sex interferes with human rights

A s9(1) GRA reading of "sex" in the EqA10 would involve an infringement of Article 8 (protection of privacy) in relation to (at least): (i) the consequential inability to consider the interests of biological women separately from transwomen for the purposes of the PSED and positive action provisions; and (ii) the practical impact on the ability coherently to

operate and apply the exceptions for single-sex services/accommodation and single-characteristic associations in circumstances where the privacy and dignity of women are engaged. The limits on the exception for single-characteristic associations if a s9(1) GRA reading were applied clearly infringe on Article 11 (freedom of association).

Since a s9(1) GRA reading of “sex” in the EqA10 is not necessary to meet the purposes of the GRA to provide adequate recognition for gender reassignment in UK law, those infringements cannot be justified. Accordingly, the Human Rights Act requires that such a reading be

avoided: “sex” in the EqA10 must be read as referring to biological sex.

CONCLUSION: “Sex” in the Equality Act 2010 should be construed as referring to biological sex. This approach is consistent with protecting everyone’s human rights.