Ben Cooper KC's analysis of *For Women Scotland v The Scottish Ministers*

sex matters in life | in law

Briefing for Parliamentarians, July 2025

1. Duty-bearers must act now

Ben Cooper KC of Old Square Chambers (who represented Sex Matters in its intervention in *For Women Scotland*) has written a comprehensive analysis (see sex-matters.org/implications-of-fws/) of the legal and practical implications of the judgment for single-sex and separate-sex services.

> "The practical effect of the balance struck by the EA 2010, in light of the decision of the Supreme Court in FWS, is to apply a general rule that, where there are sufficiently weighty needs of one or both sexes to justify the provision of single sex or sex-segregated services, service providers should provide those services on the basis of biological sex and trans people should be excluded from the services provided for members of the sex with which they identify, but that alternative provision should be made so far as (reasonably) possible."

Duty-bearers under the Equality Act who are using "trans inclusive" definitions of "woman" and "man" must act now to bring their policies in line with the law.

> "The Supreme Court's decision in FWS as to the meaning of 'sex' in the EA 2010 determines what the law is, and always has been.
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> "**It is the Supreme Court, and not the EHRC, that authoritatively determines the law.** The EHRC's role is to provide guidance to assist people to understand and comply with their rights and obligations under the EA 2010; its role is not to determine the law or to interpret the EA 2010."
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> … "If a service provider, employer or other duty bearer is currently following policies or practices that, in consequence of the Supreme Court's decision in FWS, are unlawful under the EA 2010, **it will be no defence to any claim against them to say that they are awaiting guidance from the EHRC**.
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> "So, for example, if a service provider is currently operating a service or facility for women based on a 'trans inclusive' definition of 'woman', they will be exposing themselves to a serious risk of (i) claims for direct sex discrimination by men who are excluded from that service; and/or (ii) claims for indirect sex discrimination by women who are put at a particular disadvantage by the undermining of their sex-based protections that the admission of men who identify as women into the service is likely to represent."

2. Protecting everyone's sex-based rights

Clarity about the meaning of sex in the Equality Act is foundational...

> "...to provide a coherent foundation for the **protection of sex-based rights and protections**, including in particular protection against disadvantages arising from the shared experiences or **needs of women as a group, or men as a group**. The critical question for the Supreme Court was which of the available alternative interpretations would enable the coherent application and operation, in practice, of those sex-based rights and protections.

The Supreme Court determined that only the ordinary meaning of sex, relating to biology not paperwork, enables sex-based rights and protections to be applied coherently and effectively.

3. Trans people have not lost any rights

All trans people, with or without a gender-recognition certificate (GRC), remain protected from unlawful discrimination or harassment because of:

- having the protected characteristic of gender reassignment
- their biological sex
- being perceived to be a particular sex or associated with that sex.

It was never lawful to provide single-sex services on the basis of self-declared gender identity:

> "Whilst there was a widespread practice of adopting broadly 'trans inclusive' policies for single sex services and facilities, that was never based on a settled understanding of the law under the EA 2010, and there was certainly no legal consensus in support of such policies.
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> "Consequently, anyone who suggests that the effect of the Supreme Court's decision in FWS is to 'remove' any settled or established 'rights' of trans people generally to be treated as the sex with which they identify for the purposes of the EA 2010 – including as regards the statutory exceptions for single sex or segregated services or facilities – is simply wrong."

4. Protecting sex-based rights requires clear sex-based rules

The provision of single-sex or separate-sex services, facilities, associations, sports and positive action, necessarily involve direct sex discrimination, which is in general unlawful. Therefore duty-bearers need to rely on an exception in the Equality Act, which depends on consideration of sex-based interests:

> "The EA 2010 only provides for limited exceptions to the general prohibition on direct sex discrimination **where there are sufficiently important overriding rights or interests at stake.** In short, this is an area where sex matters, and matters strongly."

Since "sex" means biological sex, those exceptions permit such action only in relation to this category.

> "The effect of the Supreme Court's decision in FWS is that, in order lawfully to operate single sex or sex-segregated services, a **service provider must do so by reference to biological sex** – otherwise, they cannot rely on the exceptions and must allow anyone of either sex to use the service."

The reason for single-sex provision must be such as to justify setting a rule that excludes all members of the opposite sex.

> "It is well-recognised that **a general rule may be justified where the legitimate aims in question can only be achieved by the application of such a rule**, as opposed to case-by-case consideration of individual circumstances"

The Supreme Court recognised that the kinds of legitimate aims relevant to single-sex or separate-sex services will inherently justify such general rules or policies because the objective of such services would be impossible to achieve if some members of the opposite sex were admitted.

> "The Court further explained that such aims would be intrinsically undermined if some members of the opposite sex were admitted. For example, where separate toilet or changing facilities are maintained to protect the rights of women who, for religious reasons or reasons of privacy and/or dignity, reasonably object to sharing such facilities with men, then that aim simply cannot be met if some men are admitted."

On the face of the Equality Act, the exceptions are permissive, not prescriptive. That is, they allow but do not require a service provider to operate single-sex or sex-segregated services. In practice, however, where the criteria are met, it is highly likely that failing to provide such a service would put members of one or both sexes at a particular disadvantage.

> "In those circumstances, therefore, a failure to make use of the available exception in order to provide a single sex or sex-segregated service would constitute unlawful indirect sex discrimination contrary to section 19 of the EA 2010, unless justified in turn by some countervailing legitimate aim."

5. The judgment does not breach trans people's human rights

The exclusion of trans people from services or facilities provided for the opposite (biological) sex will not constitute direct gender-reassignment discrimination because trans people are not being treated differently to other people of the same sex as them who do not have a trans identity.

It may, however, result in indirect gender-reassignment discrimination. Measures adopted must be proportionate overall. This is likely to be the case if the disadvantage to trans people is mitigated by making alternative provision without compromising the legitimate aim of the overall service.

> "So, for example, in relation to toilet facilities, the provision of unisex facilities alongside single sex provision for men and women would reduce the disadvantage to trans people who do not feel comfortable using the facilities provided for their (biological) sex."

Though this may not be trans people's preferred approach, it does not undermine their human rights.

> "Such services are not provided as a vehicle for people to express their gender identity. They are provided because there are important reasons for doing so, related to (biological) sex, which are sufficiently weighty to override the normal prohibition against direct sex discrimination."

The right to respect for private and family life (Article 8 ECHR), which encompasses a right to gender identity and personal development, is a qualified right. It may be subject to constraints when one person's interests conflict with another set of legitimate interests. Cooper concludes:

> "It is clear… that the balance that is struck by the EA 2010… does not entail any breach of the rights of trans people under the European Convention on Human Rights ('ECHR')."

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Sex Matters is a charitable incorporated organisation number 1207701